COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

January 7, 2025

TABLE OF CONTENTS

TABLE OF CONTENTS

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 7, 2025 | San Diego, CA

AGENDA

1. Opening Business

A. Welcome and Opening Remarks Judge John D. Bates, Chair

B. **ACTION:** The Committee will be asked to approve the minutes of the June 2024 Committee meeting.

C. Status of Rules Amendments

- Report on proposed rules amendments approved by the Judicial Conference and transmitted to the Supreme Court on October 17, 2024 (potential effective date of December 1, 2025).

2. Joint Committee Business

A. Information Items

- Report on electronic filing by self-represented litigants.
- Report of joint subcommittee on attorney admission.
- Report on privacy rule issues.

3. Report of the Advisory Committee on Evidence Rules Judge Jesse M. Furman, Chair

A. Information Items

- Report on Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding hearsay exemption for prior inconsistent statements, currently out for public comment.
- Report regarding consideration of possible amendments to Rule 609(a)(1)(B) (Impeachment by Evidence of a Criminal Conviction).
- Report regarding consideration of new Rules 707 and 901(c), to govern the admissibility of evidence generated by artificial intelligence.
- Report on consideration of a new rule to address evidence of prior false accusations made by alleged victims in criminal cases involving sexual assault.
- Report on consideration of possible amendment to Rule 404(b) (Character Evidence; Other Crimes, Wrongs, or Acts) regarding probative value.
- Report on suggestion to amend Rule 702 (Testimony by Expert Witnesses) regarding the relevance of peer review.
- Report on suggestion to amend Rule 901(1) (Authenticating or Identifying Evidence) to add a reference to federally recognized tribes.

4. Report of the Advisory Committee on Appellate Rules Judge Allison H. Eid, Chair

A. Information Items

- Report on Rule 29 (Brief of an Amicus Curiae) and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) currently out for public comment.
- Report on suggestions regarding intervention on appeal.
- Report on suggestion to amend Rule 4 (Appeal as of Right – When Taken) regarding notices of appeal.
- Report on suggestion to amend Rule 15 (Review or Enforcement of Agency Order) regarding review of agency actions.
- Report on suggestion to amend Rule 8 (Stay or Injunction Pending Appeal) to address administrative stays.

5. Report of the Advisory Committee on Bankruptcy Rules Judge Rebecca B. Connelly, Chair

A. **ACTION:** The Committee will be asked to approve the following for publication and public comment:

- Proposed amendment to Rule 2002 (Caption of a Petition; Title of the Case).
- Proposed amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy) to clarify EIN information requested in Question 4.

B. Information Items

- Report regarding suggestion to remove redacted social security numbers from filed documents.
- Report regarding suggestion to propose a rule requiring random assignment of mega bankruptcy cases within a district.
- Consideration of suggestion to amend Rule 9031 to allow appointment of masters in bankruptcy cases and proceedings.
- Report regarding suggestion to amend certain discharge forms to add language concerning unclaimed funds.

6. Report of the Advisory Committee on Civil Rules Judge Robin L. Rosenberg, Chair

A. **ACTION:** The Committee will be asked to approve the following for publication and public comment:

- Proposed amendment to Rule 41 (Dismissal of Actions).
- Proposed amendment to Rule 81 (Applicability of the Rules in General; Removed Actions).

B. Information Items

- Report on possible amendments to Rule 45 (Subpoena) regarding remote trial testimony and service.
- Report on suggestion to amend Rule 53 (Masters) to change the term masters to court-appointed neutral.
- Report on work of the subcommittees on Rule 7.1 (Disclosure Statement) and discovery.
- Report on third party litigation funding suggestions.
- Report on suggestions concerning random case assignment.
- Report on cross-border discovery.

7. Report of the Advisory Committee on Criminal Rules Judge James C. Dever III, Chair

A. Information Items

- Report on suggestions to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited).
- Report on suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) regarding reference to minors by pseudonyms.
- Report on suggestions to amend Rule 40 (Arrest for Failing to Appear in Another District or Violating Conditions of Release Set in Another District).
- Report on suggestion to amend Rule 43 (Defendant's Presence).
- Report on panel discussion on possible amendments to Rule 17 (Subpoena).

8. Other Committee Business

A. Legislative Update.

B. **ACTION:** Strategic Planning. This agenda item asks the Committee to identify any changes it believes should be considered in updating the Strategic Plan for the Federal Judiciary. Proposed updates should reflect any significant policy modifications that have occurred since September 2020, trends and issues expected to affect the judiciary, progress that has been achieved since the latest Plan update, and challenges that remain. These proposals should also include a thorough explanation of any proposed changes.

C. Next Meeting – June 10, 2025 in Washington, DC.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Members

Honorable Paul J. Barbadoro United States District Court Concord, NH	Elizabeth J. Cabraser, Esq. Lieff Cabraser Heimann & Bernstein, LLP San Francisco, CA
Louis A. Chaiten, Esq. Jones Day Cleveland, OH	Honorable Joan N. Ericksen United States District Court Minneapolis, MN
Honorable Stephen A. Higginson United States Court of Appeals New Orleans, LA	Honorable Edward M. Mansfield Iowa Supreme Court Des Moines, IA
Dean Troy A. McKenzie New York University School of Law New York, NY	Honorable Patricia A. Millett United States Court of Appeals Washington, DC
Honorable Lisa O. Monaco Deputy Attorney General (ex officio) United States Department of Justice Washington, DC	Andrew J. Pincus, Esq. Mayer Brown LLP Washington, DC
Honorable D. Brooks Smith United States Court of Appeals Duncansville, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
Honorable Jennifer G. Zipps United States District Court Tucson, AZ	

Consultants

Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX
Professor Joseph Kimble Thomas M. Cooley Law School Lansing, MI	Joseph F. Spaniol, Jr., Esq. Bethesda, MD

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Committee on Rules of Practice and Procedure

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Member: 2020 Chair: 2020	---- 2025
Paul Barbadoro	D	New Hampshire	2023	2025
Elizabeth J. Cabraser	ESQ	California	2021	2027
Louis A. Chaiten	ESQ	Ohio	2023	2026
Joan N. Ericksen	D	Minnesota	2024	2027
Stephen A. Higginson	C	Fifth Circuit	2024	2027
Edward M. Mansfield	JUST	Iowa	2023	2026
Troy A. McKenzie	ACAD	New York	2021	2027
Patricia A. Millett	C	DC Circuit	2020	2025
Lisa O. Monaco*	DOJ	Washington, DC	----	Open
Andrew J. Pincus	ESQ	Washington, DC	2022	2025
D. Brooks Smith	C	Third Circuit	2022	2025
Kosta Stojilkovic	ESQ	Washington, DC	2019	2025
Jennifer G. Zipps	D	Arizona	2019	2025
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2026

Secretary and Principal Staff: H. Thomas Byron III, 202-502-1820

* Ex-officio - Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Michael W. Mosman (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

H. Thomas Byron III, Esq.
Chief Counsel
Office of the General Counsel – Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Bridget M. Healy, Esq.
Counsel

S. Scott Myers, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Carly E. Giffin, Esq.
Research Associate
(Bankruptcy)

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

Item 1A will be an oral report.

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Washington, D.C., on June 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing Committee; Dr. Elizabeth C. Wiggins, Director, Research Division, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including the committee members and reporters who were attending remotely. Judge Bates also welcomed members of the public and press who joined as observers.

Judge Bates expressed sorrow at the loss of Judge Gene E.K. Pratter the prior month. She completed a full term on the Civil Rules Committee before joining the Standing Committee and she will be missed.

Professor Catherine Struve honored Judge Pratter's legacy as the quintessential Philadelphia lawyer and judge—incredibly skilled in lawyering and rhetoric—and a role model in the Philadelphia legal community. She began her career in 1975 at Duane Morris LLP where she became the firm's first general counsel and expert on legal ethics. She came to teach ethics and trial advocacy at the University of Pennsylvania Law School and served on its board of overseers. Professor Struve also recalled Judge Pratter's generosity and sense of humor.

Judge D. Brooks Smith noted how shocked he had been to learn of Judge Pratter's untimely passing. He came to know her as a friend and colleague when she became a judge, and he quickly learned of her abilities as a district judge. She also contributed greatly when she sat by designation on the court of appeals. He also remarked on Judge Pratter's wonderful sense of style and humor.

Judge Bates thanked Professor Struve and Judge Brooks and added that Judge Pratter will be remembered as an excellent judge who made countless contributions to justice, the federal judiciary, and the rules process in particular.

As this was Judge Kayatta's last meeting, Judge Bates thanked him for his work and recognized that he had been a wonderful contributor to the efforts of the Standing Committee and the rules process.

Judge Bates welcomed the incoming chairs for the Advisory Committees on Appellate Rules and Evidence Rules. Judge Allison Eid, who is from the Tenth Circuit and a former member of the Appellate Rules Committee, will be succeeding Judge Jay Bybee as chair of the Appellate Rules Committee. Judge Jesse Furman from the Southern District of New York, a former member of the Standing Committee, will be succeeding Judge Patrick Schiltz as chair of the Evidence Rules Committee. Judge Bates recognized the great work that Judge Bybee and Judge Schiltz had performed as chairs of their committees, which have been amazingly productive and done excellent work throughout their tenure.

Judge Bates noted that his term as Chair of the Standing Committee had been extended for another year.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2024, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, reported that the latest set of proposed rule amendments had been approved by the Supreme Court and transmitted to Congress. Those amendments will take effect on December 1, 2024, in the absence of congressional action.

Judge Bates noted that the Standing Committee's March 2024 report to the Judicial Conference begins on page 54 of the agenda book and the FJC's report on research projects begins on page 64. Dr. Tim Reagan explained that the FJC in January restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include information about the FJC's Education Division.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported that the working group hopes to bring proposals to the advisory committees in the fall.

Redaction of Social Security Numbers

Mr. Byron provided the report on several privacy issues, including redaction of social-security numbers. A memorandum from the Reporters' Privacy Rules Working Group begins on page 74 of the agenda book and outlines what the working group and Rules Committee Staff have done over the last several months. The advisory committees and their chairs were asked to provide feedback on this memorandum at their spring meetings.

As previously reported, the rules currently require filers to redact all but the last four digits of a social-security number in court filings, and Senator Ron Wyden suggested that the rules committees revisit whether to require complete redaction. A tentative draft of such an amendment appears on page 75 of the agenda book.

That draft is not being proposed as a rule amendment at this time because it makes sense to consider it in conjunction with other privacy rule proposals that have been received in the last year. As described in the memorandum, there are also other potential ambiguities and areas for clarification in the exemption and waiver provisions that may be worth addressing. The working group, with the help of the advisory committee chairs, will continue considering whether to address any of those issues—in addition to the suggestions from Senator Wyden and others—through the fall, and likely spring, meetings.

Joint Subcommittee on Attorney Admission

Professor Struve reported that there was robust discussion of the various options under consideration by the Joint Subcommittee on Attorney Admission at some of the advisory committees' spring meetings. The subcommittee will continue to consider that input as well as the feedback gathered during the Standing Committee's January meeting. The Subcommittee's consideration is also aided by the excellent research from the FJC regarding fees for admission to federal court bars as well as local counsel requirements for practice in federal district courts. Those FJC reports begin on page 78 of the agenda book. The subcommittee will next meet in July.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on April 10, 2024, in Denver, Colorado. The Advisory Committee presented four action items – two for final approval and two for publication and public comment – and one information item. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 126.

Action Items

Final Approval of Proposed Amendment to Rule 39 (Costs on Appeal). Judge Bybee reported on this item. The text of the proposed amendment appears on page 184 of the agenda book, and the written report begins on page 127.

The proposed amendment to Rule 39 would address allocating and taxing costs in the courts of appeals and the district courts. "Allocate" refers to which party bears the costs, and "tax" refers to the calculation of the costs. The Advisory Committee received two favorable comments, one comment that was not relevant, and one late-filed comment. Aside from some stylistic changes, the Advisory Committee did not believe changes were needed to the published version.

A practitioner member commented that he liked the terminology, which was in response to prior feedback from the Standing Committee, that is, "allocate" when describing who is being asked to pay and "tax" when describing what should be paid. He offered a tweak to Rule 39(a) on page 184, line 3, to say, "The following rules apply to allocating taxable costs…" Adding "taxable" would introduce both concepts. Judge Bybee agreed that the addition would signal exactly what the rule was doing, and, without objection, the addition was made.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 39.**

Final Approval of Proposed Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee reported on this item. The text of the proposed amendment begins on page 163 of the agenda book, and the written report begins on page 129.

This extensive revision of Rule 6 concerns appeals in bankruptcy cases. First, it addresses resetting the time to appeal as a result of a tolling motion in the district court, making clear that the shorter time period used in the Bankruptcy Rules for such motions applies. Second, it addresses direct appeals to the courts of appeals that bypass review by the district court or bankruptcy appellate panel. The amendments overhaul and clarify the provisions for direct appeal, making the rule largely self-contained. Judge Bybee thanked the Bankruptcy Rules Committee for its substantial assistance. There was only one comment during the comment period, and it supported the amendment.

Judge Bates commented that on page 173, line 184, the rule says that Bankruptcy Rule 8007 "applies" to any stay pending appeal, but elsewhere the rule uses "governs." He asked if there is a reason to say "applies" rather than "governs."

Professor Hartnett could not think of one but asked if the style consultants or bankruptcy representatives had a preference. Professor Garner commented that consistency is preferable and that "governs" seems to work. Judge Bybee noted that "applies" was used in the stricken language on line 203 and that the committee note on page 182, line 433, uses "governs." The rule and the note should be made consistent regardless of which word is used.

A judge member agreed with using "governs" if Rule 8007 is all-inclusive as to what controls the appeal. If another rule contains requirements for the appeal, however, Rule 8007 would not "govern," only "apply." Judge Connelly and Professor Gibson indicated that Rule 8007 is the only rule relevant to stays pending appeal.

Professor Struve noted that she had suggested the language change to "applies to" at the spring 2023 Advisory Committee meeting but that she did not object to reverting to "governs." Judge Bates called for a vote on the proposal with the minor change from "applies to" to "governs."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 6.**

Publication of Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (IFP)). Judge Bybee reported on this item. The text of the proposed form appears on page 213 of the agenda book, and the written report begins on page 132.

This proposal is a change to streamline the way in which Appellate Form 4 collects information for purposes of seeking leave to appeal IFP. It does not affect the standard for whether to grant IFP status. The Advisory Committee has been considering this matter since 2019 and gave the courts of appeals, which have adopted various local versions of Form 4, an opportunity to weigh in on the changes.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Form 4 for public comment.**

Publication of Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Bybee reported on this item. The text of the proposed amendment appears on page 192 of the agenda book, and the written report begins on page 135.

The Advisory Committee has been considering the proposal to amend Rule 29, regarding disclosures in amicus briefs, since 2019. In 2020, the Supreme Court received inquiries from Senator Whitehouse and Representative Johnson, which were referred to the Advisory Committee.

Judge Bybee expressed the Advisory Committee's appreciation for the substantial feedback from the Standing Committee. The Advisory Committee anticipates receiving a lot of public input, which will inform whether the rule strikes the right balance. It has already received some anticipatory comments that have been docketed as additional rules suggestions.

As explained in the written report, the Advisory Committee considered three difficult issues: (1) disclosure requirements concerning the relationship between a party and the amicus,

including contributions to an amicus that were not earmarked for the preparation of a brief; (2) disclosure requirements concerning the relationship between a nonparty and the amicus; and (3) an exception in the existing rule concerning earmarked contributions by members of an amicus organization.

Judge Bates thanked Judge Bybee and Professor Hartnett for providing an extensive discussion of the rule from various perspectives, including First Amendment considerations.

Much of the Standing Committee's discussion related to concerns about a change that would require leave of the court for non-governmental entities to file an amicus brief during the initial consideration of a case on the merits.

A practitioner member questioned the decision to move away from the Supreme Court's recent rule revision permitting amicus briefs to be filed without leave of the court or the consent of the parties. The Supreme Court's rule presumably reflects the view that the value of helpful amicus briefs outweighs the burden of unhelpful briefs. He wondered if there is actually an overabundance of amicus briefs in the courts of appeals. Even if this rule reduces the number of amicus briefs, there would be more motions for leave to file. He also struggled to see why recusal is an issue for courts of appeals considering that they can strike amicus briefs. If recusal is an issue, rather than limiting the circumstances in which a party can file an amicus brief, perhaps recusal should be addressed directly in the rule (for example, by providing that any amicus brief that would cause recusal of a judge would automatically be stricken) or addressed by the Code of Conduct for United States Judges.

Judge Bates recalled that these concerns were discussed at the Advisory Committee and some unique considerations came up with respect to some appellate courts.

Professor Hartnett remarked that the Supreme Court's rule removes even the very modest filter of consent, so adopting the approach taken in the current Supreme Court rule would require a change from the current Rule 29. One concern expressed at the Advisory Committee was that this completely open rule might result in what are effectively letters to the editor being filed as amicus briefs. However, the recusal issue was a far greater concern to the Advisory Committee. A judge member on the Advisory Committee had explained that the problem is particularly acute during a court's consideration of whether to grant rehearing en banc. When an amicus brief is filed at the en banc stage, no judge is in a position to strike an amicus brief that would require automatic recusal. There is also a recusal problem at the initial panel stage to the extent that the clerk may effectively recuse a judge on the basis of an amicus brief without any judge actually deciding whether the contribution of the amicus brief outweighs the fact that the brief will cause the recusal.

Judge Bybee added that the Advisory Committee's clerk representative was satisfied that this modest change in the rule would not dramatically increase the burden on the clerk's office. He also noted that a prior draft of this proposal followed the Supreme Court's rule and that the requirement of a motion for leave was a recent addition to the proposed amendment.

Multiple members expressed concerns about the increased burden on judges, amici, and parties resulting from a rule that requires a motion for leave to accompany every amicus brief. One judge member noted that motions tend to spawn additional filings—responses, motions for

extensions of time, and replies. She also pointed out that the motion for leave to file may come before a panel is assigned or publicly disclosed. And she was not sure on what basis, other than recusal, leave to file might be denied. Amicus briefs are a way for people to express their views to the court, which is an important part of the openness of the appellate process. If the parties consented to the amicus brief being filed, she did not know why the court would need to police it.

A practitioner member commented that there was a powerful case made at the Advisory Committee meeting about automatic recusal at the en banc petition stage—at least with respect to the Ninth Circuit—because no panel was assigned to decide whether to permit the amicus brief before the en banc petition vote. His reaction as to the panel stage, however, was similar to the judge member's reaction in that recusal prior to a panel assignment was uncertain, and there would be added costs for motions. Nevertheless, he was persuaded that allowing the public to comment on this proposal would reveal whether there is a problem, and a distinction might be drawn after publication between the panel and en banc stages.

Another practitioner member had a mild negative reaction to the added cost but recognized that the reaction from appellate practitioners—and those who pay for their services—during the public comment process will inform whether this procedure is worth the cost. In practice, she always consents to the filing of an amicus brief, even if it is unfavorable to her position. A judge member agreed that she had advised clients to consent to amicus briefs when she was in private practice.

A judge member remarked that, in her circuit, amicus briefs are often circulated before the vote on the petition for rehearing en banc, and an amicus brief is rejected if it would cause a judge to be recused. That said, her circuit does not have en banc proceedings as often as the Ninth Circuit.

Judge Bates invited Judge Bybee and Professor Hartnett to respond to the concerns expressed by some members of the Standing Committee about eliminating consent at the panel stage.

Professor Hartnett suggested that the proposal be published as-is. The proposal may be changed after the comment period to treat the panel and en banc stages differently, but the current structure of the rule was not amenable to making that change during this meeting. From a process perspective, he also explained that, if there is a substantial concern about the burden that a motion requirement will impose, that will come out during the comment period with the proposal in its current form. But, if the proposal were revised (for example, to retain the option of filings on consent), the Advisory Committee could miss out on that feedback. Judge Bybee added that he does not expect judges to comment on this proposal, and that, by publishing the version of the proposal that accommodates some judges' concerns about the en banc process, the rulemakers can elicit comments from the bar.

A judge member expressed skepticism about publishing the proposal with the motion requirement, considering that the appellate judges on the Standing Committee had expressed opposition. But, if the motion requirement were to remain, it would be practically useful for the judge who is considering the motion to have those disclosures in the motion itself, not only the brief.

Judge Bybee's initial reaction was to suspect that recusal issues would be identified by the parties in the motion and that the disclosures would inform the judge about how to weigh the brief. It was also noted that this proposal does not change the current rule with respect to disclosures being contained in the briefs, not motions. The judge member responded that who was contributing money could be relevant on whether to grant leave to file. Also, it has not been an issue because there is not currently a mandatory motion process.

To address disclosures in motions, a practitioner member suggested inserting "motion and" on page 198, line 113, so that the opening of new Rule 29(b) would read "An amicus motion and brief must disclose." Another practitioner member did not think that would capture everything and suggested adding a new Rule 29(a)(3)(C), on the bottom of page 193, to add the disclosures required by Rule 29(b), (c), and (e) to the information accompanying a motion for leave to file. Professor Struve added that Rule 29(a)(4)(A) also requires corporate amici to include a disclosure statement like that required of parties by Rule 26.1. With Judge Bybee's consent, the new subparagraph was added to require those disclosures in a motion for leave.

Regarding the motion requirement issue, a judge member asked about bracketing parts of the proposed rule. A practitioner member suggested bracketing "~~the consent of the parties or~~" on page 193, lines 15–16 and "~~or if the brief states that all parties have consented to its filing~~" on lines 18–19. Judge Bybee agreed with the concept of bracketing that language to call attention to the issue, although he and Professor Hartnett noted that, if that language were restored, it would require some changes later in the rule.

Following further discussion among chairs and reporters during a break, rather than bracketing the language, Professor Hartnett proposed adding language to the report included with the Preliminary Draft, specifically inviting public comment on whether motions should always be required for amicus briefs at the panel stage and whether rehearing should be treated differently. A judge member pointed out that there is language in the proposed committee note, defending the elimination of the consent provision, that would be inconsistent with this solicitation, and Judge Bates suggested that the new report language could refer to the committee note as well as at the rule text. The Standing Committee accepted this proposal.

A few minor changes were made to the proposed rule text and committee note.

First, a judge member questioned why the amicus brief was referred to as being of "considerable help" to the court, on page 192, line 10, whereas it was simply of "help" elsewhere. A practitioner member agreed with omitting "considerable," commenting that no one would want to argue in motions about whether something is of "considerable help" and that it could be an unintentional burden. Professor Hartnett indicated that the phrase was borrowed from the Supreme Court rule, and Judge Bybee indicated no objection to removing "considerable."

Second, Judge Bates asked what is being captured in the phrase "a party, its counsel, or any combination of parties or their counsel" and whether the "or" should be "and." Professor Hartnett indicated they were trying to capture a group of parties, a group of counsel, or a group that includes some counsel and some parties. Professor Struve offered "a party, its counsel, or any combination of parties, their counsel, or both." A practitioner member observed that this provision will cause anxiety, and it is better to be specific even if a little clunky. After further discussion and

with the style consultants' and Judge Bybee's acquiescence, the Standing Committee approved Professor Struve's suggested language.

Judge Bates also asked whether it was necessary to include the clause "but must disclose the date when the amicus was created" in Rule 29(e) when it is also required in Rule 29(a)(4)(E). Judge Bybee indicated the Advisory Committee felt that the repetition was warranted because it is closing a loophole. However, for consistency, the word "when" was removed from the clause in Rule 29(e).

Conforming changes and minor corrections to citations were also made to the proposed committee note. In addition, on page 206, the parentheses around "(or pledged to contribute)" and "(or pledges)" were removed because, as a judge member noted, pledges to contribute are as relevant as actual contributions.

Several issues were also discussed that did not result in changes to the proposal.

Judge Bates asked about the scope of the term "counsel" regarding the obligations placed on parties or their counsel. Professor Hartnett noted that it was not discussed because it is in the current rule, and no one has raised any concerns about it. Judge Bates asked the practitioner members if they had any concerns, and none were offered.

With respect to the disclosure period in Rule 29(b)(4) for "the prior fiscal year," a judge member asked why the period is not the prior or current fiscal year. Professor Hartnett responded that this provision was a compromise when the Advisory Committee was considering whether to use the calendar year or the 12 months prior to filing the brief. This compromise might leave open some strange situations in which there is a dramatic change in an amicus's revenue, but the provision was designed to make administration of the disclosure requirement as simple as possible. Professor Struve added that the contribution or pledge is captured in the numerator, that is the 12 months before the brief is filed, and that the denominator is set by the prior fiscal year. Plus, the total revenue of the current fiscal year may not be knowable.

A judge member commented that some amicus briefs are filed, not to bring anything new to the court's attention, but to notify the court of their support for a position on a policy issue. He added that it was not apparent to him what additional, useful information will be uncovered by this proposal that is not disclosed under the current rule or that is not obvious from the brief. Judge Bybee responded that the Advisory Committee has been weighing that foundational question, and there were some judges who felt very strongly about having this information. Professor Hartnett added that this is a disclosure requirement, not a filing requirement, and that disclosure also serves to inform the public about who is trying to influence the judiciary.

Finally, a judge member asked if there is urgency to publishing this rule now, given the changes made during the meeting. Professor Hartnett responded that the majority of the changes were stylistic and that the most significant change was to require information provided in the brief to also be provided in the motion. No changes were made to address the most serious concerns about the proposed requirement for a motion for leave. Instead, they will flag that issue in the report. Moreover, the Advisory Committee has already started receiving preemptive comments that have been docketed as rules suggestions, and there is a strong sense from the Advisory

Committee that it is time to get formal feedback after a very long time considering this issue. Judge Bates agreed that a substantial delay in publication is not warranted given the thoroughness of the examination that has taken place.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 29 for public comment.**

Publication of Proposed Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers); Appendix of Length Limits. Judge Bybee reported that the proposed amendment to Rule 29 required conforming changes to Rule 32 and the appendix on length limits. The text of the proposed amendments appears on page 210 of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rule 32 and the appendix of length limits for public comment.**

Information Item

Intervention on appeal. Judge Bybee reported that the Advisory Committee continues to consider intervention on appeal, but nothing new is being proposed right now.

Judge Bates thanked Judge Bybee and Professor Hartnett for their report and thanked Judge Bybee, in particular, for his fantastic and concerted work over the years.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on April 11, 2024, in Denver, Colorado. The Advisory Committee presented action items for final approval of two rules and seven official forms, as well as publication of several proposed rule amendments. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 237.

Action Items

Final Approval of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R. Judge Connelly reported on this item. The text of the proposed amendments begins on page 253 of the agenda book, and the written report begins on page 239.

Rule 3002.1 applies in Chapter 13 cases and addresses notices from mortgage companies concerning postpetition mortgage payments. The proposed amendment to Rule 3002.1 provides for status updates during the case and enhances the notice at the end of the case. The six accompanying forms—which consist of two motions, one notice, and responses to them—provide a uniform mechanism to do this.

The Standing Committee approved the proposal for publication last year, and the Advisory Committee received a number of helpful, constructive comments. The comments guided the Advisory Committee in making clarifying changes in the proposed rule. The Advisory Committee unanimously approved Rule 3002.1 and the accompanying forms at its spring meeting.

Following a brief style discussion, Judge Bates called for a motion on a vote for final approval for the proposed amendment to Rule 3002.1 and the adoption of the six new official forms as presented in the agenda book. Mr. Byron and Professor Gibson clarified that the effective date for the official forms related to Rule 3002.1, if approved, would be the same as the proposed changes to the rule, December 1, 2025.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rule 3002.1 and new Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.**

Final Approval of Proposed Amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Judge Connelly reported on this item. The text of the proposed amendment begins on page 291 of the agenda book, and the written report begins on page 241.

The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may request that the court of appeals authorize a direct appeal. The Advisory Committee received only one comment during publication, and it was supportive. This change is related to, and consistent with, Appellate Rule 6(c)(2)(A), which was given final approval during the Appellate Rules Committee's report.

Professor Hartnett noted that this small amendment to Rule 8006 drove virtually all of the revisions to Appellate Rule 6, and he thanked the Bankruptcy Rules Committee for working closely with the Appellate Rules Committee.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 8006(g).**

Final Approval of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The text of the proposed amendment begins on page 327 of the agenda book, and the written report begins on page 245.

The uniform claim identifier (UCI) is a bankruptcy identifier that was developed to facilitate electronic disbursements in Chapter 13 cases to certain large creditors. Official Form 410, which is the proof of claim form used by any creditor making a claim for payment in a bankruptcy case, currently provides for the creditor's disclosure of the UCI "for electronic payments in Chapter 13 (if you use one)." The proposed amendment would eliminate that restriction, thereby expanding the disclosure of the UCI to any chapter and for nonelectronic disbursements, as well as electronic disbursements. Following publication, the Advisory Committee received one favorable comment.

Mr. Byron and Professor Gibson clarified that, unlike the official forms related to Rule 3002.1, the amendment to Official Form 410, if approved, would take effect in the normal course on December 1, 2024.

Professor Coquillette asked if this identifier could cause any privacy issues. Judge Connelly responded that use of a UCI may enhance debtor privacy, as it does not require a full account number or Social Security number. It is a unique bankruptcy identifier for creditors that use it to identify the creditor, court, and debtor's claim.

An academic member asked what would happen if someone wanted to use Official Form 410 to file a proof of claim on behalf of someone else, such as a would-be class representative filing on behalf of members of a proposed class under Rule 7023. Judge Connelly commented that this form cannot address all circumstances but that this change would not be affected by who is filing the claim. She added that only parties who represent large institutions would be likely to use an accounting system that would involve a UCI. There are also safeguards in place to address false or duplicative claims.

One additional technical change was made to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on December 1, 2024: The reference to Bankruptcy Rule 5005(a)(2) in Part 3 of the form was changed to Rule 5005(a)(3).

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410.**

Publication of Proposed Amendment to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan). Judge Connelly reported on this item. The text of the proposed amendment begins on page 334 of the agenda book, and the written report begins on page 245.

The Standing Committee approved this proposal for publication at its January 2024 meeting. After that meeting, Professor Struve and the Standing Committee's liaison to the Bankruptcy Rules Committee, among others, raised some concerns about the language that had been approved. The Advisory Committee considered those comments and approved some clarifying revisions at its spring meeting. It now seeks approval to publish this revised version for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018 for public comment.**

Publication of Proposed Amendments to Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). Judge Connelly reported on this item. The text of the proposed amendments begins on page 341 of the agenda book, and the written report begins on page 247.

This proposal relates to the means of taking testimony in bankruptcy cases, and, if approved, would establish different standards for allowing remote testimony in bankruptcy adversary proceedings (separate lawsuits within the bankruptcy case analogous to a civil action in district court) and contested matters (a motion-based procedure that can usually be resolved

expeditiously by means of a hearing).[1] Under current Rule 9017, Civil Rule 43 applies to "cases under the Code." Civil Rule 43(a), in turn, provides that, at trial, a court may permit testimony by remote means if three criteria are present: (1) good cause, (2) appropriate safeguards, and (3) compelling circumstances. Many bankruptcy courts read Bankruptcy Rules 9014(d) and 9017 together to require that the three-part standard set forth in Civil Rule 43(a) must be met before allowing any remote testimony in a bankruptcy case, whether it is in a contested matter or an adversary proceeding.

This proposal would remove the reference to Civil Rule 43 in Rule 9017, but it would retain Rule 43(a)'s three-part standard for allowing remote testimony in adversary proceedings via a new Rule 7043. A separate amendment would be made to Rule 9014(d) that would incorporate most of the language in Civil Rule 43, but without the requirement to show "compelling circumstances" before a court could allow remote testimony in a contested matter. Good cause—now shortened by restyling to "cause"—and appropriate safeguards would continue to be required for a witness to testify remotely in contested matters.

When this proposal came before Advisory Committee during its fall 2023 meeting, it was pointed out that the Judicial Conference was considering amendments to the broadcast policy based on a recommendation—which has since been adopted—from the Committee on Court Administration and Case Management (CACM). The proposal was delayed so that the Advisory Committee could confer with the CACM Committee. A CACM subcommittee, with input from the Committee on the Administration of the Bankruptcy System, considered this bankruptcy rules proposal and indicated that the proposed amendments and their publication would not violate the new policy or interfere with the CACM Committee's ongoing work.

At the Advisory Committee's spring meeting, there was consensus to seek public comment on the proposal. There was also a question raised about whether this proposal represented a first step with the goal of allowing remote testimony more broadly in bankruptcy cases. Judge Connelly explained that it was not—and is not—the intent of the proposal to herald a broader change, although the Advisory Committee recognizes that adoption of this proposal might lead to future suggestions to adopt the less stringent standard for remote testimony beyond contested matters.

Judge Bates stated that remote proceedings and remote testimony are important issues across the judiciary, not only in the bankruptcy courts. He asked three questions. First, what is the current practice, and is remote testimony being taken already? Second, what are the expected effects of the proposed amendments? Third, what does the standard "for cause and with appropriate safeguards" mean?

As to the first question, Judge Connelly explained that she did not have hard data. Based on conversations with colleagues, she said that remote testimony has been occurring on an ad hoc

[1] Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice or a discovery plan. They occur frequently over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

basis following the pandemic. Her impression was that, although not unheard-of pre-pandemic, it has become more common to allow remote testimony in contested matters in Chapter 11 cases because these cases involve parties across the country or the world and the hearings tend to be more administrative and for the purpose of gathering information. She thought that permitting remote testimony for background information in consumer cases was rare pre-pandemic but that the practice has become more common post-pandemic—although some judges have told her that they feel they can no longer take remote testimony now that the pandemic has subsided.

As to expectations concerning the proposed amendments, Judge Connelly anticipates that remote testimony will become more common in contested matters, particularly consumer matters. She noted, however, that some bankruptcy judges have expressed concern about taking remote testimony and giving increased discretion to those judges is not likely to change their practice.

Judge Connelly said that "cause and appropriate safeguards" under proposed Rule 9014(d) means what "good cause" and "appropriate safeguards" mean under Civil Rule 43, adding that under the restyled Bankruptcy Rules "good cause" is restyled to "cause." Part of the reason for the proposed change, however, was that under most of the published opinions on Civil Rule 43 courts have held that the "compelling circumstances" element in Rule 43 is almost impossible to meet. Many courts have found that distance to the courthouse and financial concerns—two big issues in bankruptcy—are not compelling circumstances that would allow for remote testimony, though they might be enough to find cause to allow remote testimony.

Judge Bates expressed some concern about the prospect that the amendments would make remote testimony more common than it is under the existing rules, and wondered if it might be expected to overtake the general rule requiring in-person testimony. Judge Connelly stated that live testimony would, of course, remain the default under the rules. A party would need to request permission to testify remotely, and a judge would need to find cause.

Professor Marcus mentioned, for context, the Civil Rule 43(a) proposal on page 527 of the agenda book. The Civil Rules Committee has referred that proposal to a subcommittee, in which Judge Kahn is participating on behalf of the Bankruptcy Rules Committee. The practitioners who have proposed the amendment to Civil Rule 43 wish to significantly expand the availability of remote testimony in proceedings under the Civil Rules. While the bankruptcy proposal does not change the standard for adversary proceedings, the Civil Rules Committee would be very interested in seeing any comments on the bankruptcy proposal.

Professor Hartnett asked how often subpoenas are required in contested matters and whether bankruptcy has the same issues as civil with respect to Civil Rule 45 distance requirements. Judge Connelly responded that subpoenas are common in adversary proceedings but less so in contested matters.

A judge member inquired if the Advisory Committee contemplated a judge making a blanket order setting remote testimony as the default for certain categories of matters. He explained that there is a new courthouse that is not yet accessible to the public for security reasons, but the bankruptcy judges were able to move in because most things are done remotely. Judge Connelly responded that the Advisory Committee did not anticipate such blanket orders. If anything, she had heard from colleagues the opposite, that is, that they would generally not approve requests to

testify remotely. There might, however, be circumstances that prevent people from being able to access the courthouse—like security, the pandemic, or weather—and being able to conduct hearings in those circumstances is valuable to the system.

Ms. Shapiro asked why the CACM Committee did not think this would interfere with its work. Mr. Byron and others explained that the CACM Committee separates the ideas of using technology for broadcasting—making the courtroom more accessible to the public—from remote participation, such as allowing witnesses to testify remotely. Because the CACM Committee is focused on broadcasting, this proposal on remote testimony in contested matters is different in kind from, and does not impede, its work. Ms. Shapiro commented that, whether intended or not, some might conflate remote testimony and remote public access because proponents of cameras in the courtroom use a similar good cause and substantial safeguards standard.

Another judge member pointed out that the committee note for Civil Rule 43 has extensive discussion of what constitutes "good cause" and says that "good cause and compelling circumstances" may be established with relative ease if all parties agree that testimony should be presented by remote transmission. She asked if there should be more detail in the bankruptcy rule's note about it. Judge Bates wondered if that supports a cross-reference in the committee note to the explanation in the committee note to Civil Rule 43 about good cause. Judge Connelly responded that a cross-reference to the Rule 43 committee note might make sense, but she explained that unlike in a two-party dispute, it would be difficult in a contested bankruptcy matter to get the consent of every affected party, which technically could include all creditors in the bankruptcy case. So, while there may be consent of all hearing participants, that might not mean the same thing as consent of all parties in a civil case in district court.

Judge Bates later observed that Civil Rule 43 has been viewed as limiting remote proceedings whereas the proposed bankruptcy rule is intended to expand access to remote proceedings. Yet, they share most of the same language, including a reference in the note to Civil Rule 43, and the only change is the removal of the language requiring compelling circumstances.

Professor Bartell responded that both rules permit remote proceedings but only under very limited circumstances. The proposed bankruptcy rule will simply permit it in slightly broader circumstances. Judge Connelly added that, under both rules, the judge still has discretion and there must be cause. Professor Bartell also noted that, in jurisdictions with a large geographic scope, in-person attendance can be a significant burden on parties, whether on the debtor or creditor side. Presumably, jurisdictions with small geographic areas will have fewer situations calling for remote testimony. Judge Bates noted that the vast area explanation also comes up in other contexts like non-random case assignment.

A judge member commented that there will always be some basis for cause—convenience or lesser expense—so, as a practical matter, dropping compelling circumstances means that this decision will be left to the judge's discretion in contested matters. Judge Connelly noted that this could be another reason to cross-reference Civil Rule 43 for the cause standard.

A practitioner member remarked that the big question is whether this is the beginning of a larger creep toward allowing remote participation in proceedings more generally, and another practitioner member wondered if this proposal should be on the same timeline as the recent

suggestion concerning Civil Rule 43. An academic member pointed out that, while coordination is generally a good idea, the Bankruptcy Rules often adapt to new technology first, and that experience in that arena can inform the other rule sets.

Judge Connelly reiterated that this proposal does not affect Civil Rule 43's application in adversary proceedings; it only affects contested matters and only by removing the need to show compelling circumstances. That is a much more limited change than what is proposed to Civil Rule 43. Delaying the bankruptcy proposal might make things more complicated.

Several committee members felt it would be helpful to add language to the committee note giving a principled reason for why contested matters are being treated differently than adversary proceedings. For example, contested matters occur with routine frequency, often require the attendance of pro se litigants, are shorter, involve more affected parties which makes consent harder to obtain, and often involve testimony where credibility is less of an issue.

Judge Bates remarked that his sense of the Standing Committee's discussion was that it is not necessary to tie the timing of this proposal to that of the proposal concerning Civil Rule 43 but that some additional explanation in the committee note would be useful.

The committee briefly discussed how to incorporate this feedback without delaying publication for another year. A practitioner member asked if this could be handled via email in the coming days, and Judge Bates commented that an email vote is only used if there is some need to resolve the matter promptly. A judge member asked if remote testimony is being permitted around the country. Judge Connelly noted that remote testimony is taking place, although it was hard to tell how often, and there is some urgency in the need to provide clarity. She offered to provide the amendment to the note very promptly. Another judge member remarked that it would be enough for him if the note captured the explanation given during the meeting and that he would like to give the Advisory Committee leadership an opportunity to provide that without derailing the process entirely. Judge Bates emphasized that this would not create a precedent, but, with no opposition from the Standing Committee, he was comfortable with handling this matter by email.

Following the meeting, Judge Connelly and Professors Gibson and Bartell prepared a revised committee note for Rule 9014 that addresses the concerns raised during the Standing Committee meeting, explaining why contested matters are different from adversary proceedings. The Advisory Committee unanimously approved the revised committee note for publication. The revised committee note was circulated to the Standing Committee, which unanimously approved it, and the revised language was included in the agenda book posted on the judiciary's public website.

By email ballot and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 9014 and 9017 and proposed new Rule 7043 for public comment.**

Publication of Proposed Amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). The text of the proposed amendments begins on page 331 of the agenda book, and the written report begins on page 248.

By statute, most individual debtors must complete a course on personal financial management to receive a discharge. Rule 1007 provides the deadline for filing a certificate of course completion, and Rule 9006 provides for altering timelines. The proposal is to eliminate the deadline in Rule 1007 and the cross-reference in Rule 9006. The education requirement is a prerequisite for the discharge, but there is not a particular statutory deadline. But because there is a specific deadline in Rule 1007, some courts have denied a discharge even if the debtor completed the education after the deadline. The Advisory Committee seeks to publish this proposal to address the concern that the rule is making it unnecessarily difficult for debtors to obtain a discharge.

Relatedly, Rule 5009 directs the clerk to perform certain tasks, including sending a reminder notice to debtors who have not filed a certification of completion. This proposal would add a second reminder notice creating a two-tiered system with one notice early in the case when engagement is higher, and a second notice, if the certification of course completion has not been filed, before the case is closed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 1007, 5009, and 9006 for public comment.**

Information Items

In the interest of time, Judge Connelly and the reporters referred the Standing Committee to the written materials, beginning on page 250 of the agenda book, for a report on four information items. The information items pertain to suggestions to remove partially redacted social-security numbers from certain filings, suggestions to allow the use of masters in bankruptcy cases, a description of technical amendments made to certain bankruptcy forms and form instructions to reflect the restyling of the Bankruptcy Rules, and a decision not to go forward with proposed amendments to two forms.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on April 9, 2024, in Denver, Colorado. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 375.

Judge Rosenberg reported that, in August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Three public hearings were held on these changes in October 2023, January 2024, and February 2024, presenting the views of over 80 witnesses. The public comment period ended on February 16, 2024. On April 9, the Advisory Committee voted unanimously to seek final approval from the Standing Committee for both proposals.

Action Items

Final Approval of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery). Judge Rosenberg reported on this item. The text of the proposed rule amendments begins, respectively, on page 530 and page 550 of the agenda book, and the written report begins on page 379.

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), the "privilege log" rule amendments, were published for public comment, and there was a lot of feedback from the viewpoints of both discovery "producers" and "requesters." Summaries of the testimony and written comments begin on page 391 of the agenda book. The Discovery Subcommittee recommended no change to the rule text, but it shortened the committee note considerably. The shortened committee note omitted observations about burdens, avoided language favoring either side, and took no position on controversial issues raised during the public comment process. As described in the Advisory Committee's written report, the subcommittee considered several other issues but ultimately did not recommend other changes to the proposal.

Professor Marcus emphasized that the Advisory Committee preferred an adaptable approach. Shortening the committee note was intended to allow judges to consider arguments from both sides without the note giving support to either.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv).**

Final Approval of Proposed New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The text of the proposed new rule begins on page 533 of the agenda book, and the written report begins on page 414.

Judge Rosenberg acknowledged the long, hard work of many people on Rule 16.1, including contributions from Judge Proctor, the current chair of the MDL Subcommittee, and Judge Dow, the prior Chair of the MDL Subcommittee and the Advisory Committee. She also recognized the work of Judge Bates, the Advisory Committee members and reporters, the stylists, and the many organizations and individuals who have offered their feedback during this seven-year process.

The Advisory Committee heard from over 80 witnesses and received over 100 written comments, representing a diverse set of views and perspectives. The MDL transferee judges expressed strong, unanimous support for the proposed Rule 16.1 at the transferee judges conferences in October 2022 and 2023. In addition, the two judges who have been assigned perhaps the most MDLs and the largest MDL wrote letters in support of the version approved for public comment. The MDL Subcommittee and the full Advisory Committee weighed this feedback carefully.

As detailed in the written report, since publication, the proposed rule has been restructured to address both style and substantive feedback. The revised rule now has two lists of prompts to consider, differentiating topics calling for the parties' "initial" views, those topics where court action may be premature before leadership counsel is appointed, if that is to occur, from those

topics that frequently call for early action by the court. Additionally, the revised proposal omits a provision concerning the appointment of coordinating counsel, which generated negative feedback. Nothing in the revised rule precludes a judge from appointing coordinating or liaison counsel, but the negative public reaction to that provision resulted in its removal from the rule. The rule also highlights the need to decide early whether, and if so how, to appoint leadership counsel. The revised rule also reverses the default such that parties must address the matters listed in the rule unless the court directs otherwise.

The Advisory Committee concluded that republication was not required in light of these changes. Under the rules committees' governing procedures, republication is appropriate when an advisory committee makes substantial changes to a rule after publication unless it determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees. The Advisory Committee concluded that the post-publication changes to proposed Rule 16.1 did not rise to the level of substantial changes. Moreover, the changes were discussed regularly throughout the hearings and rulemaking process, and the changes were made in light of the comments the Advisory Committee received.

Professor Marcus emphasized that the public comment period really works and that the rule proposal today is quite similar to the published version albeit rearranged after careful reconsideration. The support of the transferee judges is significant, and the alternative to something like this rule is to leave transferee judges with no indication of the parties' views going into the initial management conference. The Advisory Committee worked for seven years on this proposal, and the original MDL Subcommittee was appointed by Judge Bates when he was chair of the Advisory Committee.

Professor Bradt remarked that the process and outreach to practitioners, academics, and judges had been extraordinary. Although this rule may not include everything that any particular group would have wanted, it achieved consensus.

Professor Cooper added that this rule is discretionary, not a mandate, and is a terrific guide.

Judge Bates congratulated the Advisory Committee's current leadership, members, and predecessors for an outstanding effort in preparing this rule. It is a modest rule considering the initial proposals.

Judge Rosenberg explained that, shortly before the meeting, a judge member of the Standing Committee had suggested clarifying the term "judicial assistance" in the committee note regarding Rule 16.1(b)(3)(E). In response, Judge Rosenberg proposed the following change to the paragraph beginning on page 547, line 386:

> **Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, the court may consider measures to facilitate the resolution of some or all actions before the court ~~it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.~~ In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues,

> selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.

Judge Bates pointed out that the paragraph begins with "[w]hether or not the court has appointed leadership counsel" yet this provision is contained in a list that must wait for appointment of leadership counsel. Professor Marcus stated that Judge Bates identified a drafting challenge in that the question of leadership counsel informs a variety of other issues. A judge member suggested striking that introductory phrase, which Judge Rosenberg accepted. This change to the committee note—including the omission of "Whether or not the court has appointed leadership counsel"—was incorporated into the Rule 16.1 proposal.

With respect to proposed Rule 16.1(b)(2)(A)(iv), Judge Bates suggested adding "facilitating" before "resolution." That term reflects the language in proposed Rule 16.1(b)(3)(E) and the language in the committee note explaining that one purpose of item (iv) "is to facilitate resolution of claims." Judge Bates also suggested deleting "some of" in the committee note on page 539, line 140, because this is the only reason given for all of the items. With Judge Rosenberg's agreement and the input from the style consultants, "facilitating" was added to Rule 16.1(b)(2)(A)(iv), and the language in the committee note for Rule 16.1(b)(2) was changed to "court action on a matter ~~some of the matters~~ identified in Rule 16.1(b)(3)."

Judge Bates also commented that whether direct filings will be permitted is a threshold question for the transferee court, but the language in proposed Rule 16.1(b)(2)(D) ("how to manage the direct filing of new actions in the MDL proceedings") seems to presume that there would be direct filings. Judge Rosenberg explained that the current language served to notify the court that there will likely be actions filed directly in the transferee court in addition to those transferred as tagalongs by the Judicial Panel on Multidistrict Litigation (JPML). The use of "manage" in the rule is also intended to encourage parties to think about issues like choice of law and where a directly filed case would be remanded if less than the entire case is resolved in the MDL. Professor Bradt added that there will inevitably be actions filed directly in the transferee court even if there is no direct filing stipulation to waive venue and personal jurisdiction objections. It is the plaintiff's decision where to file in the first instance and the defendant's decision whether to challenge that decision by a Rule 12(b) motion. The current language avoids weighing in on whether a direct filing order pursuant to a defendant's stipulation is necessary, and he worried that it would create confusion if the rule were changed to suggest that the plaintiff could not file first in the MDL forum. Judge Bates said that he would defer to the Advisory Committee's judgment on the direct filing language.

A practitioner member pointed out that the transferee court may be a natural jurisdiction for trial purposes, so there will be direct filings. There could even be direct filings in MDLs involving class actions; she recalled one MDL in which over 400 class actions were filed. MDLs are inherently trans-substantive, and she was impressed by the balance that the Advisory Committee struck to give flexibility. She suggested removing "(g)" from "Rule 23(g)" on page 543, line 256, in response to a concern that she heard from antitrust and securities practitioners. They were concerned that the case management provisions in Rule 16 and 23 might be abrogated by Rule 16.1. Without objection, that change was made to the committee note.

Another practitioner member asked about the interplay of proposed Rule 16.1(b)(2)(D) and (E) and how to manage plaintiffs who file lawsuits outside the transferee court. Professor Marcus noted that such a case when filed in another federal district court is a tag-along, and it will be transferred to the transferee court unless the JPML chooses not to do so. Professor Bradt remarked that how to deal with tag-along actions is fairly regularized. The rule deals with direct filings because there is a lot of confusion that does not apply to tag-alongs. Another practitioner member added that the JPML has a set of detailed rules regarding tag-alongs, which is likely why it has not been brought up in this rule. Whether to transfer the tag-along case to the transferee district is up to the JPML, not the transferee court; so the issues that would actually come before the transferee court (rather than the JPML) are those in the categories described by (D) and (E).

Another practitioner member worried about the term "authority" in proposed Rule 16.1(b)(2)(A)(iv), referring to leadership counsel's "responsibilities and authority in conducting pretrial activities," and what it might suggest about leadership counsel's ability to bind other attorneys. Striking "and authority" would make it more consistent with the committee note, which speaks of duties and responsibilities, not authority. Professor Marcus responded that to say only "responsibilities" would leave out an important part of the appointment of leadership counsel; as proposed Rule 16.1(b)(2)(A)(vi) recognizes, a corollary to appointing leadership counsel often involves setting limits on activity by nonleadership counsel. Judge Rosenberg noted that one of her prior orders of appointment, which was based on a survey of other judges' orders, defined the "authority, duties, and responsibility" of plaintiffs' leadership.

After a review of all of the changes, Judge Bates called for a motion to approve proposed new Rule 16.1.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 16.1.**

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 523 of the agenda book.

Rule 41 Subcommittee. The Rule 41 Subcommittee was formed in October 2022 in response to submissions identifying a circuit split on whether Rule 41 permits a unilateral, voluntary dismissal of something less than an entire action. The subcommittee has concluded that the rule should be revised to explicitly increase its flexibility so that parties can dismiss one or more claims from the case. That is consistent with the prevailing district court practice and the policy goal of narrowing the issues in the case. The subcommittee plans to put forth proposed text at the fall Advisory Committee meeting, changing "an action" to "a claim."

Discovery Subcommittee. The Discovery Subcommittee continues to work on two items—the manner of service for subpoenas, and filing under seal—that were reported on at the January Standing Committee meeting.

Rule 7.1 Subcommittee. The Rule 7.1 Subcommittee also hopes to put forward a proposal at the fall Advisory Committee meeting. The subcommittee has been considering whether to

expand the disclosures required of non-governmental organizations. Rule 7.1 disclosures inform judges when making recusal decisions under 28 U.S.C. § 455(b)(4). The Committee on Codes of Conduct recently issued guidance providing that judges should recuse themselves when they have a financial interest in a parent company that controls a party to a case before them. Professor Bradt added that the subcommittee is working on a rule that makes it as easy as possible for judges to implement this guidance.

Cross-Border Discovery Subcommittee. Cross-border discovery is a big issue, and the subcommittee is in an early, information-gathering stage. The subcommittee decided to focus first on handling discovery for use in litigation in the United States and the application of the Hague Convention.

Rule 43/45 Subcommittee. A number of plaintiff-side attorneys have suggested resolving a split in courts about the interaction of (i) Rule 45(c)'s limitations on where a witness must appear under subpoena and (ii) the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena. A new subcommittee has been created to look at this issue.

Professor Marcus noted that there are two subcommittees looking at Rule 45. The Rule 45 aspect of this remote testimony question appears easier to solve compared to the Rule 43 part. It is possible that the Advisory Committee will consider the Rule 45 issues together in a single proposal separate from the Rule 43 remote testimony question.

Random Case Assignment. The reporters continue to research this issue and monitor the effects of new Judicial Conference guidance that encourages random assignment of cases seeking nationwide or statewide injunctive relief. Professor Bradt added that he is researching Rules Enabling Act authority for a rule and what a rule might look like. The subcommittee will focus on monitoring the uptake of the new guidance over the summer.

Use of the Word "Master" in the Rules. The American Bar Association proposed removing the word "master" from the rules, particularly Rule 53, and substituting "court-appointed neutral." The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) supports the proposal. The Advisory Committee would appreciate the views of the Standing Committee on whether the word "master" should be discarded in the rules and, if so, what term should replace it. The term "master" appears in at least six other rules, the Supreme Court's rules, and at least one statute. Judges also use the term in making appointments to assist in the conduct of litigation even without relying on Rule 53.

Professor Marcus sought guidance, particularly from judges. The term "master" has been used in Anglo-American jurisprudence for a very long time, but it has also been used in a very harmful way in contexts mostly unrelated to judicial proceedings. Anecdotally, from the two judges he asked, he heard opposite views about whether a change is needed.

Hearing nothing, Judge Bates noted that the Standing Committee members could reach out to Professor Marcus after the meeting and commented that the Standing Committee would look forward to the Advisory Committee's views.

Demands for Jury Trials in Removed Actions. The Advisory Committee has not yet decided how to address the verb-tense change made during the restyling of Rule 81(c)(3)(A) and the potential issues that it may be causing in removed actions.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever presented the report of the Advisory Committee on Criminal Rules, which last met on April 18, 2024, in Washington, D.C. The Advisory Committee presented four information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 573.

Information Items

Rule 17 and pretrial subpoena authority. The Rule 17 Subcommittee, chaired by Judge Nguyen, has been considering how information is gathered from third parties in criminal cases and has determined that there is a need to clarify the rule. The subcommittee has conducted a survey and gathered information showing that there is great disparity in actual practice regarding how Rule 17 has been interpreted by courts. The subcommittee has been working to draft language for the Advisory Committee to review and possibly to road test.

Rule 53 and broadcasting criminal proceedings. The Rule 53 Subcommittee is considering a suggestion from a consortium of media groups proposing to amend Rule 53 to give courts discretion to televise trials. The Rules Law Clerk has prepared a memorandum on the history of Rule 53, and the subcommittee is now in the process of gathering information about actual practice. Judge Michael Mosman, who joined the Advisory Committee to replace Judge Conrad after he was appointed Director of the Administrative Office of the U.S. Courts, will serve as a member of the Rule 53 Subcommittee.

The subcommittee is also coordinating with the CACM Committee. As Judge Dever commented during the discussion on remote testimony in contested bankruptcy matters, the CACM Committee draws a distinction between using technology to bring witnesses into court and using technology to expand the courtroom.

Rule 49.1 and references to minors by pseudonyms. The Advisory Committee recently received a suggestion from the Department of Justice to amend Rule 49.1 to protect the privacy of minors by using pseudonyms, instead of initials as is currently required. Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers.

Ambiguities and gaps in Rule 40. Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating conditions of release. The Magistrate Judges Advisory Group recently submitted a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. Judge Dever anticipates creating a new subcommittee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on April 19, 2024, in Washington, D.C. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 96.

Action Item

Publication of Proposed Amendment to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Schiltz reported on this item. The text of the proposed amendment appears on page 102 of the agenda book, and the written report begins on page 97.

This proposal is related to a witness's prior inconsistent statements, which are introduced early and often at trials. In theory, under the current Rule, prior inconsistent statements can be used only to assess the credibility of a witness—not for the substance of the statement—unless the statement was made under oath at a formal proceeding. As a practical matter, prior inconsistent statements are likely being used by jurors for substantive purposes, and the proposed amendment would allow admissible prior inconsistent statements to be used for both credibility and substance.

Aside from prosecutors using grand jury testimony, prior inconsistent statements are rarely made under oath at a formal proceeding. Judges give instructions like the following: "You heard Joe testify that the light was red. You also heard that, a few months ago, Joe told his sister that the light was green. You may use Joe's statement to his sister in deciding whether Joe was being truthful in saying the light was red, but you may not use Joe's statement to his sister in deciding whether the light was red." But many trial judges believe jurors do not understand or follow such instructions, and attorneys often do not ask for these instructions.

As a matter of hearsay law, a prior inconsistent statement cannot be admitted unless the person who made it is on the stand, under oath, and subject to cross-examination; this proposal would not change that standard and would not result in jurors hearing anything new. Rather, the proposal would bring the rule into alignment with practice and spare judges from giving jury instructions that are likely not being followed. It would further bring the treatment of prior *inconsistent* statements into alignment with prior *consistent* statements, which may be considered for both purposes (substance and credibility). This would restore the rule to the version proposed by the original Advisory Committee before Congress, in enacting the Evidence Rules, changed Rule 801's approach to prior inconsistent statements. Additionally, about half of the states have more lenient treatment than the federal rules, and around 15 states allow the use of prior inconsistent statements for any purpose.

One of the practitioner members commented that the proposal was elegant, but the deletion of the limiting language in Rule 801(d)(1)(A) would raise questions about new types of evidence coming in as substantive evidence. For example, in a criminal case, witnesses are commonly confronted with prior statements memorialized in federal agent notes such as the FBI form FD-302. But those federal agent notes are not a transcript and would not themselves be admissible. He wondered whether the rule would encompass prior statements that cannot be easily verified; what if the witness states that they cannot recall what they previously told the agent? He suggested

adding "is otherwise admissible under these rules" in the rule or clarifying it in the committee note. Another practitioner member suggested that the committee note could provide a more fulsome cross-reference to the other rules to expressly clarify that the statement would need to be otherwise admissible.

Professor Capra explained that proving a prior inconsistent statement is done with extrinsic evidence under Rule 613(b), and the statement will be admitted as substantive proof only if there is admissible evidence. Judge Schiltz noted that this is not an affirmative rule of admissibility. The proposal simply lifts the hearsay bar as is already done with prior consistent statements. Judge Schiltz and Professor Capra pointed out that judges could still monitor the use of statements through Rule 403, and authenticity rules also still apply. Nevertheless, they agreed that a new paragraph could be added to the committee note to clarify this issue, and there was some discussion about whether to make that change now or after publication.

A judge member asked why we would only make this clarification (referring to otherwise admissible evidence) as to inconsistent statements and not to consistent statements. Professor Capra agreed that was a good point. The rules do not say that the evidence must be admissible every time there is an exception to the hearsay rule. The judge member asked if there had been issues with the change to consistent statements, and Professor Capra indicated there had not. The judge member stated that she would not limit any change to inconsistent statements, and Professor Capra worried about negative inferences for every other hearsay exception. Another judge member echoed this concern.

The first practitioner member commented that it would be sufficient to address this in the committee note. He reiterated that the note's statement that "[t]he rule is one of admissibility, not sufficiency" implies something that the Advisory Committee did not mean to imply. Professor Capra proposed removing that sentence from the note. The previous judge member indicated that would be acceptable, and that sentence in the note was deleted without opposition.

The practitioner member also suggested deleting the word "timing" on line 79 because Rule 613(b) is not just a matter of timing, and Professor Capra agreed. A conforming change was made in line 79 to make "requirement" plural. For consistency, Judge Bates also suggested adding "prior" before "inconsistent statement" in line 31, which Judge Schiltz agreed was a good idea.

Another judge member thought there was a convincing argument that this proposal will not make a practical difference in most cases. However, this change would make a substantive difference in cases where the out-of-court statement is the only piece of evidence to fill a hole in the sufficiency of the evidence.

Judge Schiltz agreed that it is theoretically possible for a case to be decided on only a prior inconsistent statement, but he found it difficult to produce real-life examples of that happening. Professor Capra added that, as state practice shows, this rule change will make a difference in some cases. He also noted that, when Congress was initially considering Rule 801, a senator objected to the third subparagraph of Rule 801(d)(1) on the ground that a prior identification, not made under oath, should not serve as the sole basis of conviction. Congress, however, revised its thinking because, like an excited utterance, this is a form of hearsay exception, and hearsay exceptions can

be sufficient evidence. The Evidence Rules address admissibility, not sufficiency, of evidence; concerns about sufficiency of evidence are beyond the purview of those rules.

Another judge member offered a hypothetical where five witnesses said that the light was green, and one witness gave an out-of-court hearsay statement that the light was red but recanted at trial, saying he was mistaken and could not recall. That case would now go to a jury. Judge Schiltz agreed that the case would go to the jury, but it is unlikely that jurors would credit the inconsistent statement over the five people who testified. There are already convictions based on out-of-court statements made by people who do not testify in court, such as excited utterances by victims in domestic violence cases. Under this proposal, the person who made the prior inconsistent statement would need to be in court, under oath, and subject to cross-examination.

Ms. Shapiro commented that Judge Schiltz made a compelling argument. As she had expressed to the Advisory Committee, the prosecutor community generally opposed this proposal. First, prior inconsistent statements are definitionally hearsay and unreliable. Such statements contradict what is being said on the stand. Second, prosecutors are concerned about collateral litigation around proving statements that the witness denies ever making. Finally, limiting instructions are common, and we presume juries understand and apply these instructions. Amending this rule because jurors do not understand limiting instructions could lead to many other rule changes. On the other hand, there were some prosecutors who came from states where this proposal was the rule, and they did not have issues. The Department's civil litigators were agnostic.

Professor Capra responded that the prior inconsistent statement may or may not be credible, but the reliability is guaranteed by the person being on the stand and subject to cross-examination. With respect to collateral litigation about extrinsic evidence, that already happens when a party seeks to admit the statement for impeachment purposes, and this is no different from proving any other fact. Finally, this proposal is not an attack on all limiting instructions. This limiting instruction is particularly hard to understand, which was also true in 2014 with respect to amendments addressing prior consistent statements.

Judge Bates asked Ms. Shapiro if prosecutors had a position on the agent notes issue that was raised earlier. Ms. Shapiro explained that federal agent interview notes, such as FBI FD-302 forms, are turned over during discovery as statements of the witness, but the notes are actually the work product of the agent. When an agent is testifying and there is something potentially inconsistent in the interview notes, there can be fights over whether the statement belongs to the witness or the agent. Judge Schiltz commented that these issues exist today, and this proposal does not create new problems in this respect.

Judge Schiltz and Professor Capra also noted that prosecutors coming from state courts that allow the use of prior inconsistent statements as substantive evidence say that the rule is very valuable in certain kinds of cases, like domestic violence and gang cases, where witnesses can be intimidated before the trial. And a panel of state prosecutors in California indicated several years ago that they could not bring many cases without this rule. There is also value to the defense side, and the Advisory Committee's public defender member voted in favor of publishing this rule.

Judge Bates noted that this proposal is only for publication and that further changes can be made later. He asked Judge Schiltz to clarify what the committee was voting on. Judge Schiltz

explained that the rule text is as proposed on pages 102–03 of the agenda book. The changes to the committee note are as follows: on page 103, line 31, "prior" was inserted before "inconsistent;" on page 105, line 77, the last sentence was deleted; on line 79, "timing" was deleted, and "requirement" became "requirements."

Upon motion by a member, seconded by another, and by show of hands: **The Standing Committee, with one abstention,[2] gave approval to publish the proposed amendment to Rule 801 for public comment.**

Information Items

Professor Capra reported on three topics being considered by the Advisory Committee. The written report begins on page 98 of the agenda book.

Artificial intelligence and machine-generated information. The Advisory Committee has convened two panels of experts to educate the committee about artificial intelligence and how it affects admissibility. The Advisory Committee is focusing on two issues: (1) reliability issues concerning machine learning and algorithms and (2) authenticity issues related to deepfake audio and visual presentations.

Regarding machine learning, the Advisory Committee is looking at Article VII of the Evidence Rules. Although the issue is still in its early stages: one possibility is a new Rule 707 treating machine outputs that are used like human experts the same as human expert testimony by applying *Daubert* and Rule 702 standards.

Regarding deepfakes, the problem is how to authenticate alleged fakes. The Advisory Committee is considering proposals to create a structure for resolving these disputes but is also considering waiting and monitoring the caselaw. A New York State Bar Association commission decided to wait to see what courts are doing. In 2010, with respect to social media and allegations of hacking, the Advisory Committee determined that the authenticity rules were sufficiently flexible, and courts handled it well. The question is whether deepfakes are a difference in kind as opposed to degree. Timing also presents a dilemma. If the rule is too specific, it may no longer be relevant in three years. But a rule that is too general may not be helpful.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Under Rule 609(a)(2), convictions that involve dishonesty or false statement are automatically admissible for impeachment. Rule 609(a)(1) allows a party to impeach with prior convictions that do not involve dishonesty or false statement. For non-falsity convictions, there are two balancing tests. In deference to a defendant's right to testify, Congress provided a more protective rule for defendants: the conviction is admissible only if the probative value outweighs its prejudicial effect. For all other witnesses, the admissibility is governed by Rule 403.

One professor urged the Advisory Committee to abrogate the entire rule because, as many academics argue, the rule does not make sense and is unfair. Many problematic convictions under

[2] Ms. Shapiro indicated that the DOJ would abstain for now and await publication.

Rule 609(a)(1) are being admitted against criminal defendants, particularly those similar to the crime being charged. Professor Capra explained that some Advisory Committee members felt that the problem was not with the rule but its application. On the other hand, if courts are misapplying the rule, then it may be a rule problem.

The Advisory Committee first considered eliminating Rule 609(a)(1) entirely and leaving only Rule 609(a)(2) for convictions that involve dishonesty or false statement. Some members felt that went too far so the Advisory Committee is focusing on a proposal to make the balancing test more protective for criminal defendants under Rule 609(a)(1)—the probative value must *substantially* outweigh the prejudice.

Some Advisory Committee members were also skeptical about whether this proposal would make a difference in how likely criminal defendants are to testify. Trying to determine whether, or to what extent, this rule impacts a defendant's decision to testify is difficult, and the FJC and Sentencing Commission will hopefully be able to help with data.

Evidence of prior false accusations made by complainants in criminal cases. The final information item related to false complaints, most often in sexual assault cases. This proposal came from a law professor who explained that courts are not using a consistent set of rules to handle the admissibility of false complaints of sexual assault. They might use Rule 404(b), Rule 608, or Rule 412. She proposed a new Rule 416 specifically addressing false complaints.

The proposal is in a nascent stage. Reducing confusion would be good. But states have much more experience handling false complaints of sexual assault, and the Advisory Committee resolved to first look at what states are doing. Professor Liesa Richter, Consultant to the Advisory Committee, is conducting a 50-state survey on this issue.

Judge Bates thanked Judge Schiltz and Professor Capra for the report and for Judge Schlitz's many years of excellent service.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 606 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the current legislative session will end shortly before the Standing Committee's next meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report). This was the last item on the meeting's agenda, and the draft 2024 Privacy Report is included in the agenda book starting on page 616. Mr. Byron asked for the

Standing Committee's approval of this draft with authorization for the Chair and Secretary to make minor changes based on feedback leading up to the Judicial Conference.

Judge Bates noted that the CACM Committee played a substantial role in preparing the 2024 Privacy Report. Mr. Byron added that the FJC also meaningfully contributed. The report describes the first phase of a study that the FJC conducted, which will assist both the CACM Committee and the Rules Committees in evaluating the adequacy of the privacy rules.

Without objection, the Standing Committee recommended that the Judicial Conference approve the 2024 Privacy Report, subject to any minor revisions approved by the Chair, and ask the AO Director to transmit it to Congress in accordance with law.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on January 7, 2025, in a location to be announced.

TAB 1C

TAB 1C.11

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 1C.2

Agenda E-19 (Summary)
Rules
September 2024

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve, effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

   c. Approve, effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 7-9

3. Approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 11-13

4. Approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 16-18

The remainder of the report is submitted for the record and includes the following items for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Chief Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, Consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC);

and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, U.S. Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act[1] process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees on attorney admission rules, and by those committees and the Appellate Rules Committee on electronic filing by pro se litigants and on the redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court.

The proposed amendments clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court, and establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Form Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 29 and 32, and the Appendix of Length Limits, as well as Form 4, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with minor changes to the proposed amendments to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

After much consideration, the Advisory Committee recommended publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. In considering the proposed amendments, the Advisory Committee was mindful of First Amendment concerns and proposed legislation regarding amicus filings.

The proposed amendments require all amicus briefs to include, as applicable, a description of the identity, history, experience, and interests of the amicus curiae along with an explanation of how the brief will help the court. Also, the proposed amendments require an amicus entity that has existed for less than 12 months to state the date the entity was created.

The proposed amendments add two new disclosure requirements regarding the relationship between a party and an amicus curiae. Those disclosure requirements focus, respectively, on ownership or control of the amicus (if it is a legal entity), and contributions to the amicus curiae; in each instance the focus is on ownership, control, or contributions by (1) a party, (2) its counsel, or (3) any combination of parties, counsel, or both. The first provision would require the disclosure of a majority ownership interest in or majority control of

a legal entity submitting the brief. The second provision would require disclosure of contributions to an amicus curiae, with a threshold amount of 25 percent of annual revenue, with the reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure.

In addition, the proposed amendments revise the disclosure obligation with respect to a relationship between a nonparty and an amicus curiae. The current rule requires disclosure of contributions intended to fund preparing or submitting the brief by persons "other than the amicus curiae, its members, or its counsel." The proposed amended rule would retain the member exception, but would limit that exception to persons who have been members of the amicus for at least the prior 12 months or who are contributing to an amicus that has existed for less than 12 months. (As noted above, an amicus that has existed for less than 12 months must state the date it was created.) These proposed amendments would require a new member making contributions earmarked for a particular brief to be effectively treated as a non-member for these purposes and would require disclosure.

The proposed amendments would also eliminate the option for a non-governmental entity to file an amicus brief based on the parties' consent during a court's initial consideration of a case on the merits, and would therefore require a motion for leave to file the brief.

Finally, the proposed amendments set the length limit for amicus briefs at 6,500 words (rather than one-half the maximum length authorized for a party's principal brief) to simplify the calculation for filers.

At its meeting, the Standing Committee made minor changes to the rule. The phrase "may be of considerable help to the court" was changed to "may help the court" both to improve the style and readability and because the Committee determined that including the word "considerable" could create an unintentional burden. The disclosures required by the rule were

added to the required contents of the motion for leave. And to promote clarity, the phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both." Other changes to improve style and consistency were made to the rule and the committee note.

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

The proposed amendments to Rule 32 conform Rule 32(g)'s cross-references to the proposed amendments to Rule 29.

Appendix of Length Limits

The proposed amendments to the Appendix of Length Limits conform the Appendix's list of length limits for amicus briefs to the proposed amendments to Rule 29.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The proposed amendments, in response to several suggestions, simplify Form 4 to reduce the burden on individuals seeking in forma pauperis (IFP) status (including the amount of personal financial detail required), while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.

Information Items

The Advisory Committee met on April 10, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a possible new rule regarding intervention on appeal, considered the possibility of improving the length and content of appendices, and discussed possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention). Also, the Advisory Committee removed from consideration a suggestion to eliminate PACER fees, because it is not a subject governed by the rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 and six new Official Forms related to those amendments; (2) amendments to Rule 8006; and (3) amendments to Official Form 410. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Accompanying the proposed amendments to Rule 3002.1 is a proposal for adoption of six new Official Forms:

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-N (Trustee's Notice of Payments Made)
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

Under Rule 3002.1(f), an official form motion (410C13-M1) can be used by the debtor or trustee over the course of the plan to determine the status of the mortgage. An official form response (410C13-M1R) is used by the claim holder if it disagrees with facts stated in the motion. If there is a disagreement, the court will determine the status of the mortgage claim. If

the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under Rule 3002.1(g), after all plan payments have been made to the trustee, the trustee must file the new official form notice (410C13-N) concerning disbursements made, amounts paid to cure any default, and whether the default has been cured. The claim holder must respond to the notice using the official form response (410C13-NR) to provide the required information. Rule 3002.1(g) also provides that either the trustee or the debtor may file a motion, again using an official form (410C13-M2), for a determination of final cure and payment. If the claim holder disagrees with the facts set out in the motion, it must respond using Official Form 410C13-M2R.

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

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

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

Official Form 410 (Proof of Claim)

The form is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Bankruptcy Code, not merely electronic payments in chapter 13 cases. In addition, an amendment is made to the margin note in "Part 3: Sign Below" to conform to the restyled rules approved by the Judicial Conference in September 2023 (JCUS-SEP 2023, p. 24): the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

Recommendation: That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

c. Effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to (1) Rule 3018; (2) Rules 9014, 9017, and new Rule 7043; and (3) Rules 1007, 5009, and 9006, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with changes to the language in the committee note to Rule 9014 addressing the different treatment of adversary proceedings and contested matters with respect to allowing remote testimony.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent.

Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony)

The proposed amendments would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 (Taking Testimony) to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would retain the applicability of Fed. R. Civ. P. 43 in

adversary proceedings—thereby authorizing remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"; and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The effect of this proposal would be to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters. This proposed change rests on the difference between adversary proceedings and contested matters: whereas adversary proceedings resemble civil actions, contested matters proceed by motion and can usually be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested testimony.[2]

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed changes to Rules 1007, 5009, and 9006 are made to reduce the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007, along with conforming amendments to Rule 9006, would eliminate the deadlines for filing the certificate of course completion. The proposed amendment to Rule 5009 would provide for two notices instead of just one, reminding the debtor of the need to take the course and to file the certificate of completion.

[2]The Advisory Committee on Bankruptcy Rules previously requested input on these proposed amendments from the Committees on Court Administration and Case Management (CACM Committee) and the Administration of the Bankruptcy System, which advised that the proposals would not appear to create any conflict with existing Judicial Conference policy regarding remote access or remote proceedings, nor impact the CACM Committee's ongoing consideration of potential revisions to the remote public access policy.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 11, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a proposal to require redaction of the entire SSN in court filings; two suggestions to eliminate the requirement that all notices given under Rule 2002 include in the caption, among other things, the last four digits of the debtor's SSN; and a suggestion to allow the appointment of masters in bankruptcy cases and proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed,

those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Civil Rules met on April 9, 2024. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible

grounds for recusal, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 81(c)(3)(A) (Applicability of the Rules in General; Removed Actions) regarding demands for a jury trial in removed cases. The Advisory Committee also discussed issues related to sealed filings and use of the word "master" in the rules, and was briefed on the random case assignment policy adopted by the Judicial Conference in March 2024 (*see* JCUS-MAR 2024, p. 8) and the importance of monitoring its implementation, as well as ongoing research related to rulemaking authority in this area. Finally, the Advisory Committee discussed a new proposal to amend Rule 43(a) (Taking Testimony) and Rule 45(c) (Subpoena) concerning the use of remote testimony in certain circumstances, and a new subcommittee was formed to consider this proposal.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 18, 2024, and discussed several information items, including two new suggestions.

The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee is working to develop a draft of a proposed amendment to clarify the rule and expand the scope of parties' authority to subpoena material from third parties before trial. The subcommittee has tentatively concluded that any proposed amendment should provide for case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information and other information.

Last year, the Advisory Committee received two suggestions regarding Rule 53 (Courtroom Photographing and Broadcasting Prohibited) and proceedings in the cases of *United States v. Donald J. Trump*. The Advisory Committee concluded that it did not have the authority to exempt specific cases or parties from the rule's prohibition on broadcasting, and it acknowledged that any amendment under the Rules Enabling Act process would likely take three or more years. The Advisory Committee determined, however, that further examination of the proposal to amend Rule 53 was warranted, and, as previously reported to the Judicial Conference, a subcommittee was formed. The subcommittee is in early stages of its consideration of potential amendments and will coordinate with other committees evaluating issues of remote public access to federal judicial proceedings.

The Advisory Committee also discussed two new suggestions. The Department of Justice has submitted a suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) to require the use of pseudonyms—instead of initials—to mask the identity of minors in court filings. A new subcommittee was formed to consider this proposal as well as other privacy issues under Rule 49.1. The Advisory Committee received another suggestion to clarify Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) as it applies when a defendant from outside the district is arrested for violating conditions of release. The Advisory Committee recently received a related submission (from the Administrative Office's Magistrate Judges Advisory Group) which includes a comprehensive proposal for additional amendments to Rule 40. Consideration of these proposals will continue.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 801(d)(1)(A) with a recommendation that it be published for public comment in August 2024. The Standing Committee (with the Department of Justice representative abstaining) approved the Advisory Committee's recommendation, with minor amendments to the committee note.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment provides that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. The current Rule 801(d)(1)(A) includes a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness, providing that a prior statement is substantively admissible only when it was made under oath at a formal proceeding.

Information Items

The Advisory Committee met on April 19, 2024. In addition to the recommendation discussed above, the Advisory Committee held a panel discussion on artificial intelligence and machine-generated information, and the possible impact of artificial intelligence on the Federal Rules of Evidence. The Advisory Committee also discussed a possible amendment to Rule 609(a) (Impeachment by Evidence of a Criminal Conviction) and a possible new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

PROPOSED 2024 REPORT OF THE JUDICIAL CONFERENCE ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L.

No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was completed in June 2022. This report covers the period from June 2022 to June 2024. The Committee considered and approved the proposed draft 2024 report of the Judicial Conference on the Adequacy of the Privacy Rules Prescribed under the E-Government Act of 2002, subject to revisions approved by the chair in consultation with the Rules Committee Staff.

Part I of the 2024 report describes the consideration of several proposed rule changes that include privacy-related issues. The Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 report resulted in the proposed amendments to Appellate Form 4 (discussed earlier in this report) that will be published for comment in August 2024. Several more recent privacy-related suggestions are in the beginning stages of consideration. Part II of the 2024 report describes ongoing judiciary implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect personal information in court filings and opinions and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee asked

the Administrative Office and the FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions. This has led the Administrative Office to update the judiciary's internal and external websites, and the FJC to consider increased ways to address privacy issues in educational materials for new judges and other judiciary officials. Part III of the 2024 report, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the rate of compliance with existing privacy rules regarding unredacted SSNs in court filings, conducted at the request of the CACM Committee. The FJC's 2024 study reveals that instances of non-compliance remain very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

The CACM Committee considered the draft report at its May 2024 meeting and endorsed a recommendation that the Judicial Conference approve the 2024 report and ask the AO Director to transmit it to Congress in accordance with the law.

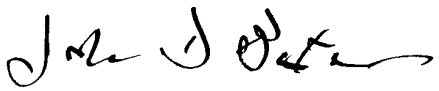
> **Recommendation:** That the Judicial Conference approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*. The Committee's views were

communicated to Judge Scott Coogler (N.D. Ala.), the judiciary planning coordinator, by letter dated June 17, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	D. Brooks Smith
William J. Kayatta, Jr.	Kosta Stojilkovic
Edward M. Mansfield	Jennifer G. Zipps
Troy A. McKenzie	
Patricia Ann Millett	

* * * * *

TAB 1D

Federal Judicial Center

Date: December 13, 2024

To: Standing Committee on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55 (www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts). In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center prepared a research plan for surveying criminal defense attorneys on factors determining how defendants plead and whether they testify, consistency of rulings on whether criminal histories would be admissible for impeachment, and the predictive value of criminal history on defendants' truthfulness as witnesses. Because the research would take approximately two years, the committee decided to proceed with a proposal to amend Evidence Rule 609 without waiting for the research.

Broadcasting Criminal Proceedings

The Center provided the Criminal Rules Committee with research support as it studied whether the proscription on remote public access to criminal proceedings should be amended. The committee decided not to pursue an amendment to that proscription at this time.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers on certain public forms. Based on the results of the survey, the committee decided not to pursue a requirement for full redaction at this time, and it decided to continue to monitor treatment of the issue by other committees.

Remote Participation in Bankruptcy Contested Matters

The Center provided the Bankruptcy Rules Committee with research support as it studied remote participation in contested matters.

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

Bankruptcy Judges' Use of Masters

At the request of the Bankruptcy Rules Committee, the Center will survey bankruptcy judges on how and whether they would use masters if they had the authority to do that.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Civics Education and Outreach

A new curated website shows public-outreach and civics-education efforts by individual federal courts, as well as materials prepared by the Center and the Administrative Office (www.fjc.gov/content/388217/overview). The curated resources educate the public about the role, structure, function, and operation of the federal courts. The site includes an interactive map, created at the request of the Committee on the Judicial Branch, that displays highlighted civics-education resources and civics-program information pages on court websites. This may assist courts in developing or expanding their own civics efforts.

Unredacted Social Security Numbers in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, as part of the Center's ongoing privacy study, the Center identified unredacted Social Security numbers in public filings apparently out of compliance with Federal Rules of Practice and Procedure: Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Center found 22,391 unredacted Social Security numbers in a sample of 4.7 million filed documents (www.fjc.gov/content/387587/unredacted-social-security-numbers-federal-court-pacer-documents). Of those, 22% were exempt from the redaction requirement, and 6% belonged to pro se filers who waived the rules' privacy protection by disclosing their own Social Security numbers.

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Enhancing Efforts to Coordinate Best Workplace Practices Across the Federal Judiciary

This report, and the study of federal-judiciary workplace practices on which it is based, were undertaken by the Center and the National Academy of Public Administration pursuant to a House Committee recommendation under the Consolidated Appropriations Act of 2023 (www.fjc.gov/content/388247/enhancing-efforts-coordinate-best-workplace-practices-across-federal-judiciary).

Science Resources

The Center maintains a curated website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Recently added is information on dementia and the law (www.fjc.gov/content/385467/dementia-and-law).

JUDICIAL GUIDES

Completed

Mutual Legal Assistance Treaties and Letters Rogatory: Obtaining Evidence and Assistance from Foreign Jurisdictions

This guide, now in its second edition, provides an overview of the statutory schemes and procedural matters that distinguish mutual legal assistance treaties and letters rogatory (www.fjc.gov/content/386124/mutual-legal-assistance-treaties-letters-rogatory). It also discusses legal issues that arise when the prosecution, the defense, or a civil litigant seek to obtain evidence from abroad as part of a criminal or civil proceeding.

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition). A draft is currently under review by a Benchbook Committee.

HISTORY

Spotlight on Judicial History

Since 2020, the Center has posted twenty-four short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history).

Recently posted is "The Codification of Federal Statutes on the Judiciary" (www.fjc.gov/history/spotlight-judicial-history/federal-judicial-statutes).

Work of the Courts

Of the Center's seven essays on the work of the courts, the most recent two are "Foreign Treaties in the Federal Courts" (fjc.gov/history/work-courts/foreign-treaties-in-federal-courts) and "Juries in the Federal Judicial System" (www.fjc.gov/history/work-courts/juries-in-federal-judicial-system).

Summer Institute for Teachers

In June 2024, the Center collaborated with the ABA to present a week-long professional-development conference for teachers, focusing on three famous historical trials: The *Amistad* trial, *United States v. Guiteau*, and *United States v. Rosenberg*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshops

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop, held in 2023 and 2024, addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual-property law. It was cosponsored by the Berkeley Center for Law and Technology.

Search and Surveillance Warrants in the Digital Age

This three-day, in-person program was designed for magistrate judges who handle criminal warrant applications as part of their day-to-day responsibilities.

Law and Technology Workshop for Judges

This three-day, in-person workshop addressed artificial intelligence and its regulation and governance, digital forensics, statistics in law and forensic evidence, technology and cognitive liberty, technology and the Fourth Amendment, access to justice, cybersecurity, and ethical and policy issues with artificial intelligence.

FJC–Center for Law, Brain & Behavior Workshop on Science-Informed Decision-Making

Judges and probation and pretrial services officers participated in this three-day, in-person workshop on the incorporation of behavioral science into decisions made in criminal cases.

Antitrust Judicial Law and Economics Institute for Federal Judges

This three-day, in-person judicial workshop focused on the legal and economic considerations of antitrust cases.

Distance Education

Implications of Purdue *for Bankruptcy Judges*

A live webcast for bankruptcy judges discussed the implications of the Supreme Court's June 27, 2024, decision in *Harrington v. Purdue Pharma L.P.*, which held, "The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants."

Court to Court

A documentary-style video program presenting innovation and creative problem solving by personnel in individual court units around the country, this program included as a recent episode "Transforming Justice: The Power of Drug Courts" (featuring Northern District of West Virginia Magistrate Judge Michael Aloi and Special Offender Specialist and U.S. Probation Officer Jill Henline).

Court Web

This monthly webcast included as recent episodes "Neuroscience-Informed Decision-Making" (featuring retired District of Massachusetts Judge Nancy Gertner, now managing director of the Massachusetts General Hospital Center for Law, Brain & Behavior, and codirector and cofounder psychiatrist and lawyer Dr. Judith Edersheim), "An Update on the Cardone Report after the 60th Anniversary of the CJA" (featuring District of New Hampshire Judge Landya B. McCafferty and Western District of Texas Judge Kathleen Cardone), "Generative AI and the Future of Legal Practice" (featuring Middle District of Florida Magistrate Judge Anthony Porcelli and Southern District of California Magistrate Judge Allison Goddard), and "Election Litigation Update" (featuring Professors Richard Hasen and Derek Muller).

Term Talk

The Center presents periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes included "*City of Grants Pass v. Johnson*; *McElrath v. Georgia*" (discussing status and conduct in the context of ordinances that punish sleeping and the absolute bar against retrying acquitted defendants even when there are inconsistent verdicts), "*Smith v. Arizona*; *Diaz v. United States*" (discussing guidelines for determining when reports prepared by analysts are testimonial and limitations on expert testimony about a defendant's mental state), "*Erlinger v. United States*; *Pulsifer v. United States*" (discussing the existence of a prior offense as a jury

question and the requirements for safety-valve relief under the First Step Act), "*Chiaverini v. City of Napoleon*" (discussing how probable cause for one charge does not insulate other charges from a § 1983 malicious-prosecution claim), "*United States Trustee v. John Q. Hammons*; *Harrington v. Purdue Pharma L.P.*" (discussing the Supreme Court's decision to not reimburse claimants for bounded nonuniformities and the Court's rejection of the release of claims against third-party nondebtors without claimant consent), "*Fischer v. United States*; *Snyder v. United States*" (discussing the 2002 Sarbanes-Oxley Act as applied to January 6 defendants and whether the amended federal bribery statute criminalizes gratuities), and "*Alexander v. S.C. State Conference of NAACP*; *Robinson v. Callais*" (discussing how courts should determine if race or party affiliation predominates in a legislature's redistricting and the uncertainty surrounding application of the *Purcell* principle).

Supreme Court Term in Review for Bankruptcy Judges

A 2024 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Diocese Cases in Bankruptcy

This webcast for bankruptcy judges addressed the authority of the court, the scope of the automatic stay, and limitations of bankruptcy relief. It included discussion of the overarching themes of religion, trauma, procedural justice, confidence in the court system, and the inevitable media presence.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

Recent General Workshops

National Workshop for U.S. District Court Judges

These three-day workshops are held in even-numbered years. Among the topics examined at the 2024 workshop were scientific evidence, artificial intelligence, employment-discrimination litigation, deferred sentencing, restorative justice, and managing mass litigation.

National Workshop for U.S. Magistrate Judges

These three-day workshops are held annually. Among the topics examined at the 2024 workshop were the impact of ChatGPT on court filings, including

those by self-represented litigants, and the impact of "deepfakes" on evidence and procedure.

National Workshop for U.S. Bankruptcy Judges

These three-day workshops are held annually. Among the topics discussed in 2024 were sealing court records and healthcare bankruptcies.

Circuit Workshops for U.S. Appellate and District Judges

In October 2024, the Center put on a three-day workshop for Article III judges in the Fourth Circuit.

National Conference for Pro Se and Death Penalty Staff Attorneys

This three-day educational conference was presented in 2022 and 2024.

Orientation Programs

Orientation Programs for Judges

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, judicial ethics, and opinion writing. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, case management, security, self-represented litigants, relations with the media, and ethics. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

Orientation for Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

TAB 2

TAB 2A

MEMORANDUM

DATE: December 16, 2024

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

I write to report on the development of possible rule amendments on the topic of self-represented litigants' filing and service. Since the Standing Committee's last meeting, the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules discussed a sketch of proposed amendments on those topics. The Appellate, Civil, and Criminal Rules Committees appear open to working in tandem to move forward with proposed amendments, but the Bankruptcy Rules Committee has expressed concerns that are specific to the bankruptcy context.

We are hoping to gain the Standing Committee's guidance concerning the possibility of moving forward with proposals for the Appellate, Civil, and Criminal Rules but not the Bankruptcy Rules. Such a move would run counter to the usual preference for uniformity across the national sets of procedural rules. But the preference for uniformity is not an inexorable command, and when genuine differences specific to a particular rule set justify a departure, variances from uniformity have been adopted in the past.

For specifics on the current working model of the proposal, please refer to the enclosed August 21, 2024 memo to the Advisory Committees. In the current memo, after providing a nutshell summary of the enclosed working draft, I will briefly highlight aspects of the Advisory Committees' fall 2024 discussions and explain the basis for requesting permission to consider moving forward with proposals to amend only three of the four sets of Rules.

Summary of the working draft. As the Committee knows, this project focuses on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing) through the court's electronic-filing system or through a court-based electronic-noticing program.

For illustrative purposes, the working group has collaborated on a tentative sketch of a

possible amendment to Civil Rule 5. (Assuming that the project proceeds this spring, we will proceed to draft parallel proposals for amending Appellate Rule 25 and Criminal Rule 49.) The sketch illustrates two policy choices – one regarding service, and the other regarding filing.

As to service, the sketch eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the sketch makes two changes compared with current practice: (1) it presumptively permits self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) it provides that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with the amended filing rule by doing either of the following:

- Allowing reasonable access for self-represented litigants to the court's electronic-filing system. That access could (and I expect typically would) be limited to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training.

- Not allowing self-represented litigants to access CM/ECF, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

Under the amended filing rule, a court would need to adopt a local rule or court order *dis*allowing CM/ECF access for self-represented litigants if it wanted to foreclose such access; the default would be access. The rule would always permit a court to enter an order barring a particular litigant from using CM/ECF.

We recognize that the proposed changes regarding filing by self-represented litigants will be controversial at the level of the trial courts (though likely not at the level of the courts of appeals). Although the proposed rule and Note would make clear that e-filing need not be provided to incarcerated filers and that litigants who abuse the system can be barred from it, concerns persist that technological limitations or cybersecurity fears may nonetheless make it difficult for some trial courts to comply with either of the dual options noted above (providing self-represented litigants with either CM/ECF access or some alternative means of electronic filing and noticing). In the event that the advisory committees decide to publish these proposed amendments for comment, we would expect to receive robust public input on the filing aspects of the proposal.

Bankruptcy Rules Committee discussion. The Bankruptcy Rules Committee was the

first to discuss the enclosed rule sketch, and the Committee's discussion surfaced concerns about both the service component and the filing component.

As to the service proposal, members pointed out that there often can be multiple self-represented litigants participating in a given bankruptcy proceeding – including creditors who have relatively small-size claims and also Subchapter V trustees. In a proceeding in which multiple parties are representing themselves, the possibility exists that none of those self-represented parties is receiving electronic noticing from the court – which would mean that each of those parties needs to receive paper service. And when a self-represented party is not participating in the court's electronic-filing system, that party will not have a seamless way to learn whether another party in the case must be served with paper copies of filings. (The party could always call the clerk's office to learn that information, but the Committee was not enthusiastic about relying on that option.)

As to the filing proposal, a number of concerns were raised in the Bankruptcy Rules Committee. One Committee member has consistently warned that participants in bankruptcy proceedings might seek to electronically file "fake money." The Clerk representative to the Committee suggested caution about the use of alternatives (to the court's electronic filing system) such as a separate email or EDSS submission system, because the precise timing of filing on the court's docket is particularly vital in bankruptcy proceedings given the potential effects on foreclosures. Another Committee member pointed out that email submission might cause complications concerning a document's signature. A Committee member suggested that – as to the Bankruptcy Rules – it is not yet time to adopt the working group's proposed approach to electronic-filing access. At most, this member suggested, the rulemakers might consider amending the rules so as to reverse the current presumption (such that self-represented litigants would presumptively have access to the court's electronic-filing system unless the court adopts a local rule barring them from such access).

Appellate, Civil, and Criminal Rules Committee discussions. In contrast to the Bankruptcy Rules Committee's discussion, the discussions at the fall 2024 meetings of the other three Advisory Committees disclosed no similar hesitation concerning the proposed service and filing changes.[1]

The Appellate Rules Committee was the next committee to meet. The Clerk Liaison to the Appellate Rules Committee predicted that the service-related concerns about bankruptcy

1 A participant did express reservations about another component of the service proposal, which would permit service by email to the address that the court uses to email Notices of Filing, so long as the sender has designated in advance the email address from which such service will be made. But that aspect of the proposal is separable from the main service-related proposal – namely, eliminating the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. The latter is the focus of this memo.

proceedings would not carry over to proceedings in the courts of appeals. He also noted that, as to the filing provision, the sketch's provision permitting courts to "set reasonable conditions and restrictions on access to the court's electronic-filing system for persons not represented by an attorney" would be important. A judge member agreed, and observed that the Ninth Circuit permits self-represented litigants to use its electronic filing system and that this has not been problematic.

Participants in the Civil Rules Committee's discussion likewise evinced no qualms about the proposed changes. The Clerk representative to the Civil Rules Committee opined that the proposed changes are reasonable. Two Committee members noted with approval that the proposal's treatment of filing accords districts flexibility as to how to broaden access for self-represented litigants. It was noted that the bankruptcy context is distinctive, which might justify treating bankruptcy proceedings differently.

At the Criminal Rules Committee meeting, the discussion was relatively brief but did not surface qualms about the overall project. The Chair of the Criminal Rules Committee's Subcommittee for the project summarized the proposal's features and asked the Committee whether it would support proceeding with the project even if the Bankruptcy Rules Committee were not inclined to proceed. A Committee member responded that bankruptcy litigation is "a different world" from that of the district courts. Another Committee member inquired about access to electronic filing for incarcerated self-represented litigants. Under the proposal, excluding incarcerated self-represented litigants from a court's electronic-filing system would count as a reasonable restriction on access (given the logistical difficulties that would attend such access in a facility that has not set up an electronic-filing program). Other questions about the logistics of electronic filing by incarcerated litigants might be better addressed by making any necessary adjustments to prisoner mailbox rules.[2]

Values served by uniform treatment of cross-cutting topics. The Standing Committee is familiar with the rules committees' longstanding preference for uniform treatment of issues that apply across multiple sets of national rules. That preference is the reason why the Standing Committee sometimes forms subcommittees or (as in this instance) working groups to try to achieve such uniform treatment. To the extent that the same topic can be treated uniformly across the different rule sets, that promotes simplicity and clarity and avoids confusing litigants and courts. Examples of topics treated in largely uniform ways across the rule sets include rules for emergency situations;[3] the existing rules governing filing[4] and service;[5] the time-computation

2 Cf. Webb v. Dep't of Just., 117 F.4th 560, 564 (3d Cir. 2024) (holding that Appellate Rule 4(c) "applies to a system in which prison officials electronically file inmates' court documents").
3 See Appellate Rule 2(b); Bankruptcy Rule 9038; Civil Rule 87; and Criminal Rule 62.
4 See Appellate Rule 25(a); Bankruptcy Rule 5005(a)(3); Bankruptcy Rule 8011(a); Civil Rule 5(d); and Criminal Rule 49(b).
5 See Appellate Rule 25(c) & (d); Bankruptcy Rule 8011(c); Civil Rule 25(b); Criminal Rule 49(a).

rules;[6] rules governing privacy protections for information in filings;[7] and rules requiring disclosure statements.[8]

But the list stated in the preceding sentence also illustrates that while uniform treatment is both the goal and the norm, a good enough reason can justify an exception to the norm. For example, the emergency rules in each rule set use the same or similar provisions concerning conditions justifying an emergency declaration, who declares the emergency, the content of the declaration, and its termination[9] – but include widely disparate particulars governing proceedings during an emergency.[10] As another example, although three rule sets permit courts to adopt local rules requiring self-represented litigants to file electronically so long as the court permits reasonable exceptions,[11] the Criminal Rules do not allow a local rule to so require.[12] The 2018 Committee Note to the relevant Criminal Rule explains:

> [Rule 49](b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Potential justifications for departing from uniform treatment of service. The benefits to self-represented litigants of being absolved from the requirement of paper service (where that service is redundant and thus unnecessary) presumably would accrue (to varying degrees) across all the types of practice covered by the rule sets. But, as the discussions in the Bankruptcy Rules Committee have recently highlighted, the bankruptcy context is distinctive because one potential

---

6 See Appellate Rule 26; Bankruptcy Rule 9006; Civil Rule 6.

7 See Appellate Rule 25(a)(5); Bankruptcy Rule 9037; Civil Rule 5.2; Criminal Rule 49.1. For appeals in cases that originated in the district court or bankruptcy court, Appellate Rule 25(a)(5) piggybacks on the privacy rule that applied below.

8 See Appellate Rule 26.1; Bankruptcy Rule 7007.1; Bankruptcy Rule 8012; Civil Rule 7.1; Criminal Rule 12.4.

9 See Appellate Rule 2(b)(1) – (3); Bankruptcy Rules 9038(a) & (b); Civil Rules 87(a) & (b); Criminal Rules 62(a) & (b). Even among these provisions, there are individual departures from the norm. See, e.g., Civil Rule 87(b)(1)(B); Criminal Rule 62(a)(2).

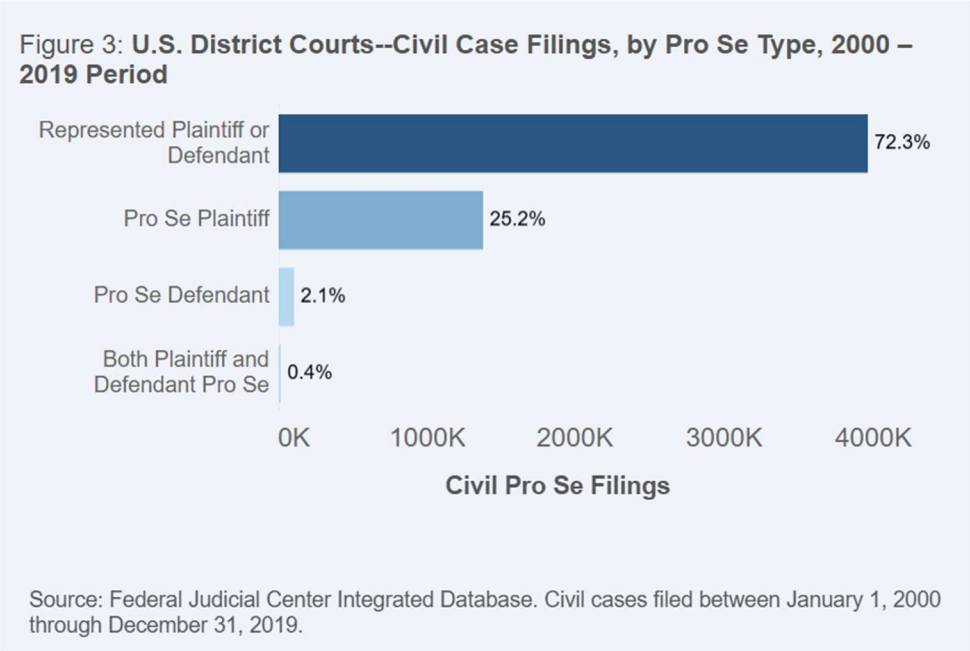
10 See Appellate Rule 2(b)(5); Bankruptcy Rule 9038(c); Civil Rule 87(c); Criminal Rules 62(d) & (e).

11 See Appellate Rule 25(a)(2)(B); Bankruptcy Rule 5005(a)(3)(B)(ii); Bankruptcy Rule 8011(a)(2)(B)(ii); and Civil Rule 5(d)(3)(B)(ii).

12 See Criminal Rule 49(b)(3)(B).

downside of such a change may constitute a more realistic risk in the bankruptcy context than in other settings.

The Bankruptcy Rules Committee's concern with the proposed service amendment arises in cases where there are multiple self-represented litigants. Participants in the Bankruptcy Rules Committee's discussion raised the concern that bankruptcy proceedings may, with some frequency, involve multiple self-represented litigants in the same proceeding. This is not merely because a subset of individual debtors are self-represented but also because small creditors may not be inclined (or may lack the resources) to retain counsel and because Subchapter V trustees also might not be represented by counsel.[13] By contrast, in federal civil cases, it is likely quite rare for multiple parties in the same case to lack legal representation. Over the first two decades of this century, only 0.4 % of federal civil cases featured both a plaintiff and a defendant who were self-represented, as shown in the following figure from the report Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019, available at https://www.uscourts.gov/data-news/judiciary-news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map (last visited December 16, 2024):



13 See, e.g., In re Penland Heating & Air Conditioning, Inc., No. 20-01795-5-DMW, 2020 WL 3124585, at *2 (Bankr. E.D.N.C. June 11, 2020) (finding that Subchapter V trustee had not shown a need to employ a lawyer under the circumstances); U.S. Dep't of Justice, Handbook for Small Business Chapter 11 Subchapter V Trustees at 3-17 (2020) ("Bearing in mind the goal of subchapter V to contain expenses, the trustee should carefully consider whether a professional is needed in any given case."), available at https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/dl (last visited December 16, 2024).

Admittedly, it is possible that in some federal civil cases there could be multiple self-represented litigants on just the plaintiff side or just the defendant side, and such cases would not be captured by the "Both Plaintiff and Defendant Pro Se" statistic shown above. But in such cases, it might well be the case that the self-represented co-plaintiffs or co-defendants might share common interests and might be likely to reach informal arrangements to ensure that they are aware of each others' filings.

These figures may help to explain why – in the interviews that Dr. Tim Reagan and I conducted in the spring of 2023 – our district-court interviewees from districts that have dispensed with the paper-service requirement did not report problems arising from the change. My report concerning those interviews is available starting at page 184 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf; here (without the footnotes) is the report's discussion of the multiple-pro-se-litigant issue:

> As to the question, how do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still required), responses varied. It was noted that this particular question would only arise in a case where multiple parties are not on CM/ECF – which some of our interviewees noted would be unusual. Also, even in such a case, the question would arise only if the person making the paper filing was not enrolled in an electronic-noticing program (because such a program would generate a NEF when the paper filing was entered in CM/ECF, and the NEF would state if any other party to the case required traditional service). One interviewee said they thought that this information might be included in a notice that the court sends to self-represented parties early in the case. A number of interviewees observed that a useful way to discern who needs traditional service is to look at the docket; if it shows no email address for a self-represented litigant, that is a tip-off that the person is not receiving electronic noticing. Interviewees from another district stated that the issue might be addressed in a court order early in the case. Interviewees from two districts said that the issue simply had not arisen.

In sum, there currently exist district courts that have made the proposed change to the service requirement and report that the change is unproblematic. The number of cases featuring multiple self-represented litigants seems likely to be less in the district courts (and courts of appeals) than in the bankruptcy courts. Many district courts allow at least some self-represented litigants to participate in electronic-filing or electronic-noticing programs, and participation in either of those programs would mean that the self-represented litigant would not need to receive paper service. These considerations suggest that, even though the Bankruptcy Rules Committee has concluded that the proposed change to the service provision is not appropriate for the Bankruptcy Rules at this time, it may be justifiable for the other three Advisory Committees to

proceed with the change to their rule sets.

Potential justifications for departing from uniform treatment of electronic-filing access. It is unsurprising that the Bankruptcy Rules Committee might in the end be the Advisory Committee most skeptical about moving forward with a national rule change to require broadening access to electronic filing for self-represented litigants. The 2022 report by the Federal Judicial Center indicates that such access is much rarer in the bankruptcy courts[14] than in the district courts[15] or the courts of appeals.[16] To the extent that one of the major challenges to the adoption of a national rule requiring some degree of electronic access for self-represented litigants will be opposition from judges and court personnel who are unfamiliar with, or may currently lack resources to implement, the logistics of increased access, such opposition may be most intense from the types of court where such access is currently the rarest. And specific concerns voiced by Bankruptcy Rules Committee participants about filings of fake money or about the need for precision and clarity concerning the timing of court filings may arise less often outside the bankruptcy context.

Potential downsides or complications of non-uniform treatment of filing and service. Even if there appear to be good reasons to depart from uniformity by proceeding with amendments to the Appellate, Civil, and Criminal Rules but not the Bankruptcy Rules, it is important to consider potential downsides of that departure. Could a non-uniform approach lead to confusion? And how would such an approach be implemented in the context of bankruptcy appeals?

Bankruptcy matters, after being heard in the bankruptcy court, may be appealed to the district court and/or the court of appeals.[17] In bankruptcy appeals in the district court, Part VIII

---

14 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants 8 (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study") ("It is very unusual for pro se debtors to receive CM/ECF privileges."); id. at 9 ("Many bankruptcy courts allow pro se creditors to register with CM/ECF as limited filers. Alternatively, most courts allow pro se creditors to use the courts' electronic proof of claim (ePOC) portals.").

15 See FJC Study, supra note 14, at 7 (reporting, based on study of local district court rules, that 55 % of districts allow self-represented litigants to use the court's electronic-filing system with individual permission, 9.6 % allow such access "without advance permission," 15 % have local rules barring such access entirely, and 19 % do not have local rules on point).

16 See FJC Study, supra note 14, at 6-7 (identifying the Sixth Circuit as the only circuit that had a local rule flatly barring electronic filing by self-represented litigants and noting that the other circuits either presumptively permit it or permit it with court permission). Since the date of the FJC Study, the Sixth Circuit amended its local rules to permit non-incarcerated self-represented litigants to file via email. See Sixth Circuit Rule 25(b)(2)(A).

17 Appeals in bankruptcy matters (other than those that proceed directly to the courts of appeals)

of the Bankruptcy Rules governs – including Bankruptcy Rule 8011's provisions on filing and service.[18] By contrast, Appellate Rule 25(a)(5), not Bankruptcy Rule 8011, governs filing and service in the courts of appeals.[19]

Thus, two questions arise with respect to appeals in bankruptcy matters. First, when a bankruptcy matter is heard on appeal in a district court or court of appeals, should the practice on that appeal track the practice ordinarily employed in that appellate court, or should it instead track the practice of the bankruptcy court below? There may be good reasons to have the practice on appeal track the ordinary practice of the relevant appellate court, at least as to electronic-filing access. That is to say, a court that ordinarily allows self-represented litigants to use its electronic-filing system presumably would experience no difficulties in allowing such litigants to do so in bankruptcy appeals as well. And a litigant would be unlikely to be confused by such an approach; it seems easy to understand that one level of court might permit such access even though another level of court bars it. In fact, such a phenomenon currently exists today, given the relatively greater openness to such access shown by the local practices of the courts of appeals (compared with the district courts) and of the district courts (compared with the bankruptcy courts).

Nor is it obvious that changing the service requirement that applies to self-represented paper filers in the district courts and courts of appeals would cause confusion for self-represented litigants while they litigate in the bankruptcy courts. For one thing, a self-represented litigant typically will have litigated in the bankruptcy court – and become accustomed to the service requirements that apply there – before they litigate on appeal. And in many appeals (e.g., final-judgment appeals that result in affirmance), there may be no further proceedings in the bankruptcy court after the appellate proceeding concludes.

---

go to the district court in circuits that do not have a Bankruptcy Appellate Panel, and even in circuits that have a BAP, a party to the appeal can elect to have the appeal heard by the district court instead of the BAP. See 28 U.S.C. § 158(b)(1) (providing for establishment of BAPs); id. § 158(c)(1) (providing for appeals from bankruptcy courts to go to the circuit's BAP – if any – unless a party elects otherwise); Laural Hooper et al., Case Management Procedures in the Federal Courts of Appeals (FJC 2011) at 24 (noting that BAPs currently exist in the First, Sixth, Eighth, Ninth, and Tenth Circuits), available at https://www.fjc.gov/sites/default/files/2012/CaseMan2.pdf (last visited December 16, 2024).

18 See Bankruptcy Rule 8001(a) ("These Part VIII rules govern the procedure in a United States district court and in a bankruptcy appellate panel on appeal from a bankruptcy court's judgment, order, or decree. They also govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d).").

19 See Appellate Rule 1(a)(1) ("These rules govern procedure in the United States courts of appeals."). Bankruptcy Rule 8001(a) provides that the Part VIII Rules "govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d)." The 2014 Committee Note to Rule 8001(a) lists (as Part VIII Rules that "relate to appeals to courts of appeals") Rules 8004(e), 8006, 8007, 8008, 8009, 8010, 8025, and 8028) – but not Rule 8011.

So if the project proceeds as to the rules other than the Bankruptcy Rules, an additional task for the Bankruptcy, Civil, and Appellate Rules Committees will be to consider how best to treat the question of the service and filing principles that should govern on appeal to district courts and courts of appeals in bankruptcy cases. If the committees decide that the service and filing approaches that ordinarily apply in the district courts and courts of appeals should also apply on bankruptcy appeals, then some adjustment to Bankruptcy Rule 8011 will be necessary.[20] Because Bankruptcy Rule 8011 governs both appeals taken to the district court and appeals to a BAP, some consultation with the five currently-extant BAPs might also be advisable when considering amendments to Rule 8011.

Alternatively, the committees might decide not to amend Bankruptcy Rule 8011, and to preserve the current approach to filing and service for purposes of appeals to a district court or BAP. Because such an approach would apply only in bankruptcy appeals, it would not cause confusion for district-court litigants in other types of cases. Under that approach, the service and filing approaches that apply on appeal from a bankruptcy court to a district court would track those that applied in the bankruptcy court, but the service and filing approaches that apply on appeal to the court of appeals would track the (new) procedures that would apply in the district courts and courts of appeals generally.

While this choice is one that will need to be made as the project proceeds, one could argue that either of the two alternatives sketched here would be compatible with the goals of the overall project.

Conclusion. At this time, the filing and service proposals sketched here appear to hold promise for use in the district courts and courts of appeals, but not in the bankruptcy courts. The question for the Standing Committee is whether it would be open to publishing for comment, and ultimately approving (if comment supports that result), a package of amendments that would effectuate the changes to the Appellate, Civil, and Criminal Rules without also changing the service and filing approaches in the Bankruptcy Rules.

Encl.

---

20 If Civil Rule 5 were to be amended to take an approach different from that in Bankruptcy Rule 8011 without a conforming amendment to Bankruptcy Rule 8011, it seems that Bankruptcy Rule 8011 would trump Civil Rule 5 in appeals from the bankruptcy court. See Bankruptcy Rule 8001(a), supra note 18, and Civil Rule 81(a)(2) ("These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.").

Even apart from the possible Rule 8011 amendment, the Bankruptcy Rules Committee would need to consider at least one additional change to the Bankruptcy Rules, because currently Bankruptcy Rule 7005 applies Civil Rule 5 to adversary proceedings in bankruptcy.

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Sketch of potential rule amendments concerning self-represented litigants' filing and service

As you know, a working group has recently been discussing possible rule amendments on the topic of self-represented litigants' filing and service. The working group has focused on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system[1] or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing)[2] through the court's electronic-filing system or through a court-based

1 In prior memos, this project had referred specifically to CM/ECF. This memo refers generically to the "court's electronic-filing system" in order to take account of other terms that courts may use for their electronic-filing system (such as the Appellate Case Management System, or "ACMS," that is in use in the Second and Ninth Circuits).

2 This memo uses "Notice of Filing" to denote an electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. The term "Notice of Filing" encompasses the current terms "Notice of Docket Activity" and "Notice of Electronic Filing" or "NEF."

One Clerk representative questions the choice of "Notice of Filing" as the defined term, and suggests "Notice of Entry" or "Notice of Docket Activity" as possible alternatives: "Because electronic notices are sent whenever anything happens on the docket, we tend to think the term 'NDA' is more appropriate. There are many instances where nothing was 'Filed' and only a docket entry has been entered. Many courts issue docket text-only orders. It's not implausible to consider attorneys eventually doing this too. If so, would 'entry' be more accurate than 'document?'"

This is a good question. If one were thinking only of items that might be served by a party, then "Notice of Filing" seems like a logical choice, because the items that a party might typically need to serve under Rule 5 – usually, post-complaint pleadings, motions, and other papers – would also be filed. But Civil Rule 77(d)(1) incorporates Rule 5(b) when discussing the

electronic-noticing program.

The working group has collaborated on a very tentative sketch of a possible amendment to Civil Rule 5. This memo sets out the current version of that sketch for discussion at the fall Advisory Committee meetings. After providing a brief introduction (in Part I of this memo), I set out the sketch in Part II.

I. Overview of the project

General policy choices. The sketch in Part II implements two policy choices – one regarding service, and the other regarding filing.

As to service, the sketch eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. (See Part I of my September 2023 memo[3] for discussion of some courts that have already implemented such an exemption.)

The sketch also permits service by email to the address that the court uses to email Notices of Filing, so long as the sender has designated in advance the email address from which such service will be made.[4] This provision could be useful beyond the context of self-

---

clerk's service of notice of the entry of an order or judgment: "Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b)." So it's worthwhile to consider whether the choice of term should reflect the reality that many of the court-provided notices served electronically under Rule 77(d)(1) and Rule 5(b) concern docket entries that don't involve a separately *filed* court order. (See also Rule 79(a)(2), including among the things the clerk must enter in the docket "papers filed with the clerk" and "orders, verdicts, and judgments.")

On the other hand, I think that terminological issue is also baked into the current Rule as well, given that existing Rule 5(b)(2)'s description of service through CM/ECF reads in relevant part "A paper is served under this rule by: … (E) sending it to a registered user by filing it with the court's electronic-filing system." If that provision is sufficiently clear as it applies currently to Rule 5(b) as incorporated by Rule 77(d)(1), then perhaps "Notice of Filing" would be sufficiently clear in the amended rule as applied to the same thing.

3 That memo is available starting at page 184 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf

4 The proviso about designating the email address from which the service will be made is designed to address the possibility that this sort of email service otherwise might end up in the

represented litigants; for example, discovery material that is served but not filed could also be served this way.

As to filing, the sketch makes two changes compared with current practice: (1) it presumptively permits self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) it provides that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with this amended filing rule by doing either of the following:

- Allowing reasonable access for self-represented litigants to the court's electronic-filing system. That access could (and I expect typically would) be limited to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training. (See Part II of my September 2023 memo for discussion of some courts that already provide such access.)

- Not allowing self-represented litigants to access CM/ECF, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). (See Part III of my September 2023 memo for discussion of some courts that already have such alternative programs.)

Note that, under the amended filing rule, a court would need to adopt a local rule or court order *dis*allowing CM/ECF access for self-represented litigants if it wanted to foreclose such access; the default would be access. Note also that the rule would always permit a court to enter an order barring a particular litigant from using CM/ECF.

These policy choices, at present, are the product of discussions in the working group.

---

recipient's "junk mail" folder. This concern might arise with respect to service by a party in a way that it wouldn't arise with respect to notices from the court, because it's reasonable to expect those participating in the court's electronic-filing or electronic-noticing systems to take steps to ensure that emails from the court's email address won't be snared in a junk folder. In order for the participant to take similar steps with respect to service by another litigant, it may be necessary to require that a litigant making service by email has designated their email address in advance before using it to make email service.

It should be noted, though, that there is not full consensus on the inclusion of this proviso. One of the Clerk representatives argues that this proviso is unnecessary and "serves only to complicate the rule. A recipient's junk filters aren't really of concern to the courts. This potentially exists in the paper world too. (We mailed it, but it never arrived for any myriad of reasons.)"

After roughing out a sketch of the proposed rule changes based on those policy choices, we circulated the sketch to the Clerk representatives on the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for their comments. Their input has produced significant improvements in the draft shown here.

In addition, the Clerk liaisons' feedback made clear that – as the committees have already heard – the proposed changes regarding filing by self-represented litigants will be controversial at the level of the trial courts (though likely not at the level of the courts of appeals). Although the proposed rule and Note would make clear that e-filing need not be provided to incarcerated filers and that litigants who abuse the system can be barred from it, concerns persist that technological limitations or cybersecurity fears may nonetheless make it difficult for some trial courts to comply with either of the dual options noted above (providing self-represented litigants with either CM/ECF access or some alternative means of electronic filing and noticing).

In the event that the advisory committees decide to publish these proposed amendments for comment, we would expect to receive robust public input on the filing aspects of the proposal. A question for the Advisory Committees is whether to proceed with publication and comment of the filing portion of the project despite the concerns that have been expressed about it. On one hand, these concerns may ultimately lead the Advisory Committees to hold back from approving the filing aspects of the proposal sketched below (at least in the rule sets that apply to the trial courts). But on the other hand, publication and comment may usefully serve to generate new knowledge and awareness about practices in federal courts around the country, which may be salutary even if the changes concerning filing are not adopted in this rulemaking cycle.

In any event, whether or not the Advisory Committees decide to publish for public comment the aspects of the proposed rule concerning filing, the working group supports the publication (and adoption, assuming no unanticipated grounds for hesitation emerge from the comment period) of the proposed rule changes concerning service. The service-related changes sketched below have not generated substantive concerns to date (though, as noted in this memo, consensus is still emerging on the best language choices for the service provisions).

Implementation across the rule sets. As noted, we are using Civil Rule 5 for illustrative purposes. Once we arrive at a working draft of Civil Rule 5, we would then turn to working on parallel sketches for amendments to the other sets of rules.[5]

---

5 Here is my working list of the rules that would require consideration: Appellate Rule 25 (filing and service); Bankruptcy Rules 5005 (filing), 7005 (applying Civil Rule 5 in adversary proceedings), 8011 (filing & service in appeals to a district court or BAP), and 9036(c) (electronic service); and Criminal Rule 49.

In those other rules, there might be additional particularities to consider as drafting proceeds. For example, as noted in the text, our goal here is to address filing and service issues of documents subsequent to the initial complaint – hence the focus on Civil Rule 5 rather than

Application in the criminal, habeas, and Section 2255 contexts. We are contemplating possible amendments that would be generally parallel across the Appellate, Bankruptcy, Civil, and Criminal rule sets. It is also necessary to consider how the amendments would work in the context of state-prisoner habeas (i.e., Section 2254) and Section 2255 proceedings.

Criminal Rule 49's treatment of issues regarding self-represented litigants may at first appear beside the point, given that nearly all criminal defendants are represented. But Criminal Rule 49's potential applicability to Section 2255 proceedings means that there is a significant population of self-represented litigants that could be affected by the proposed changes to Criminal Rule 49. Admittedly, nearly all those self-represented litigants will be incarcerated, and the proposed amendments would not require courts to provide CM/ECF access for self-represented litigants who are incarcerated. So the on-the-ground effect of the proposed filing-related changes to Criminal Rule 49 would be minimal. However, the proposed service-related changes to Criminal Rule 49 (and Civil Rule 5) would be important for incarcerated self-represented litigants (in Section 2254 and Section 2255 proceedings), because those changes would relieve such litigants of a service requirement that is likely to be onerous for incarcerated litigants (who may have greater difficulty than non-incarcerated litigants in paying for postage).

There is a further reason to amend Criminal Rule 49 in tandem with Civil Rule 5. As you know, Rule 12 of the Rules Governing § 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Meanwhile, Rule 12 of the Rules Governing § 2255 Proceedings provides that "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." To the extent that Civil Rule 5 and Criminal Rule 49 are amended so as to take the same approach to the service and filing questions discussed here, that would allow courts to avoid choosing which rule governs.

As drafting proceeds, the Appellate and Criminal Rules Committees might also wish to give attention to whether the proposed changes would require adjustment to the 'prison mailbox' provisions in Appellate Rules 4(c) and 25(a)(2)(A)(iii) and in Rules 3 of the habeas and Section

---

Civil Rule 4. In the bankruptcy context, the petition that initiates the bankruptcy may not be the only case-initiating document, because complaints in adversary proceedings might also be filed in the context of an ongoing bankruptcy. Thus, the Bankruptcy Rules Committee might wish to consider adjusting the language of the sketch's Committee Note, when transposing it into the context of Bankruptcy Rule 5005, to make clear that the amended rule does not displace any local requirement that a complaint initiating an adversary proceeding be filed in paper. The adjustment might be accomplished by this tweak to the Committee Note: "Also, a court could adopt a local provision stating that certain types of filings – for example, **complaints in adversary proceedings, and/or** notices of appeal – cannot be made by means of the court's electronic-filing system."

2255 rules.[6]

II. The tentative rule sketch

Below is the current sketch. A particular focus, in drafting, has been on terminology. We are trying to use language that maps onto the way in which court technology programs currently work and are likely to work in the future.

Currently, the court electronic-filing programs that we are aware of are the Case Management / Electronic Case Filing (CM/ECF) system and the Appellate Case Management (ACMS) system; both of those are encompassed in the term "the court's electronic-filing system." We are also aware of alternative electronic-filing options that some courts provide to self-represented litigants (such as the Electronic Document Submission System (EDSS)) and court-based electronic-noticing programs. Notice from a court-based electronic-noticing system is encompassed in proposed Rule 5(b)(2)'s reference to persons "registered to receive [a Notice of Filing] from the court's electronic-filing system" and in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for … receiving electronic notice of activity in the case." Alternative electronic-filing options (such as EDSS) are encompassed in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for filing documents … in the case."

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

---

6 I highlighted this question in a prior sketch of this project that was circulated to the Clerk representatives on the Advisory Committees and to selected additional court personnel. The feedback that we received included this suggestion: "This would be a good opportunity to amend [Appellate Rule] 4(c) to make explicit that the electronic service programs qualify as 'a system designed for legal mail' and to define 'deposited in the institution's mail system' for purposes of filing - what kind of document, statement, or evidence does the inmate need to provide when filing electronically, to get the benefit of the mailbox rule?"

The possibility of revising the prisoner-mailbox provisions to take account of prison e-filing programs may have been briefly considered the last time that the Appellate Rules' prison-mailbox rules were amended (effective 2016). At that time, no attempt was made to address institutional e-filing programs. But it may well be that the prevalence of prison e-filing programs has expanded in the 8+ years since the 2016 amendments were under consideration, so perhaps the time may be ripe for re-considering this question. In any event, that question seems potentially separable from the proposed rule changes addressed in the text of this memo.

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by Means of the Court's Electronic-Filing System. The [court's sending of the][7] Notice of Filing [is] [constitutes][8] service under this rule [of the filed paper][9] on the Notice's[10] date on any person registered to receive the Notice from the court's electronic-filing system. The court may provide by local rule that [filings] [papers filed] under seal are not served under this Rule 5(b)(2).

(3) Service by Other Means ~~in General~~. A paper ~~is~~ can also be served under this rule by:

---

7 Some participants have suggested eliminating the phrase "court's sending of the" and saying, simply, "The Notice of Filing is" service. That shorter formulation may also work, but one benefit of the slightly longer formulation is that it might be clearer to users (such as self-represented litigants) who aren't generally familiar with the system.

8 Which of these verbs is better? Cf. Civil Rule 5(d)(3)(C) ("A filing made through a person's electronic-filing account . . . constitutes the person's signature.").

9 Is this bracketed language helpful or unnecessary? A participant suggested "of the filed document," but I would lean toward "of the filed paper" if we are adding this phrase, because Civil Rule 5 uses "paper" instead of "document."

10 Should we capitalize "Notice"? I believe that the CM/ECF authorities use capitals in the phrase "Notice of Electronic Filing," see, e.g., https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf. Presumably whether to capitalize the short form ("Notice") is a question for the style consultants.

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic filing system or~~ sending it by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made – or by other electronic means that the person consented to in writing—in either of which events service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~
(4) Papers not filed. Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Filing." The term "Notice of Filing" in this rule includes a Notice of Docket Activity, a Notice of Electronic Filing, and any other similar electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic filing system~~. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented Person—When Allowed or Required.

(i) A person not represented by an attorney~~: (i)~~ may file electronically ~~only if allowed by~~ unless a court order or ~~by~~ local rule bars the person from doing so; ~~and~~but ~~(ii)~~ may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(ii) A local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

(iii) A court may set reasonable conditions and restrictions on access to the court's electronic-filing system for persons not represented by an attorney.

(iv) A court may deny a particular person access to the court's electronic-filing system, and may revoke a person's prior access to the court's electronic-filing system for noncompliance with the conditions stated in (iii).

* * *

Committee Note

Rule 5 is amended to address two topics concerning self-represented litigants. Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a Notice of Filing from the court's electronic-filing system. Litigants who are registered to receive a Notice of Filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the

Notice because they have registered for a court-based electronic-noticing program.[11] (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that the court may provide by local rule that papers filed under seal are not served under Rule 5(b)(2). This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper can also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives Notices of Filing. This option might be useful for a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the Notice of Filing).

Subdivision (b)(3)(E). Subdivision (b)(3)(E) is amended in two ways. First, the prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2). Second, a new option is added: "sending [the paper] by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This provision enables a litigant to serve another case participant by email to the email address that the court uses to email Notices of Filing, but only if the sending litigant has already designated in advance the email address from which such service will be made. The latter proviso addresses the possible concern that otherwise an email from another litigant in the case might end up in the recipient's junk email folder.

---

11 N.B.: An initial sketch of Rule 5(b) included a proposed Rule 5(b)(3) that separately treated "service by means of the court's electronic-noticing system," but we have removed that provision because it appears that such service appears to be already covered in proposed Rule 5(b)(2). The reason is that – as far as we are aware – the way that electronic-noticing programs work, in the courts that have them, is that email addresses for those self-represented litigants who opt in to electronic noticing are simply added to the list of email recipients that will receive Notices of Filing from the court's electronic-filing system. (There seems to be no reason that any court would use a different method for their e-noticing program. However, if we are incorrect about this, public comment should bring that fact to light.)

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a Notice of Filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of Filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "Electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(3)(B). Under new Rule 5(d)(3)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(3)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(3)(B)(ii) uses the term "general court order" to make clear that Rule 5(d)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

* * *

A conforming amendment to Civil Rule 6(d) would be needed to adjust for the change in numbering of current Civil Rule 5(b)(2):

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

TAB 2B

MEMORANDUM

DATE: December 16, 2024

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission. The Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

In an August 2024 memo to the Advisory Committees, we summarized our deliberations and research as of that date. We enclose that memo. Part I of this report briefly highlights matters covered in the August 2024 memo and provides two updates – one on the Advisory Committees' fall meetings and the other on additional research we conducted since August 2024.

Based on the Subcommittee's discussions at its December 9, 2024 meeting, Part II presents for the Standing Committee's consideration potential topics of further inquiry by the Subcommittee.

---

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 The proposal ("Morrison Proposal") is docketed as Nos. 23-BK-G, 23-CR-A, and 23-CV-E and is available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-cv-e . An update to the proposal is docketed as Nos. 23-BK-K, 23-CR-G, and 23-CV-BB and is available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-and-thomas-alvord-23-cv-bb .

I. Deliberations and research to date

We will not recapitulate here the lengthy discussion in our August 2024 memo. Instead, Part I.A draws together some of the themes discussed in that memo, and Part I.B brings that memo up to date by summarizing the fall Advisory Committee discussions, our survey of the Circuit Clerks concerning Appellate Rule 46, and our inquiry to state bar authorities via the National Organization of Bar Counsel website.

A. Overall themes

As our August 2024 memo indicates, participants in the rulemaking committees' discussions[3] have recognized that Dean Morrison has raised important questions concerning barriers to district-court admission for out-of-state attorneys. He points out that the district courts currently take varying approaches to attorney admission, with the more restrictive districts' approaches requiring that an applicant for admission to the district-court bar be admitted to practice in the courts of the state in which the relevant district court sits. And in four such states, there is no reciprocity with other states, so that the lawyer must take the state's bar exam in order to gain admission to practice in the district court. Most participants[4] in our discussions have generally agreed that if one could lessen such barriers without creating other problems, that would be worthwhile.

But we have also discussed potential problems that might attend any national rulemaking on this subject. Concerns in the forefront of the Subcommittee's discussions have included:

- The need to allow districts to pursue their goal of protecting the quality of practice within the district.
- Concerns about protecting clients.
- Concerns about state bars' and state courts' reactions.
- Interaction of attorney-admission standards with local-counsel requirements.

Protecting the quality of practice. As to protecting the quality of practice within the district, proponents of a rule change argue that in-state bar admission is not a close proxy for the quality of practice. But where lawyers do misbehave, one concern is that out-of-state lawyers may be subject to fewer checks on their conduct than in-state lawyers. Quality-of-practice concerns also encompass concerns that an out-of-state lawyer will often be less familiar with the local culture of the district's bench and bar.

We have considered whether the appellate courts' experience with Appellate Rule 46 may be instructive on the question of whether an open approach to attorney admission necessarily jeopardizes the quality of practice. Our research indicates that routine admission of

3 For a summary of those discussions, see Part I of our August 2024 memo.
4 Some participants, though, have questioned whether any of this is a matter for Rules Enabling Act rulemaking.

out-of-circuit attorneys has not caused problems for the courts of appeals.[5] But a possible rejoinder to this point is that the Rule 46 experience is of limited value in predicting how a looser admission approach would work in the district courts, where the range of attorney activity is much broader and much of it (e.g., routine discovery) takes place outside the direct supervision of the court.

Protecting clients. Concerns about protecting clients include that lawyers admitted to practice only in the federal court and not the encompassing state might distort their advice and strategy in order to be able to litigate in federal instead of state court. Client-protection concerns also dovetail with concerns about unauthorized practice of law.

Our discussion of unauthorized-practice-of-law (UPL) issues has been inconclusive.[6] There likely are a range of scenarios in which district-court practice by a lawyer not admitted to the encompassing state's bar would raise no UPL concerns in the relevant state. However, initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. A danger of UPL problems might arise, for example, if the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Whether such scenarios are likely enough to occur that they would raise concerns with bar authorities is a question on which we do not yet have a definite answer. As noted in Part I.B, we shared an informal inquiry with state bar counsel this fall, but the lack of response to that inquiry does not seem to us to be conclusive. We also note more generally that debates about how state bar authorities should handle multi-jurisdictional practice are ongoing, and could have implications for proposals to broaden attorney-admission standards for the federal courts.[7]

Reactions of state bars and state courts. Concerns about state bars' and state courts' reactions center both on federalism concerns and concerns about the unauthorized practice of law. As to the federalism concerns, some participants have expressed worry that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend

---

5 See Part III.A of our August 2024 memo and Part I.B, below.

6 See Part VI of our August 2024 memo.

7 An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

federalism values.

Interaction with local-counsel requirements. Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice.[8] We have seen indications that such requirements might be adopted for a number of different reasons in different district courts. Districts might require local-counsel involvement in order to ensure compliance with a speedy local case-management approach; to ensure that a local (repeat-player) practitioner exercises a check on sharp practices by outsider (and perhaps one-shotter) lawyers; or to ensure that there is a local lawyer available to be served with papers. While the latter reason for requiring local counsel might be increasingly obsolete in a world of e-filing and e-service, other reasons appear to endure, and we have increasingly wondered whether districts that have restrictive admissions requirements might respond to a national rule (requiring loosening of those admissions requirements) by adopting or broadening local-counsel requirements. We have noted the possibility that to the extent that Dean Morrison's suggestion is designed to curb barriers to access that face litigants with out-of-district attorneys, local-counsel expenses might overwhelm any savings from looser attorney-admission standards.

B. Discussions and information-gathering in Fall 2024

The project's main developments in fall 2024 concerned a survey to the Circuit Clerks concerning Appellate Rule 46 and some outreach to solicit the views of state bar counsel. We also reported to the Advisory Committees with an update on our research.

Appellate Rule 46. The Subcommittee's summer 2024 discussions identified Appellate Rule 46 as an area of interest, and so we surveyed the Circuit Clerks about that Rule's operation.[9] We first interviewed Molly Dwyer, who is the Ninth Circuit Clerk and until recently was the Clerk Liaison to the Appellate Rules Committee. Ms. Dwyer then kindly circulated to her Circuit Clerk colleagues a list of questions that we had formulated. Ms. Dwyer's guidance, plus the survey responses, provided us with the views of the Circuit Clerks for ten of the circuits.[10]

The overall picture that emerges from these responses is that the Appellate Rule 46 system works well for the courts of appeals.[11] Indeed, one respondent volunteered that a more restrictive approach would itself be problematic. When the circuits discipline attorneys, it often

---

8 For detail on this topic, please see Part IV of our August 2024 memo and Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts .

9 For background on Rule 46, please see Part III.A of our August 2024 memo.

10 Namely, the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits.

11 On the other hand, two respondents did suggest that it would be better if Rule 46's eligibility criteria required state bar admission rather than permitting the alternative of eligibility based on federal bar admission.

is simply a matter of imposing reciprocal discipline based on discipline imposed by another jurisdiction; a number of respondents observed that attorney misbehavior before the Court of Appeals itself is rare or nonexistent. The circuits learn of other jurisdictions' discipline from a variety of sources – apparently in this rough order of prevalence: from states and federal courts within the circuit; from states outside the circuit; from the attorneys themselves; and from proactive searches of state databases or websites. (Most circuits do not appear to rely on the National Lawyer Regulatory Data Bank for such information.) Most respondents indicated that the out-of-circuit attorneys do not present any distinctive conduct problems for the court as compared with attorneys who are admitted to a state bar within the circuit.

State bar counsel views. Subcommittee interest in gaining the views of state bar counsel led us to reach out to Paula Frederick, the General Counsel of the Georgia State Bar. Ms. Frederick spoke with us and provided us with extremely useful background on related state regulatory developments. In addition, she generously agreed to post an inquiry about our project on the website of the National Organization of Bar Counsel (NOBC). Here is the inquiry that Ms. Frederick posted on our behalf:

> We write in our capacity as co-reporters to the Joint Subcommittee on Attorney Admission of the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure. The Subcommittee has been tasked by the Standing Committee with considering the proposal by Dean Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts. The proposal is available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g . Dean Morrison's proposal springs from concerns about the current system, in which the U.S. District Courts take varying approaches to attorney admission, with the more restrictive districts' approaches requiring that an applicant for admission to the U.S. District Court's bar be admitted to practice in the courts of the state in which the relevant U.S. District Court sites. (In some of those states, Dean Morrison notes, there is no reciprocity with other states, so that the lawyer must take the state's bar exam in order to gain admission.)
>
> In evaluating the proposal, the Subcommittee has been focusing particularly on the third option proposed by Dean Morrison – that is, the possibility of adopting a rule barring the U.S. District Courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located. The Subcommittee is also considering other possibilities, such as modeling a national rule for the U.S. District Courts on Federal Rule of Appellate Procedure 46. (Appellate Rule 46 mandates that an attorney is eligible for admission to the bar of a U.S. Court of Appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court.)

The Subcommittee is still determining what recommendation to make to the Standing Committee. In preliminary discussions with the Standing Committee and its Advisory Committees on Bankruptcy, Civil, and Criminal Rules, participants have raised questions about whether adoption of any of these possible rule amendment proposals would raise concerns on the part of state bar authorities. As co-reporters to the Subcommittee, we would be very grateful for any input on that question.

For example, would the adoption of a federal rule along the lines proposed (barring the U.S. District Courts from requiring as a condition of admission to the district court's bar that the applicant reside in, or be a member of the bar of, the state in which the district court is located) raise any concerns about the unauthorized practice of law in the state? If so, would those UPL concerns arise only in some types of fact patterns and not in others? What if anything should we consider in drafting such a national rule for the federal district courts in order to avoid causing any UPL concerns at the state level?

Beyond UPL concerns, would the state bar authorities have any other concerns with or suggestions on these possible rule changes for the federal trial courts?

This summary offers the key points on which we would welcome feedback, but for context, you can find the Subcommittee's most recent report starting at page 127 of the agenda book that can be downloaded here: https://www.uscourts.gov/sites/default/files/bankruptcy_agenda_book_final_-_updated_9-9-24_0.pdf

Ms. Frederick posted this inquiry for us in October 2024. She asked that anyone who would like to respond should respond directly to us. We have received no such responses. In November Ms. Frederick checked the website and was able to see that the posting had been viewed 41 times. Accordingly, it does appear that a number of users of the NOBC website are aware of the posting and that none of them have been moved to send us input on it.

Fall 2024 Advisory Committee discussions. We provided a report to four Advisory Committees (Bankruptcy, Appellate, Civil, and Criminal) during their fall 2024 meetings. This was in the nature of a progress report and an introduction to the project for the benefit of new committee members; we also emphasized that we welcomed input on the project.

At the Bankruptcy Rules Committee's meeting, participants discussed the interaction between attorney-admission requirements and local-counsel requirements. It was also noted that the valence of attorney-admission and local-counsel requirements may be different in the bankruptcy context, where a district that attracts a lot of bankruptcy filings may thus attract "repeat player" lawyers from outside the district to a greater degree than a district court might.

The Appellate Rules Committee's discussion focused mostly on how the Appellate Rule 46 system works in various circuits. At least one circuit has an active grievance committee and shares information with state bars and district courts within the circuit. An appellate judge from another circuit noted, however, that the issues are completely different at the district-court level, that in the district courts disciplinary issues are a bigger concern, and that some of the districts in his circuit would vehemently oppose a national rule expanding access for out-of-district lawyers.

There was relatively little discussion of the attorney-admission project at the Civil Rules Committee's meeting, though one new member did ask how many state bars' admission frameworks eschew reciprocity with other states (that is, require passage of their bar examination as a condition of state bar admission). We noted that in four non-reciprocity states,[12] there are federal districts that require in-state bar admission as a condition of admission to the federal district court bar.

At the Criminal Rules Committee, there was a brief presentation on the project, but it did not generate substantive comments by members of the Committee.

II. Requests for Standing Committee guidance

The Subcommittee's December 9, 2024 meeting[13] offered an opportunity for members to discuss the information noted in Part I and to consider next steps. As we detail below, a majority of the Subcommittee members feel that additional inquiries would be useful. The Subcommittee hopes that the January Standing Committee meeting will provide an opportunity for guidance on those proposed inquiries.

Inquiries to chief district judges in selected districts. The Subcommittee members expressed interest in learning more from two types of district courts: (1) the districts that require in-state bar admission as a condition of district-court bar admission, and (2) the districts that do not require such bar admission.

Inquiries in the first type of district would center on the district's reasons for its approach, how the district would react to the prospect of a national rule mandating a more permissive approach, and any possible targeted measures (perhaps in the form of waivers of otherwise-applicable admission requirements) that could mitigate barriers to practice for particular types of lawyers such as those who practice public-interest law or those who are military spouses.[14] We would propose to develop a short list of districts that might be the focus of this inquiry, starting with the districts in California, Delaware, Florida, and Hawaii that require in-state bar admission as a condition of district-court bar admission. (Focusing on those particular districts seems useful

12 California, Delaware, Florida, and Hawaii.
13 The Subcommittee met by Zoom on December 9, 2024. All members participated except for Judge Birotte and Mr. Bruton, who had obligations that conflicted with the meeting time.
14 For discussion of state licensing accommodations for military spouses, see Part VII of our August 2024 memo.

as a condition of district-court bar admission. (Focusing on those particular districts seems useful given that the combination of the district-court admission requirement and the relevant state's lack of bar-exam reciprocity mean that lawyers wishing to qualify for admission in those districts must take the relevant state's bar exam.)

Inquiries in the second type of district would be designed to elicit whether the district has experienced any of the potential adverse consequences noted in Part I.A of this report (e.g., quality of practice concerns, client protection concerns, friction with state bar authorities).

The Subcommittee envisions that the Subcommittee Chair would conduct the relevant outreach to the Chief Judges of the selected districts.

Targeted inquiries to state bar authorities. Although the Subcommittee did not discuss this possibility in so many terms, some more specific outreach to state bar authorities might be a useful adjunct to the district-court inquiries. A Subcommittee member did note that state bar authorities might not be able to offer a view on this topic without undertaking extensive study. But it may still be worthwhile to ask them for their views on a possible national rule that would bar district courts from requiring in-state bar membership as a condition of district-court bar admission. This inquiry, like that to the district courts, might usefully include California, Delaware, Florida, and Hawaii as well as other states that encompass districts that require in-state bar admission as a condition of district-court admission.

Inquiries directed to practitioners. The Subcommittee did not in terms discuss the possibility of outreach to practitioners, but it may be useful to consider whether such outreach could help to shed light on the degree to which the difficulties that Dean Morrison describes are broadly affecting practitioners.

* * *

The Subcommittee looks forward to gaining the Standing Committee's guidance on these and any other inquiries that it might usefully pursue to move this project forward.

Encl.

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on the Bankruptcy, Civil, and Criminal Rules

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee's ongoing deliberations. As you know, the Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

We are grateful for the feedback provided by the Advisory Committees at their spring 2024 meetings. This memo summarizes our inquiries since then. Part I of this memo provides a brief summary of the project to date, including the 2024 discussions in the Standing Committee and Advisory Committee meetings. Part II turns briefly to the question of statutory authority for rulemaking on the topic of attorney admission. Part III considers the admission of attorneys to practice in the federal appellate courts. Part IV discusses local-counsel requirements and how those might affect the efficacy of any national rule that might be adopted concerning attorney admission. Part V summarizes what we have learned to date concerning attorney admission fees. Part VI explores the question of how a rule concerning admission to practice in federal district courts might intersect with state law concerning the unauthorized practice of law. And Part VII

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 See Suggestions 23-BK-G, 23-CR-A, and 23-CV-E, available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g .

notes that concerns about challenges facing attorneys who are military spouses may be partially addressed through other mechanisms.

I. The project to date

In this Part, we briefly sketch some of the major developments since the project's inception.

A. October 2023 Subcommittee discussion

The Subcommittee held its initial discussion in October 2023, and considered the three possible options sketched by Dean Morrison: (1) creating a national "Bar of the District Court for the United States," (2) adopting a rule providing that admission to any federal district court entitles a lawyer to practice before any federal district court, or (3) adopting a rule barring the district courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

Subcommittee members expressed no interest in Dean Morrison's Option (1), and a number of members questioned its feasibility and/or predicted that it would generate much opposition. Some participants did express interest in considering Option (3). Participants also discussed the possibility of modeling a national rule for the district courts on Appellate Rule 46.

The Subcommittee members considered various policy concerns regarding any change from the current system. It was noted that requiring in-state bar admission is particularly burdensome in states that require applicants to take the bar examination. But participants also noted the need to allow districts to pursue their goal of protecting the quality of practice within the district – a goal that implicates both a lawyer's experience level and also the capacity of the admitting court to know of discipline imposed on the lawyer in other jurisdictions. The Subcommittee recognized that changing the rules on attorney admission might pose a revenue concern and observed that fee revenues currently fund a range of important court functions.

We also noted that any proposal would need to address questions of whether the rulemakers have statutory authority to address the topic of attorney admission.

The Subcommittee summarized its progress in a December 2023 report that was published in the agenda book for the Standing Committee's January 2024 meeting.[3]

3 That report starts on page 101 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf .

B. Morrison / Alvord December 2023 comment

On December 21, 2023, after publication of the Subcommittee's December 2023 report to the Standing Committee, Dean Morrison and Thomas Alvord responded to the report:

> … Our primary goal in making this proposal was to eliminate the many barriers that prevented lawyers who are admitted to practice in one district court from practicing in other districts. It was our view that centralizing admission in the Administrative Office of the U.S. Courts would be the easiest way to accomplish that goal, but we are by no means wedded to that alternative.
>
> In particular, we have no interest in removing the authority from individual districts to discipline attorneys, and our suggestion to centralize discipline was based on our view about centralizing admission.
>
> As for the issues of costs of implementation and loss of revenue, we also recognize that the AO has much better access to the data than we do. In that connection, we note that different districts have different rules on how often attorneys must renew their licenses and how much the court charges for renewal. The lack of uniformity might be another issue the Subcommittee might consider if it is not inclined to support a centralized system of admission….

C. January 2024 Standing Committee discussion

At the Standing Committee's January 2024 meeting, the Subcommittee Chair and reporters summarized the Subcommittee's initial discussion (as well as the new Morrison / Alvord comments) and sought the Standing Committee's reactions.[4]

Multiple members of the Standing Committee expressed support for pursuing the project. A number of members expressed support for dropping Option (1), and no one expressed interest in pursuing that option. A couple of members expressed support for considering Option (3). It was noted that in-state bar admission is not a close proxy for quality of lawyering and that fees to local counsel can be costly for litigants. A committee member encouraged us to consider whether and how to assist military spouses who must practice law while moving multiple times.

Participants did express some reservations, as well. One member wondered whether lawyers admitted only to federal court would forum-shop into federal court; and other participants expressed concern that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend federalism values. It was noted that

4 The relevant portion of the draft minutes of the meeting is available starting on page 22 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

admission to practice in the courts of appeal is not a close model for admission to practice in the trial court, where more can go wrong (e.g., with discovery).

Ethics and client-protection concerns were also highlighted. There was concern about national practitioners soliciting clients whom they can only represent in federal court. The importance of collaboration between district courts and state disciplinary authorities was noted. A member asked whether broadening admission standards for lawyers who are not members of the encompassing state's bar could raise questions of unauthorized practice of law.

The question of fees was also discussed, with one member asking how fees and revenues vary across districts.

D. February 2024 Subcommittee discussion

The Subcommittee held its second meeting on February 12, 2024. We first reported on the Standing Committee's January discussion.

The issue of local-counsel requirements emerged as a key theme during our February discussion. It was noted that some judges would oppose a rule amendment that would prevent the court from requiring the involvement of local counsel in every case. That requirement, for instance, could be viewed as important in a district that maintains a practice of moving cases quickly. Would broadening attorney admission requirements do much to increase access if the broadening rule change were offset by a broadened local-counsel requirement? Members suggested that it would be helpful to learn more about why the courts that require local counsel do so.

Attorney discipline also emerged as a matter of concern. While courts each have their own disciplinary systems, and can also coordinate with the disciplinary authorities of other jurisdictions, we questioned how any particular district court could stay abreast of disciplinary activity in far-flung jurisdictions. One idea was to require the admitted attorney to update the court concerning subsequent disciplinary actions in other jurisdictions.

Tim Reagan had already been researching the various district courts' attorney-admission fees, and he undertook to prepare an additional report on local-counsel requirements. (His findings on these topics are discussed in Parts IV and V, below.)

E. Spring Advisory Committee discussions

We provided a report to each of the relevant Advisory Committees (Bankruptcy, Civil, and Criminal) during their spring 2024 meetings. The most extensive discussion took place at the

Civil Rules Committee meeting.[5]

At the Civil Rules Committee's April 9, 2024 meeting, two judge members voiced strong opposition to the project, and a third judge member's comments were also somewhat skeptical. The first judge questioned why this is a rules issue; to him, this is a matter for state bars. He can see why a court would want lawyers practicing before it to be part of the state bar, as that increases the chances of repeat players and a sense of community. He also questioned the analogy to practice in the courts of appeals; coming in to argue an appeal differs from establishing a law practice in the state. The second judge agreed, noting that districts have distinct cultures and important traditions. This judge felt that admission pro hac vice suffices to accommodate the legitimate needs of out-of-state lawyers. The third judge noted that a district's bar-admission practices reflect the culture of the local bar as well as that of the local bench. During the Civil Rules discussion, Dan Coquillette also underscored the need to look at the unauthorized-practice issue.

Our report on the project did not generate feedback during the Bankruptcy Rules Committee's April 11, 2024 meeting, but a member shared a suggestion for a potential contact with state bar authorities. At the Criminal Rules Committee's April 18, 2024 meeting,[6] Jonathan Wroblewski (the DOJ representative) noted that the U.S. Supreme Court has very permissive practices about admitting attorneys to its bar, and he asked how the Court handles situations in which an attorney it has admitted is disbarred in another jurisdiction.

F. Summer 2024 Subcommittee discussion

The Subcommittee met virtually in July 2024. It reviewed Tim Reagan's research (detailed in Parts IV and V below) concerning local-counsel requirements and admission fees. Participants continued discussing the potential significance of local-counsel requirements, which might offset the effects of any new rule requiring the district courts to loosen their attorney-admission practices. The Subcommittee also discussed issues relating to the unauthorized practice of law (noted in Part VI of this memo). Participants noted that it would be useful to make inquiries among state bar authorities to learn whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. It was also noted that learning more about circuits' practices under Appellate Rule 46 (see Part III.A below) would be useful.

---

5 The Civil Rules discussion is also described in the Civil Rules Committee's draft minutes starting at page 566 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

6 The Criminal Rules discussion is also described in the Criminal Rules Committee's draft minutes starting at page 600 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

II. Questions of rulemaking authority

One threshold question, as always, is whether the Rules Enabling Act provides rulemaking authority on this issue. In the language of the statute, would rulemaking regarding district court bar membership fit the category of "general rules of practice and procedure . . . for cases in the United States district courts" and not "not abridge, enlarge or modify any substantive right." The Reporters are continuing research on this question, though the existence of Appellate Rule 46, detailed further below, for a half century provides strong precedent on the general issue.

Questions were also raised about the relevance of 28 U.S.C. § 1654. We enclose a helpful memo from the then-Rules Law Clerk, Zachary Hawari, on that topic.

III. Federal appellate courts as a model?

As the Subcommittee has already discussed, the federal appellate courts might provide a model for attorney admission at the district-court level. Part III.A summarizes what we know of the courts of appeals' approaches under Appellate Rule 46, and Part III.B discusses the approach taken by the U.S. Supreme Court under its rules. Part III.C notes reasons why the appellate court experience may not generalize to the district court.

A. The federal courts of appeals

This subpart recapitulates Rule 46's features and summarizes what we have learned about admission fees and attorney discipline in the courts of appeals.

Appellate Rule 46 reads:

(a) Admission to the Bar.

> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).
>
> (2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
> "I, _____, do solemnly swear [or affirm] that I will

conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

A few features of Rule 46 are worth noting. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals' authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or "conduct unbecoming") and some basic procedural protections. And Rule 46(c) recognizes a court of appeals' authority to

impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

Thanks to helpful research by Tim Reagan, we know that the fee for admission to the bar of a court of appeals varies across the circuits.[7] It is "$199 plus any additional fee that the local court charges."[8] "The median [total] bar admission fee is $239, and the range is from $214 to $300."[9] Tim notes that because Appellate Rule 46 requires that the attorney seeking admission be admitted to another bar, the attorney will also have to pay for a certificate of good standing from that other bar.[10] Three circuits charge a renewal fee (of from $20 to $50) every five years.[11] Some circuits exempt stated categories of lawyers from paying the admission fee (or, in some instances, permit the lawyer to appear pro hac vice without paying a fee). The most common exemptions are those for federal government lawyers and lawyers representing IFP litigants.

As noted, Rule 46(b)(1)(A) provides for discipline based upon suspension or disbarment in another jurisdiction. In the Subcommittee's discussions, the question has arisen how a court of appeals would become aware of discipline imposed by another jurisdiction. Anecdotally, a court of appeals is more likely to be contacted about attorney discipline by authorities from states within the circuit than by authorities from states outside the circuit. But on at least some occasions, a court of appeals may become aware of discipline imposed by an out-of-circuit state. In at least one circuit, a local rule appears to require that members of the court's bar update the court if they are suspended or disbarred in another jurisdiction.[12] Self-reporting is of course an imperfect system; one can find examples where lawyers who should have self-reported failed to do so.

There is reason to think that not all attorney-discipline opinions can be found on electronic case-reporting systems such as WestlawNext or Lexis. It is thus perhaps unsurprising that an initial very rough search found not many opinions available on WestlawNext concerning reciprocal discipline.

The Subcommittee is currently making inquiries with the Circuit Clerks to ascertain how

---

7 See Tim Reagan, Fees for Admission to Federal Court Bars 2 (FJC 2024) ("Reagan Fee Report"). Tim's report was distributed to the Subcommittee previously; you can also download it at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars (last visited August 12, 2024).

8 Id. at 1.

9 Id. at 2.

10 Id. at 1 (noting that the fee for a certificate of good standing "in the states and territories range from no fee to $50").

11 Id. at 2.

12 Ninth Circuit Rule 46-2(c) provides in part: "An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction."

Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits.

B. The U.S. Supreme Court

Like the federal courts of appeals, the U.S. Supreme Court has a relatively permissive admission standard. Supreme Court Rule 5.1 provides:

> To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

Supreme Court Rule 8 governs disbarment and disciplinary action. It provides:

> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely fled, the Court will enter an appropriate order.
>
> 2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

The Supreme Court Practice treatise offers this description of the Supreme Court's approach:

> The issuance of an order to show cause is usually premised, as Rule 8 indicates, on a report by federal or state bar authorities that some form of serious discipline has been imposed upon the attorney in question…. The Supreme Court also learns of disbarment or disciplinary actions affecting members of its Bar from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank. That data bank records disciplinary actions of all state, federal, and appellate courts and bar authorities. The Supreme Court

> Clerk's Office carefully reviews the reports of the Center for Professional Responsibility to determine whether any members of the Supreme Court Bar have been subjected to disbarment or other discipline, and it provides the Center with information concerning disbarment or discipline imposed by the Court….
>
> If reports of state disciplinary actions are made and it appears that any member of the Supreme Court Bar has been the subject of such discipline, the Clerk then makes an evaluation of the disciplinary sanction. A mere reprimand or other minor sanction is not likely to result in the issuance of a show cause order by the Court, although the fact that the state imposed such a sanction is duly noted. But if the state has imposed some significant disciplinary sanction falling short of permanent disbarment, a show cause order may well issue from the Court. In such situations, the Court has been known to impose a more severe sanction than that imposed by the state authorities, the sanction of permanent disbarment.[13]

The National Lawyer Regulatory Data Bank (as it is now called) warrants a bit of explanation. The ABA's website states:

> The ABA National Lawyer Regulatory Data Bank is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. ... The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, provide regulatory information to the Data Bank.[14]

An important limitation of the Data Bank is that submission of data is voluntary, and thus may not be complete.[15] Moreover, one commentator stated in 2012 that disciplinary authorities "are not informed automatically when lawyers they license are reported to the Data Bank."[16] And

---

13 Stephen M. Shapiro et al., Supreme Court Practice ch. 20, § 20.8 (11th ed. 2019) (ebook).
14 American Bar Association, National Lawyer Regulatory Data Bank, available at https://www.americanbar.org/groups/professional_responsibility/services/databank/ (last visited August 12, 2024).
15 See Jennifer Carpenter & Thomas Cluderay, Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation, 22 Geo. J. Legal Ethics 733, 746 (2009).
16 Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 506 n.277 (2012).

even when the authorities are told about the imposition of discipline in another jurisdiction, there may be mix-ups concerning who was disciplined: "because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a given lawyer, particularly one with a common name, has been reported."[17] Note, as well, that the "Data Bank only includes those who have actually been disciplined, thus, excluding lawyers who have been sanctioned by courts, but not disciplined."[18]

C. Whether the appellate experience generalizes to the district court

Initial anecdotal data suggest that, at least in one circuit, the current system has not led to problems with the quality of practice before the court of appeals. This is so even though it is possible that the court does not learn about disciplinary problems encountered by all the lawyers that practice before it. Similarly, the U.S. Supreme Court maintains a very large bar and a very permissive admission standard.

However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level. They note that the typical appellate proceeding involves a very confined set of activities and comparatively few deadlines (briefing and perhaps argument), whereas at the trial level – where the record is made and where the participants conduct discovery, hearings, and trials – much more can go awry if an unskilled or unscrupulous practitioner is involved.

IV. Local-counsel requirements

Many districts currently require that an attorney admitted pro hac vice associate local counsel. Dean Morrison and his fellow rule-change proponents appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case.[19] But in the Subcommittee's most recent discussions, participants asked whether expanding access to district court bars would be a Pyrrhic victory for the rule change's

17 Greenbaum, supra note 16, at 506 n. 277.

18 Lonnie T. Brown, Jr., Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 Ohio St. L.J. 1555, 1607–08 (2001).

19 Dean Morrison's proposal for a national rules change does not discuss local-counsel requirements. But the appended materials (which he and others previously submitted to the Northern District of California in support of a proposal for a local rule amendment) explain that not being admitted to practice in the district subjects litigants to onerous local-counsel requirements. See Petition of Public Citizen Litigation Group & 12 Others Pursuant to Local Rule 83-2 To Amend Local Rule 11-1(b) (Feb. 6, 2018), at 11 ("[U]nder the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court.").

proponents if districts responded by also expanding their local-counsel requirement so that it encompasses attorneys who are admitted in the district but not in the encompassing state.

Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice. Tim found that "[f]ifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar."[20]

Some districts even require local counsel for some cases litigated by members of the district court's bar;[21] these districts do so in (variously) three types of circumstances: (1) if the attorney is not an in-state bar member, (2) if the attorney neither resides nor has an office in the district, and (3) if the attorney either doesn't reside in the district or lacks a full-time office there.

Courts vary in the degree of involvement that they require of local counsel. Many courts require that local counsel make the motion for non-local counsel's admission pro hac vice; it's possible that this might be one way that a district assures itself that someone has checked that the non-local counsel is in good standing with their home-state bar. The court may also require that local counsel:

- sign the first pleading,[22]
- review and sign all filings,[23]
- be available for service of litigation papers,[24]
- be prepared to try the case,[25]

---

20 Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), at 10. Tim's report and its appendices are available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts (last visited August 12, 2024).

21 See Reagan, Local-Counsel Report, at 6 ("Thirteen districts (14%) require association with local counsel even for some members of the district court's bar."). In six of those districts, though, as Tim notes, the rules don't themselves require local counsel in this situation, but accord the judge discretion to require it.

22 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("The local attorney shall sign the first pleading filed and shall continue in the case unless other local counsel is substituted.").

23 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("Unless waived by the court … , local counsel must review and sign all motions and other filings [and] ensure that all filings comply with all local rules of this court ….").

24 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("Any notice, pleading or other paper may be served upon the local counsel with the same effect as if personally served on the non-resident attorney.").

25 M.D. Tenn. Local Rule 83.01(e)(4) ("Entry of an appearance or otherwise participating as

- be prepared to step in for the lead counsel whenever necessary,[26]
- attend all court appearances,[27] and/or
- be "equally responsible with *pro hac vice* counsel for all aspects of the case."[28]

We might try to infer from the nature of these requirements the reasons why courts require local counsel. To take an obvious example, the requirements that local counsel be available to accept service seem addressed to a simple logistical point – and one that may be largely obsolete now that service of papers subsequent to the commencement of the case is ordinarily accomplished via CM/ECF. A requirement that local counsel review and sign all filings suggests that the court wishes to have a local (and thus more accountable?) lawyer review the filings' compliance with Civil Rule 11. Requirements that local counsel be available to step in at any time suggest that the court is concerned that out-of-district lawyers not cause delay. (A related example might be the Eastern District of Virginia, where local counsel are viewed as important to fulfilling the demands of the court's "rocket docket.") An additional possibility is that, by requiring local counsel, some courts are trying to address behavior by lawyers that doesn't rise to the level of a discipline issue but that implicates questions of quality of lawyering, civility, and professionalism.

Another theme that has emerged is the potential significance of the court's discretion to excuse compliance with the local-counsel requirement. Some local rules explicitly provide for such discretion. Additionally, some local rules expressly exempt some categories of attorney from the local co-counsel requirement.[29]

Dean Morrison and the other rule-change proponents are not taking direct aim at the local counsel requirements themselves (perhaps because they are not focusing on the relatively small number of districts that require local counsel even for some admitted attorneys). Rather, they appear to assume that admission would release an out-of-district lawyer from any obligation to associate local counsel. To test the plausibility of that assumption, it may make sense to focus on districts that currently require in-state bar membership for admission and ask whether those

---

counsel of record is a representation that the attorney will be prepared to conduct the trial of the case, from which the attorney may only be relieved by approval of the Court.").

26 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the pro hac vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter in the event the applicant is unable to be present on any date scheduled by the court.").

27 See E.D. Mich. Local Rule 83.20(f)(2) ("Local counsel must attend each scheduled appearance on the case unless the Court, on its own motion or on motion or request of a party, dispenses with the requirement.").

28 M.D. Tenn. Local Rule 83.01(d)(6).

29 See, e.g., N.D. Okla. Loc. Gen. Rule 4-3(c) (exempting lawyers for the federal government, federal defenders, and CJA lawyers); M.D. Tenn. Local Rule 83.01(d)(2) (exempting lawyers for the federal government and federal defenders).

districts also impose a local-counsel requirement for attorneys who are only admitted pro hac vice.

We have not yet compiled that full list, but as a starting point, one can look at the nine districts in California, Delaware, Florida, and Hawaii that currently require in-state bar membership for admission (it is in those districts, of course, that in-state bar membership is the most onerous barrier because it requires taking the state bar exam). Here is a chart of those districts:

District	Local counsel required where lead attorney is admitted pro hac vice?
Central District of California	Yes. See C.D. Cal. Local Civil Rule 83-2.1.3.4.
Eastern District of California	Not exactly? E.D. Cal. Local Rule 180(b)(2)(ii) requires that an attorney admitted pro hac vice "shall … designate … a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made."
Northern District of California	Yes. See N.D. Cal. Local Civil Rule 11-3(a)(3) (requiring "[t]hat an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel").
Southern District of California	Not exactly? S.D. Cal. Civil Rule 83.3(c)(4) requires that an attorney admitted pro hac vice must "designate … a member of the bar of this court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers will be served."
District of Delaware	Yes. See D. Del. Local Rule 83.5(d): "Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). … Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court."
Middle District of Florida	Apparently not. (N.B.: This district's version of pro hac vice admission is called "special admission," see M.D. Fla. Local Rule 2.01(c).).
Northern District of Florida	Apparently not.
Southern District of Florida	Yes. See Rules 1(b)(1) (local counsel to move admission pro hac vice) and 1(b)(3) (requiring designation of "at least one member of the bar of this Court who is authorized to file through the Court's electronic filing system, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, and who shall be

	required to electronically file and serve all documents and things that may be filed and served electronically, and who shall be responsible for filing and serving documents in compliance with the CM/ECF Administrative Procedures").
District of Hawaii	Yes. See D. Haw. Local Rule 83.1(c)(2)(B)(vi) (requiring "designation of a current member in good standing of the bar of this court who maintains an office within the district to serve as associate counsel" and also "the associated attorney's commitment to at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes; to participate in all court proceedings (not including depositions and other discovery) unless otherwise ordered by the court; and to accept service of any document").

We can see that more than half of these districts (five of nine) require attorneys admitted pro hac vice to associate local counsel. It's not implausible to surmise that at least some of these districts – if required by national rule to admit to their bar attorneys not admitted to the bar of the encompassing state – might consider whether to extend the local-counsel requirement to such attorneys.

These reflections prompt the following questions:

- Is this sampling of districts representative of the districts that currently take a restrictive approach to bar admissions?

- In districts with rules that require local counsel, how often are those requirements waived in practice?

- Would a national rule change on bar admission simply prompt widespread enlargement of local-counsel requirements?

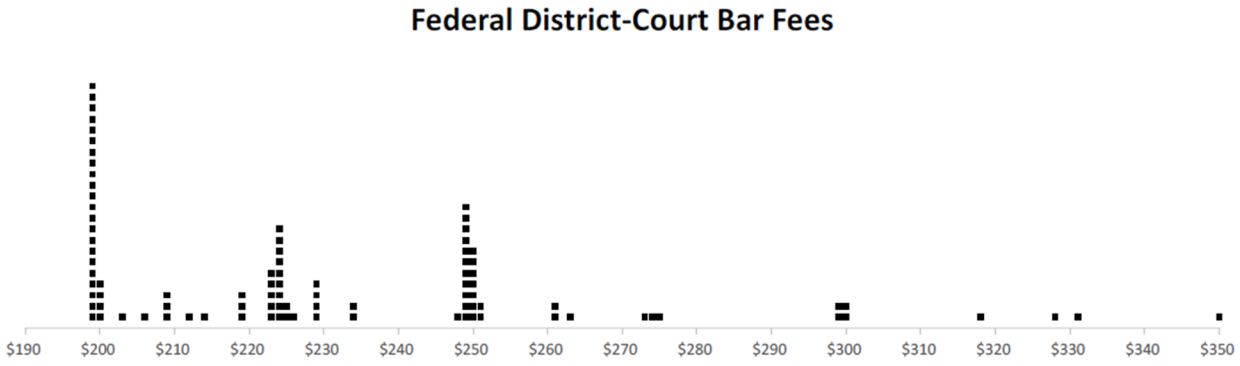
If the answer to the last of these questions is yes, then unless the rulemakers are willing to enlarge this project to encompass districts' ability to require local counsel, one might question the prospects for effectively addressing the access and expense concerns that underpin the proposals we are currently considering.

V. Attorney admission fees

Our discussions have also focused on the fiscal implications of potential changes to the district courts' attorney-admission framework. This Part briefly summarizes what we have learned about the revenue coming in and the uses to which it is put.

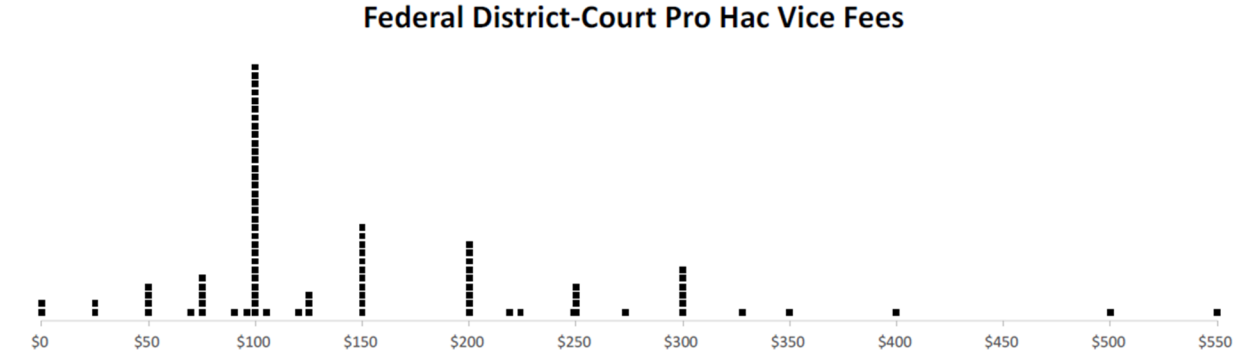
A. Revenue coming in

Tim Reagan has provided us with an overview of the fees charged by districts around the country. He reports that "admission fees range from the national minimum of $199 to $350."[30] His helpful graph[31] suggests that most districts set the fee in the $199 - $250 range:



In addition, roughly a quarter of districts charge periodic dues or renewal fees. "Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75."[32] From the detailed discussion in the accompanying footnote, it looks as though five districts have annualized 'dues' of more than $25.[33]

Separate from admission fees are the fees charged for pro hac vice admission. Tim reports that "[p]ro hac vice fees range from no fee to $550."[34] His accompanying graph[35] suggests that most districts charge $150 or less, with additional clusters at $200, $250, and $300:



30 Reagan Fee Report, supra note 7, at 3.
31 See id.
32 Id.
33 See id. at 3 n.6.
34 See id. at 3.
35 See id. at 4.

B. Uses to which revenue is put

The district courts do not keep the "national" portion of the admission fee, which is $199;[36] they remit that portion to the Administrative Office of the U.S. Courts. By contrast, there is no "national" portion of any fee for renewing a bar admission or for admission pro hac vice, and so the districts keep the entirety of those fees.

As we have previously noted, districts put their portion of the fees to various uses, including funding a clinic for self-represented litigants; guardians ad litem for defendants who are minors; bench/bar activities; reimbursement of pro bono expenses; and support for a court historical society.

VI. Unauthorized practice of law

During our discussions, a number of participants have stressed the importance of examining the relevance of state law concerning the unauthorized practice of law. An initial look at this field confirms that this topic is well worth the Subcommittee's consideration.

To some, the idea of federal-court attorney-admission barriers intersecting with unauthorized-practice-of-law issues might seem somewhat counterintuitive. After all, if a federal district court *authorizes* someone to practice as a member of the court's bar, how could practice in that court be *unauthorized*? An answer to this question becomes easier to discern if one distinguishes between different types of situations in which the question might be posed.

Some might intuitively imagine a scenario that a big-firm lawyer usually encounters: Big Corp. gets sued in federal court in State A, looks around for a high-powered lawyer, finds Lawyer B in State C, and hires B to handle the federal-court lawsuit in State A. It seems (and likely is) straightforward that B can handle the suit, without being admitted to practice in State A, so long as B is admitted to practice, or gets permission to appear pro hac vice, in the relevant federal district court in State A.

But a look at the caselaw indicates that unauthorized-practice issues usually come up in quite a different type of scenario. Lawyer D, say, is admitted to practice in State E but not in State F. Lawyer D moves to State F and doesn't get admitted in State F, but gets admitted in the federal district court for the District of F. Lawyer D hangs out a shingle in State F, sees clients, triages them, and only takes cases Lawyer D can bring in federal court. In at least some states, it seems, there is a potential risk that the state bar authorities would consider D to be engaging in the unauthorized practice of law in State F by so doing. The strictest caselaw on this topic is in some instances decades old, and there has been some movement toward making the rules on

36 See District Court Miscellaneous Fee Schedule (setting fee "[f]or original admission of attorneys to practice" at $199), available at https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (last visited June 28, 2024).

unauthorized practice of law more forgiving, but nonetheless it appears from an initial look at the caselaw that Lawyer D could run a substantial risk in a number of states by behaving as described.

We will not review here the details of the caselaw that we have gathered thus far. By definition, a field of law (like professional responsibility) that is governed state-by-state is challenging to summarize comprehensively. Moreover, some of the notable caselaw is relatively dated. Instead, we note a few key lines of authority and sketch some relevant concepts. A better sense of the scope and nature of likely problems might emerge from an inquiry with state bar authorities as the project moves forward.

It's useful to start with two sources of authority that might be influential to those shaping state law on unauthorized practice: the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Model Rule of Professional Conduct 5.5[37] currently provides in relevant part:

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) **A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that**:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

37 See American Bar Association, Model Rules of Professional Conduct Rule 5.5, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited August 12, 2024).

(2) **are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) **A lawyer admitted in another United States jurisdiction** or in a foreign jurisdiction, **and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof**, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, **may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:**

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) **are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction…**.

Model Rule 5.5 (emphases added).

Much of the contents of the current version of Model Rule 5.5 – including most of the bolded language above – was contained in the version of Model Rule 5.5 adopted by the ABA House of Delegates in August 2002.[38] Of particular interest in the current context is Rule

38 See American Bar Ass'n Center for Professional Responsibility, Client Representation in the

5.5(d)(2), which authorizes the provision, by a lawyer not admitted in the state, "through an office or other systematic and continuous presence in this jurisdiction," of "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction."

A key question is what the drafters meant by "authorized by federal … law or rule." Neither the Commentary nor the 2002 Report of the Commission on Multijurisdictional Practice addresses whether a federal court's admission of a lawyer to practice would count as authorization for this purpose, or what the scope of that authorization would be.[39]

The Restatement of the Law Governing Lawyers also provides relevant, but somewhat equivocal, authority on this point. Section 3 of the Restatement provides:

> § 3 Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment g to Section 3 states in part:

21st Century: Report of the Commission on Multijurisdictional Practice title page & 19-20 (2002) ("MJP Commission Report"). An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

39 MJP Commission Report, supra note 38, at 34.

> g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment b) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)
>
> A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business….

Reading this commentary, one might be tempted to impute to the Restatement a broad view about the preemptive force of federal-court rules governing attorney admission to practice in federal court. Before reaching that conclusion, though, it is useful also to consider this observation in the Reporter's Note to comment e: "There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted." Admittedly, the Reporter's Note expresses only the views of the Reporter, and not necessarily those of the ALI. But together, the commentary and the Reporter's Note suggest a view that admission to practice in a federal district protects the lawyer from unauthorized-practice accusations so long as the lawyer limits that practice to the cases actually filed in federal court – but that the lawyer courts trouble by actually opening an office in a state in which the lawyer isn't admitted.

It's also useful to consider the U.S. Supreme Court's decision in *Sperry v. State of Florida*, 373 U.S. 379 (1963). *Sperry* provides some support for the idea that a lawyer who only maintains an in-state office for purposes of a solely federal-tribunal practice does not violate state unauthorized-practice prohibitions. However, *Sperry* can be read narrowly to apply only to the context in which it arose – federal patent office practice – in which the topic area is well-defined and the jurisdiction is exclusively federal.

Sperry was "a practitioner registered to practice before the United States Patent Office"

who had "not been admitted to practice law before the Florida or any other bar."[40] He had an office in Tampa and held "himself out to the public as a Patent Attorney."[41] The Florida Supreme Court found that he was engaging in unauthorized practice and enjoined him from, inter alia, from calling himself a patent attorney, giving legal opinions (even on patentability), preparing legal documents (including patent applications), "holding himself out, in [Florida], as qualified to prepare … patent applications," or otherwise practicing law.[42] The U.S. Supreme Court vacated and remanded, holding that 35 U.S.C. § 31[43] and regulations promulgated thereunder authorized the admission of persons, including nonlawyers, to practice before the Patent Office.[44] The Court did not define exactly what the state was foreclosed from prohibiting, but offered this guidance:

> Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.[45]

One might read *Sperry* to stand for the proposition that any valid federal-law provision authorizing a person to practice before a federal tribunal preempts the application of state unauthorized-practice provisions to a lawyer's work in connection with such authorized practice before a federal tribunal. Note, however, that federal patent applications differ from ordinary federal-court litigation because the subject-matter is discrete and exclusively federal, and might well be ordinarily separable from matters that might be covered by state law.

---

40 Sperry, 373 U.S. at 381.
41 Id.
42 Id. at 382.
43 At the time, 35 U.S.C. § 31 provided:
> § 31. Regulations for agents and attorneys
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

44 Id. at 384-85.
45 Id. at 402 n.47.

As noted previously, it is challenging to offer confident appraisals of state unauthorized-practice law as it might apply to practice by lawyers admitted in federal court but not to the bar of the encompassing state. Much of the relevant caselaw is somewhat dated – raising the possibility that subsequent changes in applicable state statutes or rules might have undermined earlier and more restrictive approaches. Also, the Rules of Professional Conduct may provide incomplete guidance in some states, because unauthorized-practice principles are also contained in statutes that might not have been updated at the same time as the state's Rules of Professional Conduct.

Initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. The picture emerging is that the clearest case for protection from unauthorized-practice allegations is where the client relationship arose in a state where the lawyer is admitted to practice and the client then decides to sue (or is sued) in a federal court (in a different state) where the lawyer is admitted. The clearest case of danger of unauthorized practice would be where the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Even if the lawyer appears only in federal court, the lawyer might be regarded (at least by authorities in some states) as engaging in unauthorized practice.

Due to this complexity, it may be difficult to draft a national rule without giving attention to the unauthorized-practice question in some way. While the picture of unauthorized-practice-of-law doctrine is still emerging, this topic merits attention as the Subcommittee seeks the views of state bar authorities concerning the issues raised by this project.

VII. Addressing concerns about attorneys who are military spouses

In the discussions to date, participants have sometimes mentioned that particular types of attorneys face particular hardship from restrictive bar admission rules. Lawyers who are military spouses are an example, as their spouse's work might require the family to relocate multiple times.

That particular concern might be partly addressed at the state bar level. An effort is underway to persuade state bar authorities to adopt special provisions to accommodate military spouses. The Military Spouse J.D. Network Foundation provides this description of its ongoing efforts:

> In February 2012, with the support of the ABA Commission on Women in the Profession, the ABA House of Delegates adopted a ABA Resolution 108 (2012) supporting changes in state licensing rules for military spouses with law degrees.

In April 2012, Idaho became the first state to approve a military spouse licensing accommodation.

Then in July 2012, the Conference of Chief Justices voted to support a resolution for admission of military spouse attorneys without examination. ….

December 2012 saw the second state, Arizona, adopt a licensing rule specifically addressed the challenges faced by military spouse attorneys. Since then, other states have joined in the efforts to reduce barriers to employment for military spouses in the legal profession.

In the years since, MSJDN has seen more than 40 states and the U.S. Virgin Islands pass common sense license reciprocity rules for military spouse attorneys. Our efforts continue as we work to reach all 50 states. MSJDN has also begun to petition the nine states which passed license reciprocity for military spouses but included harmful supervision requirements which have rendered the rules unduly burdensome and ineffective in practice.[46]

VIII. Conclusion

This report provides a snapshot of the Subcommittee's efforts as of summer and fall 2024. The Subcommittee will provide further updates as it continues its inquiries, and welcomes any additional Advisory Committee feedback in the meantime.

Encl.

46 See Military Spouse J.D. Network Foundation, State Licensing Efforts, available at https://msjdn.org/rule-change/ (last visited August 12, 2024).

MEMORANDUM

To: Catherine T. Struve
Andrew Bradt

From: Zachary Hawari, Rules Law Clerk

Re: History of 28 U.S.C. § 1654

Date: December 28, 2023

History

Why and when was this statute first adopted, and what was its subsequent history?

The statutory right to plead and conduct one's own case personally or by counsel goes back at least to the founding of the United States courts, and its language remains largely unchanged. Section 35 of the Judiciary Act of 1789 provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct their cases therein." 1 Stat. 73, 92 (1789).

The Judiciary Act of 1789 was introduced as Senate Bill No. 1 in the first legislative session of the first Congress, and its authorship is often credited to Oliver Ellsworth and the other two members of the drafting committee–William Paterson and Caleb Strong.[1] Section 35 contains the provision that became 28 U.S.C. § 1654, but it also included a more controversial provision providing for the appointment of United States Attorneys and the Attorney General.[2] I have not had much success in identifying the purpose or history of the relevant part of Section 35.

Some courts and commentators have since observed that the Sixth Amendment's right to counsel was being debated at the same time as the Judiciary Act.[3] The history of the common law right to self-representation, the Founders'

---

[1] *See* New Light on the History of the Federal Judiciary Act of 1789 (jstor.org); The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies (usmarshals.gov); First Federal Congress: Creation of the Judiciary (gwu.edu)

[2] New Light on the History of the Federal Judiciary Act of 1789 (jstor.org).

[3] Historical Background on Right to Counsel | Constitution Annotated | Congress.gov | Library of Congress

skepticism toward lawyers, the Sixth Amendment's right to counsel, and the Judiciary Act was discussed extensively by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-32 (1975). More research would be required to understand how views during the 17th and 18th century led to Section 35, especially considering that views on the right to counsel in civil and criminal cases appears to have essentially reversed.[4]

In any event, Section 35 was codified in Section 747 of the Revised Statutes in the 1870s. The Judicial Code of 1911 then included a slightly modified version. 36 Stat. 1087, 1164 (1911). Section 272 of Chapter 11, which provided for provisions common to more than one court, stated: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein" (changes emphasized). When Title 28 was reorganized, that provision was moved from 28 U.S.C. § 394 to § 1654.

In 1948, § 1654 was briefly shortened to: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 62 Stat. 869, 944 (1948). According to the reviser's notes for the 1948 amendment, the phrase "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" was "omitted as surplusage," and "[c]hanges were made in phraseology."[5] For example, "by the assistance of such counsel or attorneys at law" was apparently shortened to "by counsel."[6]

But in 1949, Congress "restore[d]" the "language of the original law." 63 Stat. 89, 103 (1949). Oddly, this restoration only included the "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" phrase.

---

[4] Several colonies in the 17th century prohibited pleading for hire. *Faretta*, 422 U.S. at 827. Interestingly, the Massachusetts Body of Liberties included a proto-attorney-admission element or, at least, a provision giving the court power to reject a representative:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man *against whom the Court doth not except*, to helpe him, provided he give him noe fee or reward for his paines….

Id. at n.32 (quoting Art. 26 (1641)) (emphasis added).

[5] United States Code: General Provisions, 28 U.S.C. §§ 1651-1656 (1952) (loc.gov).

[6] It is not entirely clear whether shortening to "by counsel" was done in the 1948 amendment. The advisory committee notes to the 1944 amendment of Criminal Rule 44 quotes § 1654 with the assistance-of-counsel-or-attorney-at-law language. So, either there was another amendment between 1944 and 1948 or the 1949 amendment did not fully restore § 1654 to the 1911 version. Unfortunately, year-by-year versions of this statute have proven difficult to track down.

The change to "by counsel" survived the 1949 rollback. The allusion to the last phrase being "surplusage" in 1948 and its subsequent restoration in 1949 is intriguing, but I have not been able to find much legislative history on these changes. For example, the reviser's notes and several cases refer to 80th Congress House Report No. 308, but I cannot find it online.

The current § 1654 has not changed since 1949. To summarize, these are the differences between 1789 and today:

> "[I]n all ~~the~~ courts of the United States~~,~~ the parties may plead and ~~manage~~ conduct their own ~~causes~~ cases personally or by ~~the assistance of such~~ counsel ~~or attorneys at law~~ as, by the rules of ~~the said~~ such courts, respectively, ~~shall be~~ are permitted to manage and conduct ~~their cases~~ causes therein.

Rule-Making Authority and Appellate Rule 46

Does the statute's reference to counsel who are "permitted to … conduct causes" in the federal courts "by the rules of such courts" indicate that this statute accords the local courts authority over attorney admissions?

Courts were regulating attorney admissions and conduct prior to the REA, but it is not clear under what authority they did so—possibly inherent authority, some natural law theory, or statutory authorization like Section 35. *See generally Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (discussing attorney admission and discipline in the context of a Civil War era statute requiring attorneys to swear oaths).

More recently, the Supreme Court has "recogniz[ed] that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). "This authority includes the regulation of admissions to its own bar." *Id.* This is a point on which the dissent agreed. *Id.* at 652 (Rehnquist, J., dissenting) ("It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.").[7]

Nor was *Frazier* the first time the Supreme Court mentioned these provisions together as a basis for authority. The Court had previously noted that two district

[7] The Court held that the district court "was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits." *Frazier*, 482 U.S. at 645. The dissent, however, believed that the Supreme Court lacked authority to set aside a rule promulgated by a district court governing admission to its own bar merely because it found the rules "unnecessary and irrational." *Id.* at 652-55.

courts were "[a]cting under 28 U.S.C. §§ 1654, 2071, and Rule 83" when they promulgated local rules governing practice in their courts." *United States v. Hvass*, 355 U.S. 570, 571 (1958).[8]

Circuit courts have made similar statements. The Seventh Circuit stated that "[t]he authority to adopt rules relating to admission to practice before the federal courts was delegated by Congress to the federal courts in Section 35 of the Judiciary Act of 1789, … *now codified as* 28 U.S.C. § 1654." *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985); *see also Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) (quoting *Brown*). The Seventh Circuit also relied on § 2071 and inherent power to support the district court's authority to regulate attorney conduct.

It appears that courts have the necessary authority to regulate admission to the bar of that court under § 1654 and the REA, but it is not entirely clear whether § 1654, alone, would provide sufficient authority.[9]

If so, was this statute analyzed during prior rulemaking discussion on attorney admissions, for example in the lead-up to the adoption of Appellate Rule 46?

I have not found a direct reference to § 1654 in the discussion leading up to the addition of Appellate Rule 46 in the 1960s—at least not in the materials on the uscourts.gov website, namely the Committee Reports and Meeting Minutes. There is another archive of historical records that I have not yet searched, so there might still be something to be found.

Interestingly, however, in the minutes for the Appellate Rules Committee's August 1963 meeting, Dean O'Meara felt that attorney admission issues should be left for each appellate court to deal with by local rule while other members felt that this was an area where uniformity would be particularly helpful to the bar.[10]

---

[8] The issue in *Hvass* was not, however, about the validity of a local rule, but rather whether a willfully false statement made by an attorney under oath during the district court's examination, under its local rule, into his fitness to practice before it, constitutes perjury.

[9] The reviser's note to the 1940s amendments to § 1654 also mentions these sections together, stating that "the revised section [1654] and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court." That said, the reviser's note was getting at separate discussion about who can appear before the Tax Court and whether it should be limited to attorneys.

[10] Circuit courts as they existed in the 18th century looked very different from modern courts of appeal, which were created in the Evarts Act in 1891. Another potential avenue for follow-up research is determining when courts of appeals created local rules governing attorney admission (presumably in the late 19th and early 20th centuries but possibly earlier) and seeing what authority they cited.

TAB 2C

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Rules Committee Chief Counsel

Re: Potential issues related to the privacy rules

Date: August 21, 2024

The Rules Committees have received several suggestions that address particular issues related to the privacy rules (Appellate Rule 25, Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1): (1) a suggestion to reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B); (2) suggestions to streamline the caption on many bankruptcy notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J); and (3) a suggestion to amend Criminal Rule 49.1(a)(3) and corresponding provisions of the other privacy rules, which currently require including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestions 24-CR-A, 24-AP-B, 24-BK-D, 24-CV-C). The appropriate Advisory Committees will continue to consider those pending suggestions. This memo addresses whether those deliberations should expand to encompass other privacy-related issues, and recommends against such an expansion.

I. Background and Overview

At the spring 2024 meetings, the Advisory Committees discussed a suggestion from Senator Wyden (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B) that would require complete redaction of social-security numbers. The agenda books included a sketch of a draft rule amendment but did not recommend that the amendment be considered at that time. (Our March 19, 2024, memorandum is attached for reference.) Based on the recommendation of the reporters' working group, the committees decided to defer consideration of a draft rule amendment until after discussion of pending suggestions and possibly other potential issues concerning the privacy rules.

In addition to the pending suggestions that are under consideration by the Bankruptcy and Criminal Rules Committees, we have identified several potential

issues common to all three rule sets (Bankruptcy, Civil, and Criminal).[1] This memorandum explains the tentative conclusion of the working group that those issues, outlined below, do not warrant further study by the advisory committees. We seek input from each committee about that recommendation and about whether any other issues related to the privacy rules deserve consideration at this time.

Each of the issues described below represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But our consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues. Put simply, there is no real-world problem that we need to solve right now. That initial question—whether there is an actual problem in the application of the rules that could be solved by an amendment—has long driven the focus of the rules committees, and it properly reflects the limited time and other resources available to the committees, as well as the presumption that rule amendments should be limited to avoid disruption of settled practices.

That view could change if we receive a specific suggestion for a rule amendment that identifies a practical problem in the privacy rules or if case law or other information reflects real uncertainty or divergence in how the rules are being interpreted or applied. In that event, we will ask the committees to consider how to address the particular concern. Similarly, if another Judicial Conference committee, such as CACM or IT, were to identify a privacy-related concern that could be addressed by a rule amendment, the rules committees could consider the issues raised in that context.

In the meantime, the Bankruptcy and Criminal Rules Committees will continue to consider the pending proposals for amendments to the privacy rules. The suggestion for an amendment requiring complete redaction of social-security numbers can be considered along with any proposed amendments that result from that ongoing work on pending suggestions.

The following summaries describe the issues considered by the working group:

II. Potential Privacy-Rule Issues

A. Ambiguity and overlap in the exemptions

The exemptions from the redaction requirements, set forth in subdivision (b) of each of the privacy rules, include language that appears ambiguous or possibly

[1] Appellate Rule 25(a)(5) generally provides that that the appropriate privacy rule in the Bankruptcy, Civil, or Criminal Rules will govern in particular categories of cases in the appellate courts. Unless otherwise noted, privacy rule citations in this memo are to the common provisions of the Bankruptcy, Civil, and Criminal Rules.

overbroad, although we are not aware of any particular problems or concerns related to the application of these provisions. Here are two examples:

Subdivision (b)(3) refers to the "official record from a state-court proceeding"; rules committee records indicate that this exemption was originally intended to refer to the records of state cases removed to federal court. But that focus is not apparent in the text of the rules. And state-court records can be included in filings in other types of cases as well.

Subdivision (b)(4), which exempts "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed," was initially aimed at pre-2007 federal court records, although the rule text appears to apply much more broadly to the record of any court or tribunal. It appears to overlap, and perhaps make redundant, some more specific exemptions for: (1) the record of administrative or agency proceedings, in subdivision (b)(2); (2) the official record of a state-court proceeding, in subdivision (b)(3); and (3) state-court records in a pro se action brought under 28 U.S.C. § 2254, in subdivision (b)(6) of Civil Rule 5.2 and Criminal Rule 49.1.

B. Scope of the waiver

The waiver provision in subdivision (h) of Civil Rule 5.2 and Criminal Rule 49.1, and subdivision (g) of Bankruptcy Rule 9037, can be read narrowly to provide only that an individual does not violate the rule by failing to comply with the redaction requirements with respect to the person's own personally identifiable information (PII). That is, inclusion of a person's own unredacted PII waives the redaction requirement for that party with respect to that specific PII in that particular filing only. However, the records of the rules committees' original consideration of the privacy rules support a broader reading of the waiver provision: Under that view, once a person waives the protection of subdivision (a)'s redaction requirements in a filing as to the person's own information, other filers no longer need to redact the disclosed PII in subsequent filings in the case (or perhaps even in other cases).

The broader view is not apparent from the rule text or committee note. But the ambiguity inherent in the term "waives," as well as the rules committees' public records on the subject, leaves open the possibility that the waiver provision could be read by some litigants to permit inclusion of unredacted PII in a broad range of court filings. Here too, however, we have not received any indication of a problem in practice related to the waiver provision.

C. Expansion of protected information subject to redaction

Since their adoption in 2007, the privacy rules have required redaction of "an individual's social-security number, taxpayer-identification number, or birth date," as well as "the name of an individual known to be a minor" and "a financial-account

number." Civil Rule 5.2(a). Other categories or identifiers might equally warrant protection in court filings as PII. For example, an individual's passport or driver's license number could potentially cause harm if disclosed, and there seems little or no reason why an unsealed filing would need to disclose those kinds of details. Similarly, online login information such as account identifiers and passwords could cause harm if disclosed.

Other information, such as an individual's birthplace, could—in conjunction with other data—facilitate identity theft or similar malicious activity. Telephone numbers and physical or email addresses could pose different considerations, as they are generally required for attorneys and pro se filers to ensure that courts and parties can reach litigants. But there might be little reason to allow routine disclosure of third parties' information.

At this point, we have not received any indication that disclosure of these categories of information in court filings is widespread or has led to specific problems. And the absence of such a suggestion seems sufficient reason not to devote resources to these questions now.

D. Protection of other sensitive information

Beyond redaction of specific PII, there might also be additional categories of information that warrant protection from public disclosure. For example, medical records and related information about an individual's health conditions are protected from disclosure in certain circumstances, although the privacy rules do not address that type of information. And geolocation information (such as from cellphone records, smartwatches, GPS devices, or Bluetooth trackers) can also include sensitive personal information that might be considered private in some circumstances. The privacy rules specifically mention filings made under seal in subdivision (d), and these categories of information raise the question whether the rules should protect specific categories of privacy-related information that might need to be known to parties in litigation but should not be subject to wider public disclosure.

A 2023 submission from Lawyers for Civil Justice (23-CV-W) questions whether the rules as a whole do enough to ensure the protection of sensitive personal information from disclosure. The Civil Rules Committee has not yet discussed that suggestion, and its consideration of the issues could provide additional relevant guidance to the other Advisory Committees. At this time, however, there is no indication that the privacy rules need to be amended to address these broader concerns.

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 3

TAB 3A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2024

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 8, 2024 at New York University Law School. The Committee reviewed severable possible amendments, including amendments relating to Artificial Intelligence and machine learning and an amendment to Rule 609.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Rule 801(d)(1)(A)

At its Spring 2024 meeting, the Standing Committee approved, for publication for public comment, an amendment to Rule 801(d)(1)(A), which provides that all prior inconsistent statements of a testifying witness are admissible over a hearsay objection. Under the existing rule, only prior inconsistent statements made under oath at a formal proceeding are admissible over a hearsay objection. The arguments supporting the amendment are: 1) hearsay concerns are answered by the fact that the person who made the hearsay statement is at trial, under oath, and subject to cross-examination; and 2) the prior inconsistent statement is going to be admitted at any rate for impeachment, so the proposal eliminates the need to provide a potentially confusing limiting instruction.

The public comment period closes on February 15, 2025. The Committee will review and consider any public comments and determine whether to recommend the proposed amendment for final approval at its Spring 2025 meeting.

B. Rule 609(a)(1)(B)

The Committee discussed a possible amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment reviewed by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness. The proposal currently being considered by the Committee focuses on criminal defendant witnesses only.

The Committee appears to be divided about the proposal to add the word "substantially" to Rule 609(a)(1)(B). Most members agree that a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. Those in favor of the change argue that these errant courts have not effectuated the Congressional intent to provide more protection to criminal defendants, so that they will not be deterred from exercising their right to testify, and thus a mildly more protective test should be

employed. Those who oppose the change are concerned that courts that currently correctly apply the rule might end up, under a slightly stricter test, excluding convictions that ought to be admitted.

The possible amendment to Rule 609(a)(1) will be further considered at the next meeting.

C. Artificial Intelligence and Deepfakes

For the past two years the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by AI will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: 1) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake; and 2) evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by a human expert.

At its fall meeting, the Committee considered a number of proposals to amend the Evidence Rules to regulate deepfakes and machine learning. As to machine learning, the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The Committee tentatively agreed on an amendment that would simply apply the standards of Rule 702 to evidence that is the product of machine learning. The proposal — to be considered at the next meeting with the view to approve it for release for public comment — would create a new Rule 707. The current draft language for the new rule is as follows:

> **Rule 707. Machine-generated Evidence**
>
> Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

The Committee agreed that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration.

As to deepfakes, the Committee has tentatively determined that issuing a rule proposal would not be advisable at this early stage — that it would be prudent to wait to see how courts deal with deepfakes because it is quite possible that the existing rules on authenticity are flexible enough to handle the possibility that parties will be submitting manufactured audiovisual evidence. But the Committee believes it would be useful to agree on language for a possible amendment, so as to be able to respond if problems do arise. The proposal for consideration at the Spring 2025 meeting would add a new Rule 901(c). The language of the proposal is as follows:

Rule 901(c). Potentially Fabricated Evidence Created By Artificial Intelligence.

> If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by artificial intelligence, the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

The proposal protects against the possibility of an opponent demanding an inquiry by simply claiming that the item is a deepfake. The opponent has the burden of making an initial showing that there is something suspicious about the item — enough for a reasonable person to find that it is fabricated. At that point, the burden shifts to the proponent to show, by a preponderance of the evidence, that the item has not been fabricated. The preponderance standard is, of course, higher than the standard ordinarily required for establishing authenticity. That higher standard can be justified if deepfakes become prevalent and exceedingly difficult to detect.

D. False Accusations of Sexual Misconduct

The Committee considered whether the Evidence Rules should be amended to address false accusations of sexual misconduct, either by way of an amendment to Rule 412 or a freestanding new Rule 416. As between the alternatives, the Committee agreed that a new Rule 416 would be preferable. But after considerable research and review, the Committee decided not to pursue an amendment and to take the proposal off its agenda. False accusations in sexual assault cases arise more frequently in state and military courts, and research indicates that these courts have procedures and rules in place and are unlikely to adopt a Federal "model." Moreover, the Committee agreed that courts have adequate tools to address these issues under the existing Evidence Rules, including Rules 404, 412, and 608.

E. Rule 404(b)

At the Committee's fall 2023 symposium, a law professor made the argument that courts are admitting evidence of uncharged misconduct even where the probative value of the bad act is dependent on a propensity inference. He suggested an amendment to Rule 404(b) to prevent this practice. The Committee noted that the notice requirement of Rule 404(b) was amended in 2020 to require the prosecution to articulate a non-propensity purpose for bad act evidence, and it was resolved that the Committee should determine how that amendment was working before proposing another amendment to the rule. Ultimately, the Committee decided to table any proposed amendment to Rule 404(b). The Committee recognized that while some courts may have admitted propensity evidence, other instances raised by the professor as problematic were in fact proper applications of the Rule. Moreover, any attempt to amend Rule 404(b) would run into significant opposition by the Department of Justice, which had compromised on the Rule in 2020.

F. Rule 702 and Peer Review

Two attorneys submitted a proposal to the Committee to amend Rule 702 to address the "peer review" factor as set out in *Daubert* and the Committee Note to the 2000 amendment to Rule 702. Under *Daubert* and the Committee Note, the existence of peer review is relevant to a court's determination of the reliability of an expert's methodology. The attorneys argue that peer review is problematic because many peer-reviewed studies cannot be replicated.

The Committee decided not to proceed with an amendment on peer review. Rule 702 is general. It does not mention the *Daubert* factors. Thus, singling out one factor for caution, in text, would be awkward and a possible source of confusion. Moreover, courts currently have, and exercise, discretion to reject peer reviewed studies that have not been replicated. So an amendment to the text was found unnecessary and the issue was removed from the Committee's agenda.

G. Rule 704(b) and the Supreme Court's Decision in *Diaz v. United States*

Last Term, the Supreme Court decided *Diaz v. United States,* in which the defendant in a drug-smuggling case argued that Rule 704(b) prohibited testimony from an expert that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. A question for the Committee is whether the Court's construction of Rule 704(b) counsels or mandates some amendment to the Rule. After discussion, the Committee determined that no amendment is warranted. The Court's result is consistent with the language and intent of Rule 704(b), which was directly enacted by Congress.

H. The Right to Confrontation, Rule 704(b), and the Supreme Court's Decision in *Smith v. Arizona*

Last Term, the Supreme Court decided *Smith v. Arizona,* in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst — and the other analyst's findings were disclosed to the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its Fall 2024 meeting, the Committee considered whether the Court's confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on Federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on Federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably. A constitutional bar on such

reliance would probably necessitate an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case.

The Committee was of the view that *Smith* concerned disclosure, not reliance. But the Committee decided to monitor the post-*Smith* case law to determine whether and how the lower courts apply *Smith* to reliance as well.

I. Rule 902 and Tribal Certificates

Judge Frizzell submitted a suggestion to the Committee to consider whether federally recognized Indian tribes should be added to Rule 902(1) which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been at least two recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception and authentication under Rule 902(11). Moreover, the problem of authentication has arguably taken on more importance in light of the increase in federal cases resulting from the Supreme Court's decision in *McGirt v. Oklahoma.*

At its fall 2024 meeting, the Committee engaged in an initial discussion of the possibility of amending Rule 902(1) to include federally recognized Indian tribes. While the Committee was informed by the DOJ that many Indian tribes maintain records on a par with the government entities listed in Rule 902(1), it was also informed that many Indian tribes do not have the resources necessary to guarantee accurate recordkeeping. Other members noted that the problem is not with the rules, but rather with untrained prosecutors.

The Committee resolved that it would hear from the DOJ at the next meeting on two issues: 1) whether the problem is one of rulemaking or whether it can be solved by training prosecutors; and 2) whether tribal recordkeeping is sufficiently reliable across the board to warrant the same treatment as the other public bodies currently covered by Rule 902(1).

IV. Minutes of the Fall 2024 Meeting

The draft of the minutes of the Committee's fall 2024 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes of the Fall 2024 meeting of the Advisory Committee on Evidence Rules.

TAB 3B

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 8, 2024
NYU Law School – Furman Hall
New York, NY

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 8, 2024 in Furman Hall at the NYU School of Law in New York.

The following members of the Committee were present:
Hon. Jesse Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Richard J. Sullivan
Hon. Edmund A. Sargus, Jr.
John S. Siffert, Esq.
Rene L. Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Michael Mosman, Liaison from the Criminal Rules Committee
Hon. Robert Conrad, Jr., Director, Administrative Office of the United States Courts
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Finnuala Tessier, Esq., Department of Justice
Beth Wiggins, Esq., Federal Judicial Center
Tim Reagan, Esq., Federal Judicial Center
Thomas Byron III, Esq., Chief Counsel, Rules Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Kyle Brinker, Esq., Rules Law Clerk
Alex Alekri, NYU Law student
Claire Rothschild, NYU Law student
Dionis Jahjaga, Fordham Law student
Harshita Garg, NYU Law student
John Hawkinson, Journalist
John McCarthy, Smith, Gambrell & Russell, LLP
Jonah Harwood, NYU Law student
Kahaari Kenyatta, NYU Law student
Lex Uttamsingh, NYU Law student
Liam Hofmeister, NYU Law student
Mariana Gusdorf, NYU Law student

Micah Musser, NYU Law student
Milan Sani, NYU Law student
Miles Plusford, NYU Law student
Morgan Brandewie, NYU Law student
Raymond Valerio, NYU Law student
Sarah Mihm, NYU Law student
Sam Sinutko, Fordham Law student
Nate Raymond, Reuters
Noami Biale, Sher Tremonte LLP
Sue Steinman, American Association for Justice
Christopher Flood, Federal Defenders of New York, Inc.

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Alex Dahl, Lawyers for Civil Justice
Daniel Steen, Lawyers for Civil Justice
Audrey Mitchell, NYU Law student
Avalon Zoppo, National Law Journal
Carly Giffin, Federal Judicial Center
Crystal Williams
Jacqueline Thomsen, Bloomberg Law
Jeffrey Overley, Law 360
Kaiya Lyons, American Association for Justice
Leah Lorber, GSK
Margaret Williams, Federal Judicial Center
Timothy Lau, Federal Judicial Center
Hon. Paul Grimm, Duke University
Samantha Smith, Supreme Court Fellow, Federal Judicial Center
Sandi Johnson, RAINN

I. Welcome and Opening Business

Judge Furman welcomed everyone to the meeting and introduced himself as the new Chair of the Advisory Committee on Evidence Rules. He thanked Judge Schiltz for his stellar service to the Committee and then invited meeting participants to introduce themselves. Judge Furman offered a special welcome to Judge Conrad, Director of the Administrative Office of the United States courts and thanked him for his dedication to Rules Committee work. Judge Furman also welcomed Kyle Brinker, the Rules Law Clerk to his first Committee meeting and noted that Rene Valladares had been reappointed to another three-year term on the Committee. Finally, Judge Furman thanked the NYU law students and other members of the public for attending the meeting and commended their interest in rulemaking. He extended thanks to the NYU Law School for hosting the meeting as well. The Chair then recognized the U.S. Marshals' Service to make a security announcement.

The Reporter gave a report on the June meeting of the Standing Committee. He explained that the Evidence Rules Committee had only one action item to present to the Standing

Committee, the proposed publication for notice and comment of an amendment to Federal Rule of Evidence 801(d)(1)(A) to allow substantive admissibility of all witness inconsistent statements (even if those statements were not given under oath at a prior proceeding as required by the current provision). The Reporter explained that the Standing Committee asked a few questions about the proposal but approved it unanimously, with one abstention by the Department of Justice.

The Chair then asked for a motion to approve the minutes of the Committee's Spring 2024 meeting. A motion was made, seconded, and unanimously approved.

Before turning to the agenda, Thomas Byron, Chief Counsel, offered a brief update on the status of the amendments to the Federal Rules of Evidence already approved by the Committee. He explained that new Federal Rule of Evidence 107 and amendments to Evidence Rules 613(b), 801(d)(2), 804(b)(3), and 1006 are on track to take effect on December 1, 2024, absent action by Congress. He explained that the amendment to Rule 801(d)(1)(A) regarding substantive admissibility of prior inconsistent statements had been published for public comment and that the Committee would review the public comment at its Spring 2025 meeting in Washington DC. The Reporter noted that the Committee had received only one comment to date and would wait to review comments until the close of the comment period in February 2025. The Chair alerted the Committee that there was little legislative activity of relevance to the Evidence Rules Committee, with the exception of one recent proposal which would be discussed in connection with an agenda item later on.

II. Potential Amendment to Federal Rule of Evidence 609

The Reporter introduced the discussion of Rule 609 by reminding the Committee that Professor Jeff Bellin had made a presentation to the Committee at its Fall 2023 meeting in which he proposed the repeal of Federal Rule of Evidence 609 – the Rule that authorizes the impeachment of witnesses with their prior convictions. The Reporter explained that the Committee had not expressed interest in repealing Rule 609 altogether but had expressed interest in exploring modifications to Rule 609(a)(1) – the provision that allows impeachment of testifying witnesses with prior felony convictions subject to balancing.

The Reporter reminded the Committee that Rule 609(a)(1) contains a balancing test adopted by Congress at the time that the Federal Rules of Evidence were initially enacted to protect the rights of testifying criminal defendants who are subject to unique prejudice when their prior felony convictions are revealed to the jury. The current test requires the probative value of the conviction to outweigh the prejudicial effect. The Reporter also reminded the Committee that it had agreed to consider an amendment to Rule 609(a)(1)(B) that would strengthen the existing balancing test applicable to felony convictions offered to impeach criminal defendants by requiring the probative value of an impeaching conviction to "substantially" outweigh any unfair prejudice to the defendant. He explained that the Committee at its last meeting had posed an empirical question as to whether the admissibility of convictions actually deters criminal defendants from testifying when they would otherwise take the stand. He noted that the question for the Committee would be whether to move forward with an amendment to Rule 609(a)(1)(B).

The Reporter opined that the proposed amendment to Rule 609(a)(1)(B) on page 134 of the agenda materials possibly would be the shortest amendment to rule text ever because it would involve adding only the modifier "substantially" to the existing balancing test. He explained that the lengthier draft Committee note on pages 134-136 of the agenda materials would offer instruction to trial judges as to how to properly apply the balancing test to the felony convictions of criminal defendants. The Reporter noted that the proposed amendment to strengthen the balancing test would restore Congressional intent in enacting the original rule to avoid deterring criminal defendants from testifying.

He acknowledged that many federal courts apply Rule 609(a)(1)(B) correctly but explained that a significant number of courts interpret the existing balancing test in a manner that allows defendants' convictions for very similar and very inflammatory crimes to be admitted to impeach them. The Reporter explained that many federal courts permit such convictions even though they lack probative value as to a defendant's honesty. He opined that adding the modifier "substantially" to the Rule 609(a)(1)(B) balancing test would restore congressional intent to protect testifying defendants and would signal to trial courts that they should be careful in admitting felony convictions to impeach criminal defendants who wish to testify.

The Reporter explained that the agenda memo concerning the amendment attempted to respond to the Committee's concern from the Spring meeting that criminal defendants never take the stand in any event and that a reduction in felony conviction impeachment would not materially change the incentives for criminal defendants considering whether to testify. The Reporter thanked Tim Lau of the Federal Judicial Center for his excellent assistance in evaluating the data regarding defendant testimony. He explained that the data shows that 25% of defendants already testify and that, although the data set he examined was not statistically significant, it suggested that defendants would be more likely to testify if more of their felony convictions were excluded. He also noted that simple common sense suggests that more criminal defendants would take the stand if their convictions could not be admitted to impeach them. The Reporter explained that many evidentiary principles are supported by common sense rather than conclusive empirical data. For example, he noted that the attorney client privilege has never been justified through empirical findings but that it is well accepted as a matter of common-sense principles. He suggested that common sense similarly suggests that an accused impeached with a conviction is less likely to testify than one who is not. The Reporter noted that obtaining conclusive empirical evidence to show that Rule 609 has a material effect on criminal defendants' decisions not to testify could be challenging, if not impossible.

Tim Reagan of the Federal Judicial Center (FJC) discussed possible research avenues for exploring Rule 609's impact on defendant decisions regarding testimony and outcomes but opined that obtaining needed data could prove difficult due to the confidentiality of certain information and the incompleteness of available information. Even with all necessary data, additional empirical research could demonstrate only correlation between Rule 609 and defendant testimony, rather than true causation. Mr. Reagan suggested that the most fruitful research that the FJC could perform would be a more comprehensive survey of criminal defense lawyers regarding the factors that influence defendant decisions regarding testimony. He estimated that such a survey would take two years to complete.

The Chair then asked the Committee whether it wanted to move forward with consideration of an amendment to Rule 609. He explained that he was not seeking any vote on the specific proposal to add the word "substantially" to the Rule 609(a)(1)(B) balancing test but that he wanted to get a sense of whether Committee members wanted to move forward with a Rule 609 proposal and whether they thought that a comprehensive FJC survey of criminal defense lawyers would be helpful. The Reporter also noted that he would welcome Committee comments on the draft Committee note included in the agenda materials.

The Federal Public Defender expressed support for moving forward with an amendment to Rule 609(a)(1)(B). He noted that the project began with first-rate academics suggesting the repeal of Rule 609 altogether, that the Committee then discussed repeal only of Rule 609(a)(1) that allows impeachment with felony convictions (that do not qualify as dishonesty convictions), and that those good suggestions had already been rejected by the Committee. He noted that the Committee was now only looking at adding a single word to the balancing test applicable to testifying criminal defendants and that common sense and experience shows that felony conviction impeachment affects testimony. He opined that a defendant's prior convictions are one of the most significant issues for a defense lawyer to consider and that the whole defense community is closely monitoring the Committee's work on Rule 609. He urged the Committee to move forward with the very modest proposal to add the word "substantially" to the Rule 609(a)(1)(B) balancing test. He opined that the Committee should move forward without waiting two more years for an FJC survey, though he said he welcomed more study of the issue if the Committee wanted such data.

Another Committee member agreed that the Committee should keep the proposal on the agenda. Though he noted that defendants should be subject to cross-examination on some convictions, he opined that balancing probative value against unfair prejudice is certainly the appropriate method for determining which convictions are fair game. Where the cases show that appropriate balancing is not being done, he suggested that a simple and elegant addition of the single word "substantially" should be considered to improve operation of the test. He opined that any miscarriage of justice with respect to a defendant's right to testify should not be tolerated and that even the Department of Justice should be fine with the addition of the single word.

Ms. Shapiro responded that the Justice Department was not "fine" with the proposal because prosecutors report that it is extremely difficult to admit a defendant's prior convictions for impeachment purposes under the existing provision. She reported that trial judges are very diligent in parsing the admissibility of a defendant's convictions under Rule 609 as it stands now. She explained that the Reporter's case digest captures only appellate opinions in cases where convictions were admitted and fails to reflect the many cases in which the trial judge excludes the defendant's convictions. Ms. Shapiro emphasized that the memorandum prepared by Marshall Miller (in connection with the earlier proposal to eliminate Rule 609 in whole or in part) demonstrates the significant probative value of prior felonies. She further emphasized that the existing balancing test created as a result of congressional debate on this issue already favors exclusion and protects criminal defendants. She queried whether the multi-factor tests established by Circuit court precedent for evaluating the admissibility of felony convictions would be wiped out by an amendment to the balancing test.

The Reporter explained that the same factors currently utilized by the courts to evaluate admissibility would continue to control. The amendment would simply require a slightly different balance among those factors to justify admission of a testifying criminal defendant's felony convictions. He also explained that there is no denying that many federal judges evaluate Rule 609 appropriately. The question, the Reporter explained, is whether a sufficient number of federal judges are applying the balancing test improperly to justify a modest tweak to improve the Rule. The Reporter opined that the addition of a single word to rule text would not produce a radical change to the provision and that the longer Committee note accompanying the amendment would tell the courts that are misapplying the Rule to put a thumb on the scale against admitting these felony convictions.

Ms. Shapiro replied that if the amendment proposal were to advance, the Committee note should be pared back significantly to a few lines and should not tell the majority of trial judges already balancing properly to always exclude a defendant's felony convictions. The Reporter responded that he was open to alterations to the Committee note. He explained that the draft note included in the agenda materials was designed to be a first attempt that could be edited. Judge Bates opined that the draft note was particularly hefty in comparison to a tiny textual amendment and that some parts of the draft note tell judges how to rule. He suggested that a Committee note should not go so far as to tell judges how they ought to rule on admissibility. The Reporter agreed that the paragraph of the draft note on page 135 of the agenda materials that begins with: "The strict balancing test" could be dropped. The Reporter invited further feedback on the draft Committee note.

Another participant asked how the amendment would impact a defendant who takes the stand and testifies falsely to having a clean record after a trial judge has ruled that he may not be impeached with a prior felony conviction. The Reporter explained that an *in limine* ruling excluding the conviction would not bind the trial judge and that a defendant's felony conviction could be admitted to contradict his direct testimony (rather than under Rule 609 to show general untrustworthiness) if he were to offer testimony about a clean record. Another Committee member agreed that a defendant's testimony to a clean record would "open the door" to felony conviction impeachment regardless of the amendment.

Another Committee member noted that the Reporter had described the amendment as a "signal" to trial judges to exercise caution in admitting a criminal defendant's felony convictions. The Committee member opined that the proposal would constitute more than a "signal" where it would change the balancing standard from one that favors admission to one that disfavors admission. The member suggested that the Committee should not change the standard to get a different admissibility outcome and suggested that perhaps judicial education was a superior answer to misapplication. The Committee member also expressed a desire to have the FJC perform a survey to determine the extent of a problem with Rule 609. Another Committee member agreed, suggesting that most trial judges get Rule 609 rulings right and that the problem with trial judges who misapply the Rule is not the rule text itself, but rather the fact that *in limine* Rule 609 decisions are not reviewable. The Committee member noted that an amendment would not fix the problem of reviewability and suggested that it would likely lead trial judges who are already applying Rule 609 correctly to be even more exclusive but would not meaningfully change the practice of those judges who allow defendants' convictions to be admitted under the

current standard. The Committee member opined that the amendment would put a thumb on the scale against impeachment and would let criminal defendants testify free from impeachment, leading jurors to assume that testifying defendants have a clean record. The Reporter agreed that reviewability is a significant problem with Rule 609 application due to the Supreme Court's decision in *Luce* but noted that there is nothing that the Advisory Committee can do to make Rule 609 decisions reviewable. The Reporter explained that the Committee could improve the situation by proposing a more protective standard for criminal defendants.

Ms. Shapiro suggested that many factors go into a criminal defendant's decision to testify and that it would be impossible to parse all of those factors and to isolate the effect of Rule 609. She further suggested that congressional intent to allow defendants to testify has been fulfilled given that the Reporter's research shows that 25% of defendants already choose to testify under the existing Rule 609(a)(1)(B) standard. The Reporter suggested that the data regarding rates of testimony presents something of a Catch-22 and should not be used to undermine the need for an amendment. If case studies showed that criminal defendants *never testify*, then it could be argued that changing Rule 609 would be unlikely to make a difference. If a significant percentage of criminal defendants are already testifying, it can be argued that Rule 609 is not improperly deterring them.

The Federal Public Defender recognized that there are a number of factors that can influence a decision about defendant testimony but emphasized that Rule 609 is undoubtedly the main factor for consideration. He explained that the Supreme Court's opinions in *Luce* and *Ohler* compound the problem for the defense and that Rule 609 needs to be addressed. He argued that the Committee does not need a two-year survey to know what criminal defense lawyers will say about Rule 609 impeachment. Another Committee member opined that he supported the addition of the word "substantially" to the Rule 609(a)(1)(B) balancing test, arguing that it flags the concern for trial judges and would encourage them to think harder about admissibility. The Committee member also explained that he would favor trimming the draft Committee note accompanying the amendment but expressed support for the note discussion regarding sanitized convictions. Another Committee member expressed support for the proposal, opining that any concern that trial judges will always exclude felony convictions notwithstanding strong probative value could be addressed through the Committee note. Another participant expressed support for the proposal, noting that testifying defendants already face a sentencing enhancement if they are convicted which discourages testimony and that amending Rule 609 could alleviate at least one disincentive to testifying.

The Chair explained that he favored the simple and elegant addition of the word "substantially" to the Rule 609(a)(1)(B) balancing test. He opined that the Committee should do what it can to ensure fair application of the test in the trial court given the lack of reviewability of Rule 609 decisions. The Chair shared concerns about the extensive draft Committee note and suggested that the note would need to be cut back to avoid telling judges how to come out on Rule 609 rulings. In sum, he explained that the amendment would be a modest, salutary change and asked for a straw poll of the Committee regarding moving forward with consideration of the amendment and with edits to the draft Committee note, as well as interest in further FJC study. The Reporter suggested that a delay for further study would not aid the inquiry.

The straw poll suggested that Committee members were evenly divided against, and in favor of considering the amendment to Rule 609(a)(1)(B). The Chair questioned whether edits to the draft Committee note would alter any positions with respect to the proposal. Committee members who opposed the proposal explained that their opposition was to the heightened balancing test and not simply to the note. The Chair noted that it would not make sense to move forward with a proposal to amend Rule 609 if there was no chance of a proposal being approved by a majority of the Committee. He noted that one Committee member was absent and that he would check with that Committee member to solicit his input on a Rule 609 amendment. The Chair stated that he did not see the necessity of a two-year long study by the FJC. He suggested that it may make sense to develop a concrete proposal to amend Rule 609 and an edited draft Committee note for consideration if the absent Committee member is open to the possibility of an amendment. The Reporter again encouraged Committee members to communicate with him about proposed edits to the draft Committee note.

III. Potential Amendments to Evidence Rules to Address Artificial Intelligence and Other Machine-Generated Output

The Chair next called the Committee's attention to Tab 4 of the agenda and to the admissibility of audiovisual material in the era of deepfakes, as well as to the admissibility of machine-generated output. He noted that there were no action items or concrete proposals on the Committee's agenda and explained that the question for the Committee was whether to proceed to develop concrete proposals to address authenticity in the age of artificial intelligence ("AI") and to address the reliability of machine-generated output. The Chair opined that AI creates significant issues for the Evidence Rules and that it is beneficial for the Committee to take a close look at issues of admissibility. He noted that, while technology develops at a lightning speed, rulemaking does not proceed as rapidly and there is always a risk that detailed rules changes addressing technological shifts will be moot by the time they are enacted and that generalized proposals that evade mootness will prove unhelpful. The Chair noted it could make sense for the Committee to start developing concrete amendment proposals to address AI and machine-generated output as soon as possible so that the Committee is in a position to act quickly when technology requires a rules change. The Chair also noted criticisms of the Reporter and the Committee's approach to AI in an article described in the agenda materials, describing them as off-base and inappropriate.

A. The Deepfake Problem

The Reporter acknowledged increased scrutiny of rulemaking by the public as a factor for the Committee to consider. He first addressed the problem of easily generated deepfake audiovisual evidence. He explained that the authenticity of audiovisual evidence currently is determined under Rule 104(b) which requires only prima facie proof that the proffered evidence is genuine. Because deepfakes are increasingly difficult to detect, the Reporter explained that this authenticity standard could be viewed as insufficiently protective against deepfake evidence. He stated that the first question for the Committee was whether to propose any amendments regarding authenticity of AI and the risk of deepfakes at all. Even if the Committee were inclined to amend the authenticity rules to deal with the possibility of deepfake evidence, the Reporter suggested that the opponent of audiovisual evidence would have to make some initial showing to

trigger a deepfake inquiry to avoid an extended deepfake inquiry for every item of audiovisual evidence offered at trial. Finally, he explained that the Committee would need to determine the appropriate standard for showing authenticity of challenged evidence once that trigger has been met.

On the final point, the Reporter called the Committee's attention to the draft proposal to add a new Rule 901(c) on page 241 of the agenda materials. That proposal would require the trial judge to balance the probative value and prejudicial effect of "computer-generated or other electronic evidence" that a reasonable jury could find to have been "altered or fabricated" by AI. He noted that he was mystified by weighing the "probative value" of potentially fabricated evidence, arguing that fabricated evidence has no probative value. He opined that a Rule 403 balancing approach is ill-suited to possible deepfakes and called the Committee's attention to the proposal on page 269 of the agenda book. That proposal would require the trial judge to find a proffered item of evidence authentic by a preponderance of the evidence under Rule 104(a) once the opponent has shown that a reasonable jury could find it to be altered under Rule 104(b). Once the opponent triggers a deepfake concern, the Reporter suggested the opponent has earned the right to a finding of authenticity by the trial judge. The Reporter acknowledged that this would create a higher Rule 104(a) standard of authenticity for possible deepfakes.

The Chair thanked the Reporter and queried whether the existing standards of authenticity are up to the task of regulating AI evidence. The Reporter acknowledged that the Committee faced similar issues with the emergence of electronic evidence and social media and that the Committee declined to propose specific standards regulating social media and that courts have adapted well using existing evidentiary standards. That said, the Reporter suggested that AI may present a problem that is different in kind that may require rulemaking to address. Without an amendment, courts would have to adapt to AI on a case-by-case basis and could not apply a heightened Rule 104(a) standard of proof that is inconsistent with current rules.

Judge Bates queried whether audiovisual evidence found to have been fabricated or altered would necessarily be excluded under the Reporter's proposed Rule 104(a) finding of authenticity by the trial judge. He noted that altered evidence might be admissible in some cases under the Rule 403 balancing standard suggested on page 241 of the agenda materials. Judge Bates asked whether a slightly altered video could ever be admitted under the Rule 104(a) standard or whether any alteration would require its exclusion as inauthentic. The Reporter responded that a court could admit evidence that it found to have been altered in some way so long as the alteration did not render the evidence inauthentic.

The Reporter next called the Committee's attention to the proposal by Professor Delfino on page 257 of the agenda materials, explaining that this proposal would require the trial judge to determine the authenticity of all "audiovisual evidence" by a preponderance of the evidence pursuant to Rule 104(a) without the need for the opponent to trigger a special inquiry or concern about deepfake evidence. He noted that this proposal would take the question of authenticity of audiovisual evidence away from the jury entirely in every case and would involve an instruction to the jury that they *must* find audiovisual evidence authentic once the trial judge found it to be genuine under Rule 104(a). The Reporter explained that this proposal is unworkable because it applies automatically to all audiovisual evidence without any showing to trigger a special inquiry

into deepfakes. He noted that a jury instruction directing the jury to find audiovisual evidence authentic was misguided where jurors will necessarily consider authenticity in evaluating the proof. A Committee member noted that an instruction to the jury that they *must* find prosecution evidence to be genuine in a criminal case would pose a constitutional problem as well.

The Reporter also called the Committee's attention to a proposal by Professor Lamonica on page 260 of the agenda materials that would allow parties to "request a hearing requiring the proponent to corroborate the source of information by additional sources" before "photographic evidence" is admitted. The Reporter explained that this proposal would allow the opponent to demand a hearing before any piece of photographic evidence is admitted without any threshold showing of deepfake concern. Further, he noted that this proposal would not alter the standard for authenticity currently in the Federal Rules, but merely authorized a hearing to determine admissibility under existing standards. The Chair added that the proposal could exacerbate the problem of the "liar's dividend" whereby parties may levy attacks on authentic materials that a jury might accept. He explained to the Committee that the question for consideration is whether the Committee should consider an amendment to the Federal Rules of Evidence to address the concern of deepfake evidence generated by advancing AI.

One Committee member asked whether the problem of deepfake evidence could be handled adequately under the Rule 403 balancing test without the addition of new evidence rules. The Reporter replied that deepfake evidence that is not authentic has no probative value such that Rule 403 balancing would not seem to address the concern that deepfake evidence presents. The Chair agreed, noting that Rule 403 would have a role to play in evaluating audiovisual evidence that had been artificially enhanced in some way, but would not control for fake videos. Another Committee member opined that the greatest protection against lawyers presenting deepfake evidence in court is the threat of disbarment. He expressed skepticism that a tsunami of deepfake evidence was heading for federal courtrooms and noted that the existing Federal Rules of Evidence are sufficiently flexible to handle any threats that do arise. The Reporter noted that ethical standards would not serve to discourage lawyers from presenting deepfake evidence in good faith that was given to them by their clients and that the lawyers are unable to detect as inauthentic. The Committee member responded that the courts have had to grapple with the possibility of forgeries for centuries and that deepfakes are simply contemporary forgeries that courts can address using time-honored standards. The Reporter acknowledged the longstanding handling of forgeries and reminded the Committee that Professor Rebecca Wexler had made a presentation at the spring 2024 meeting in which she made the same point and argued that existing evidentiary standards are well equipped to handle deepfakes just as they have handled forgeries. But the Reporter explained that deepfakes may be harder to detect than a traditional forgery due to the sophisticated technology that produces them.

A Committee member expressed concern that courts will have to address deepfake issues whenever a party levies a deepfake charge. Another participant commented that the general possibility of deepfakes should not be enough to trigger a special inquiry and asked what showing should be required before a trial judge has to mount a deepfake inquiry. The Reporter replied that any detectable anomaly in the evidence, such as a twisted or missing finger on a hand, would trigger an inquiry. He noted that witness testimony undermining a video or evidence

that otherwise contradicts it, such as records demonstrating that a particular person was not in the location where a video places them would likewise be sufficient to trigger an inquiry.

Professor Coquillette complimented the Reporter's agenda memo on AI, characterizing it as a tour de force that would serve as a helpful reference for trial lawyers and judges alike. He noted the phenomenon of the vanishing trial, commenting that trials were disappearing in criminal cases as well as in civil cases. He emphasized that the trial process is designed to test evidence and would be the place where deepfakes are exposed but that the vast majority of both criminal and civil cases are disposed of without trial and depend upon only the intense discovery process for resolution. He noted that the possibility of deepfakes presented outside the trial process constitutes a concern that the evidence rules may not fully address. A Committee member agreed that lawyers would be dealing with much of the evidence that presents a deepfake concern without court oversight. Professor Coquillette concurred and emphasized the importance of lawyers regulating themselves with respect to AI and evidence.

A Committee member opined that the proposed new Rule 901(c) on page 269 of the agenda materials looks like a sensible solution to the problem of deepfake evidence. He queried whether there was anything in proposed new Rule 901(c) that existing caselaw does not already compel. The Reporter replied that the first step in the proposed rule that requires the opponent of the evidence to make some showing of *inauthenticity* to trigger an inquiry is part of existing caselaw with respect to social media and other electronic evidence. But he explained that the second part of the proposed standard requiring the trial judge to find authenticity by a preponderance of the evidence is not supported by existing rules and standards because authenticity is currently a Rule 104(b) issue of conditional relevance for the jury.

The Chair noted that Committee members had raised the fact that courts have long handled the possibility of forgeries under existing evidentiary standards. He asked how courts currently address claims of forgery. The Reporter explained that a court currently would hold a hearing to examine evidence after a showing by the opponent suggesting that it could be a forgery. If the court, after a hearing, finds that there is sufficient evidence from which a reasonable jury could find the challenged evidence to be authentic, the court then allows the evidence to be admitted. The parties then rehash the forgery arguments before the jury and the jury ultimately decides whether the challenged evidence is authentic under Federal Rule of Evidence 104(b). A Committee member asked whether proposed Rule 901(c) would shift the burden of proof on authenticity. The Reporter explained that it would shift the burden of production to the opponent who would have to make the requisite showing of alteration or fakery to justify the court's consideration of the evidence under Rule 104(a). The Chair noted that significant definitional issues surround any potential amendment to address AI evidence, querying whether all videos would be subject to scrutiny and asking how the Committee would define the AI evidence to which a proposal applies.

A Committee member opined that the Committee was doing the right thing by exploring potential amendments to address AI because the issue is a hot one that will not go away. He suggested that the Committee was not yet in a position to make concrete proposals to regulate AI evidence, but posited that the Committee should keep issues of AI evidence front and center and should continue to examine potential alternatives while moving cautiously. The Reporter noted

that it could be useful for the Committee to at least weed out proposals that it does not find helpful. Another Committee member explained that the issue of AI evidence and deepfakery had not arisen in her courtroom and that she did not foresee a looming problem of sufficient magnitude to justify rulemaking. That said, the Committee member objected to any proposal that requires heightened scrutiny of all audiovisual evidence given that 99% of evidence presented is genuine. The Reporter agreed that any viable amendment proposal would include some trigger that must be met to justify heightened scrutiny of audiovisual evidence.

Judge Bates asked how an amendment would handle composite video evidence created by automated systems. For example, he noted that videos that combined several different incidents or that compressed conduct over a much longer period of time and that omitted events depicted on the original video were very important in the January 6 prosecutions. He explained that the videos were captured by authorities, by media, and by individuals and later compressed. Judge Bates questioned how an amended standard of authenticity would treat such computer altered composite evidence. The Reporter responded that composite evidence would not be considered inauthentic or fake. Rather, he explained that the question would be whether the combination of the genuine videos altered the evidence in some material way. Judge Bates asked whether a new Rule 901(c) would apply to composite video evidence of the kind utilized in the January 6 trials.

The Chair noted that many similar issues, such as drawing circles around people or places in genuine videos or otherwise highlighting particular portions of a video, would require careful consideration. But he explained that such issues were secondary to whether the Committee wished to move forward at all with consideration of a proposal to address AI evidence. The Chair identified three alternative approaches to AI evidence that the Committee could adopt. First, he explained that the Committee could move forward with a concrete proposal to amend the Rules to address AI evidence. Second, the Committee could develop language for a potential amendment to be ready to enter the rulemaking process if problems with deepfakes start to emerge in federal courts. Third, the Committee could simply monitor cases concerning AI evidence to stay abreast of developments without working on any potential amendment language until concrete problems arise. The Chair solicited Committee members' preferences regarding the approach to pursue. The Reporter suggested that it would be helpful for the Committee to accept or reject the proposals submitted by Judge Grimm and Professor Grossman, and by Professors Delfino and Lamonica. He suggested that if those proposals, as submitted, were rejected by the Committee, he could work on developing a proposed Rule 901(c) along the lines illustrated on page 269 of the agenda memo which would be ready to go if the Committee felt the need to act on AI evidence. He noted that any such proposal could be tweaked or ultimately rejected by the Committee but that it could be helpful to develop a proposal that could be in the bullpen while the Committee monitors AI developments. The Chair agreed that this was a good strategy. Committee members agreed.

Ms. Shapiro reiterated the many compliments to the Reporter's memo on AI and expressed support for the idea of developing a proposal to keep in the bullpen in case the Committee decides to move forward with an AI amendment in the future. She noted that similar issues were raised with the advent of electronic evidence and that the technology moves so rapidly that there is a real risk that we will live in a completely different AI world one year from now. She noted that if the Committee ultimately chose to move forward on an AI amendment, the Department of

Justice would want to ensure that any proposed rule contains a sufficient standard for triggering an AI inquiry so that resource-draining collateral proceedings are not necessary to admit every piece of audiovisual evidence.

The Chair noted that Committee members were inclined to reject the proposals, as submitted to the Committee, but that Committee members were open to the Reporter working on an alternative new Rule 901(c) to have a concrete concept in waiting as the Committee monitors AI developments. He predicted that additional academic AI proposals would also be forthcoming. The Reporter agreed to continue work on a proposal, highlighting the definitional issues surrounding AI evidence and inviting Committee member input regarding an appropriate definition of AI evidence.

B. Machine-Generated Output

The Chair next turned the Committee's attention to the question of how to assess the reliability of evidence that is generated by a computer tool. He noted the possibility of a voluminous data set being evaluated by a software tool to identify patterns. He explained that when such evidence is admitted through an expert witness, Rule 702 acts as a gatekeeper and ensures reliability but that there is no similar guarantee of reliability for machine-generated output that is admitted without an accompanying expert. He explained that the Committee had received proposals regarding admissibility standards for machine-generated evidence and that some proposals treat the issue as one of authentication under Article 9 of the Federal Rules while other proposals address such evidence under Article 7 through *Daubert*-like standards.

The Reporter noted that the reliability of machine-generated evidence is fundamentally not a question of authenticity or genuineness which is governed by the low Rule 104(b) conditional relevance standard, and that the Committee should look to addressing any concerns under Article 7. He noted one proposal to amend Rule 702 to add requirements for admissibility of machine-generated evidence. The Reporter opined that it would be a mistake to add new, lengthy requirements to Rule 702 and that it would be inappropriate to amend Rule 702 again so soon after the recent amendment that took effect on December 1, 2023. Instead, the Reporter suggested that the Committee should focus on a possible new Rule of Evidence specifically tailored to machine-generated evidence like the draft proposed Rule 707 on page 270 of the agenda materials. A new Rule 707 would basically import the Rule 702 sufficiency and reliability requirements to screen machine-generated evidence. He noted that one proposal received by the Committee suggested adding requirements regarding access to source code to the Evidence Rules as well, but that such a proposal was problematic, as it relates more to discovery which is outside the Committee's jurisdiction and touches on a highly controversial and debated issue which could derail any helpful rulemaking. Everyone might agree, he suggested, that importing the Rule 702 criteria to the admissibility of machine-generated evidence would be beneficial.

The Chair explained that the first question for the Committee was whether the Rules needed to be amended at all to address machine-generated evidence. If so, the Committee would need to decide whether an amendment is best included in Article 7 or Article 9. Finally, the Committee would need to determine the specific standards to be added to regulate machine-generated

evidence. One Committee member suggested that the Committee should continue to study machine-generated evidence, and that Article 7 would seem to be the superior place to add a provision. The Reporter noted that some state courts that had encountered the issue were already taking an Article 7 approach and holding *Frye* hearings to evaluate admissibility of machine-generated output. Another Committee member agreed that there was even more need for a provision regulating machine-generated evidence than for deepfakes. He noted that technology is reaching a point where no human witness may be able to explain how a machine is generating output which could prevent it from being admitted and that is important for the Committee to explore standards for this evidence which is only increasing in importance. This Committee member opined that a new Rule 707 would be a logical place for such a provision. Another Committee member agreed.

Ms. Shapiro noted that the draft proposal to add a new Rule 707 on page 270 of the agenda materials included an exception for "the output of basic scientific instruments or routinely relied upon commercial software." She suggested that such a carve-out should also apply to routinely relied upon government software. The Chair opined that there are several issues that the Committee would need to address in crafting any specific proposal. He explained that the Rule 702 requirements which were fashioned to regulate expert opinion testimony are not a perfect fit for machine-generated testimony and that the Committee would need to address which basic scientific instruments are excluded from coverage. Still, he noted that judges and lawyers are very familiar with the Rule 702 requirements which could militate in favor of applying them to machine-generated evidence. Judge Bates suggested that a new provision would essentially separate consideration of machine-generated evidence into three categories: (1) circumstances in which an expert witness testifies to the machine-generated output thus triggering Rule 702; (2) circumstances in which parties introduce the output of basic scientific instruments not covered by Rule 702 or a new Rule 707; and (3) other machine-generated evidence that would be regulated by Rule 707. He queried whether adding a new Rule 707 would discourage lawyers from calling expert witnesses if they can admit machine-generated output under the new provision without them. The Reporter responded that a new Rule 707 would increase regulation of machine-generated output because a party who does not call an expert witness now to admit the evidence will rely only upon basic relevance under Rules 401 and 402.

The Chair then invited Committee members to share their preferences regarding development of a concrete amendment proposal regarding machine-generated evidence as opposed to working on a concept that could be kept waiting in the bullpen depending on problems arising in federal cases with respect to such evidence. Several Committee members opined that Article 7 should have a provision regulating machine-generated output and that development of a standard should remain on the Committee's agenda. One Committee member suggested that a Committee note describing the new provision could specifically state that the rule is not intended to alleviate the need to call an expert in appropriate cases to address Judge Bates' concern about discouraging use of expert witnesses. Ms. Shapiro agreed that the Committee should move forward with a proposal but cautioned that "basic scientific instruments'" and other software exempt from the provision would have to be defined. The Reporter suggested that examples of such basic scientific instruments and software could be included in a Committee note and that the definition of exempted instruments would require more work and thought.

The Chair then noted the Committee consensus to work up a proposal on deepfakes to hold for future publication, if necessary, and to develop a concrete proposal to advance through rulemaking regarding machine-generated evidence. He further noted the Committee consensus to eliminate any discussion in the Committee note about access to source code, suggesting that the issue of source code discovery could be referred to the Criminal and Civil Rules Committees for consideration.

Finally, the Reporter noted a proposal by Professor Andrea Roth to amend Rule 806 on pages 254-255 of the agenda materials to permit impeachment of machine-generated evidence through methods currently available to impeach hearsay declarants. The Reporter suggested that this proposed amendment was unnecessary, both because the methods for impeaching hearsay declarants do not all translate to machines and because Rules 402 and 403 are capable of admitting evidence necessary to undermine machine-generated evidence. Committee members agreed that an amendment to Rule 806 should not be pursued and voted to remove the proposal from the Committee's agenda going forward. The Reporter thanked Professor Roth for all her assistance to the Committee on the topic of machine-generated evidence, and particularly for her ideas on a new Rule 707.

IV. Potential New Federal Rule of Evidence Governing an Alleged Victim's Prior False Accusations

The Chair next explained that the Committee had been exploring the possibility of an amendment to the Federal Rules of Evidence to admit prior false accusations made by alleged victims. He recognized Academic Consultant, Professor Richter, to give a report on the Committee's consideration of the issue.

Professor Richter reminded the Committee that Professor Erin Murphy had recommended adoption of a new Federal Rule of Evidence 416 to admit prior false accusations made by alleged victims at a scholarly symposium hosted by the Committee during the Fall 2023 meeting and that the Committee had authorized further study of the issue. Professor Richter explained that she had drafted a memorandum regarding the admissibility of prior false accusations under the Federal Rules of Evidence for the Spring 2024 meeting, noting that such evidence is almost exclusively offered in sex offense prosecutions and that her previous memo on admissibility in federal court was included for the Committee's reference behind Tab 5b of the agenda materials. She explained that prior false accusations could be admitted through the Federal Rules of Evidence and under constitutional frameworks in federal court in compelling cases but acknowledged that the proponent of such evidence would have to chart a rather tortured path through the Federal Rules to admit it. Professor Richter explained that she had cautioned the Committee at the Spring 2024 meeting to examine the admissibility of such evidence in state and military courts, where the vast majority of sex offense cases are tried, before proceeding to consider a new Federal Rule of Evidence. Professor Richter explained that the memo behind Tab 5a of the agenda materials reflected her survey of state and military standards for admitting prior false accusations evidence.

Professor Richter summarized her findings that most jurisdictions permit defendants to offer prior false accusations evidence in appropriate circumstances. Professor Richter explained that almost all jurisdictions require the defense to prove that a victim's prior accusation was

made and that it was more likely than not false or "demonstrably false" before offering such evidence. She noted that a few jurisdictions require "clear and convincing evidence" of falsity and that a few allow the defense to present such evidence once it has shown evidence from which a reasonable jury could find falsity under Rule 104(b). Because state and military courts rigorously enforce the defense burden of proving falsity, Professor Richter explained that proffered prior false accusations are routinely excluded. She explained that courts reject defense evidence that the prior perpetrator has denied the allegations, that charges were not pursued, or that the prior alleged perpetrator was acquitted after charges were brought. Courts have rejected evidence that witnesses to the prior incident deny any sexual assault and even evidence that the victim recanted a prior accusation where she now contends that an assault occurred. In sum, while most jurisdictions authorize admission of prior false accusation evidence, they almost always exclude it.

Professor Richter further noted that the vast majority of state jurisdictions admit such evidence through general evidentiary provisions modeled on the Federal Rules of Evidence or pursuant to constitutional frameworks when they do permit its admission, and that only a handful of jurisdictions have a specialized evidentiary provision directed to prior false accusation evidence. She explained that the jurisdictions that do have special provisions for prior false accusation evidence include those provisions within their rape shield statutes or in their counterpart to Federal Rule 608(b) governing cross-examination with a witness's prior dishonest acts. No state has a free-standing evidence rule dedicated to prior false accusations evidence.

Professor Richter directed the Committee's attention to pages 284-286 of the agenda memo behind Tab 5a and drafting alternatives for a new federal evidentiary provision covering an alleged victim's prior false accusations based upon state treatment of such evidence. But she ultimately counseled against any proposal to add a false accusations provision to the Federal Rules of Evidence for several reasons. First, she emphasized that such evidence is proffered almost exclusively in sex offense prosecutions, which are overwhelmingly handled in state and military courts. She noted that only 2.2% of federal sentencings for 2023 involved sex offense cases, undermining any need for a federal provision to handle false accusation evidence, especially where existing standards are capable of admitting it in appropriate cases. She suggested that the states have well-developed standards for admitting such evidence and need no federal model to guide their admissibility determinations. Furthermore, she noted that the states had been processing prior false accusations evidence for many decades and were unlikely to adopt a new federal model. Finally, Professor Richter highlighted the unintended consequences that could flow from federal rulemaking targeted at prior false accusations evidence, including the risk of discouraging victims in sex offense cases from reporting or from participating in prosecutions, as well as the expenditure of federal resources to make routine pretrial determinations regarding admissibility. She emphasized that federal rulemaking around prior false accusations evidence would be unlikely to yield any corresponding benefit to defendants due to the high standards of proof required to admit such evidence.

The Chair then explained that there had been recent legislative activity relevant to the Committee's consideration of false accusations evidence and recognized Rules Law Clerk, Kyle Brinker, to provide a report. Mr. Brinker told the Committee that the "Rape Shield Enhancement Act of 2024" had been introduced the week before the meeting. The Act would require a report

from the Judicial Conference on Rule 412 and would limit inquiries into a victim's sexual history unless directly relevant to a case. It would further establish additional protections for alleged victims of sexual assault.

The Chair thanked Mr. Brinker for his report and solicited the views of Committee members regarding the amendment of the Federal Rules of Evidence to add a provision governing admissibility of a victim's prior false accusations. One Committee member stated that he agreed with the suggestion to remove the proposal from the agenda but noted that he appreciated the Committee's thorough research into the topic. The Reporter expressed his gratitude to Professor Erin Murphy for her excellent proposal, noting that it was a worthy topic for the Committee's study. The Federal Public Defender agreed that the Committee should not advance a proposal regarding prior false accusations but noted that the Committee could revisit the issue in the future should prosecution of sex offenses increase substantially in federal court due to the Supreme Court's *McGirt v. Oklahoma* decision. Another Committee member agreed that the Committee should not proceed with a rule on prior false accusations, noting that a specialized provision in the Federal Rules of Evidence might somehow suggest inaccurately that victim false accusations are an epidemic. The Chair agreed, also noting that a false accusations rule could be seen as inconsistent with the recently introduced legislation aimed at enhancing protections for victims. All agreed to remove prior false accusations from the Committee's agenda.

V. Amending Federal Rule of Evidence 404(b)

The Reporter next called the Committee's attention to Tab 6 of the agenda materials and a discussion of Rule 404(b). He reminded the Committee that Professor Hillel Bavli had recommended an amendment to Rule 404(b) to exclude evidence of other crimes, wrongs, or acts that depend upon inferences about propensity for their relevance at the symposium hosted by the Committee during its Fall 2023 meeting. The Reporter noted that the Committee had rejected the suggestion to explore amendments to Rule 404(b) at that time because the provision had been studied and amended in 2020 to add a new notice provision requiring articulation of the non-propensity reasoning supporting admissibility of other acts evidence. He explained that continuous tinkering with a rule through repeated amendments is to be discouraged and that the Committee wanted to wait to determine whether the 2020 notice amendment had a positive impact on Rule 404(b) rulings. The Reporter explained that Rule 404(b) was back on the Committee's agenda because he and Professor Bavli had conducted a case survey showing that federal courts continue to admit evidence through Rule 404(b) that depends for its relevance on inferences about a defendant's propensities notwithstanding the 2020 amendment to the notice requirement. The Reporter noted that the Committee had considered substantive amendments to Rule 404(b) when it proposed the amendment to the notice provision and that the cases studied at that time had also demonstrated that propensity-based evidence was being admitted through Rule 404(b). For these reasons, the Reporter suggested that the Committee should consider whether to propose an amendment to Rule 404(b) along the lines suggested on page 330 of the agenda materials to prohibit the admission of other acts evidence that depends upon propensity inferences.

One Committee member asked whether a better solution would be prosecutor education about proper use of other acts evidence. The Reporter replied that prosecutors are educated about the evidence they may seek to admit under existing law and that, where propensity evidence is commonly admitted under existing precedent, prosecutors are likely educated to utilize all such evidence consistent with that precedent. Therefore, prosecutorial education is unlikely to reduce the use of propensity evidence unless the federal courts stop admitting it. Ms. Shapiro explained that prosecutors were trained to articulate a "non-propensity" purpose for the evidence they were proffering under Rule 404(b) after the 2020 notice amendment took effect and that the expanded notice provision and training were designed to produce better Rule 404(b) decisions. She also noted a fundamental disagreement with the Reporter's suggestion that Rule 404(b) should prohibit *all* propensity inferences. She explained that other acts evidence may be admissible under Rule 404(b) even if it depends to some extent on propensity inferences so long as it is admitted for *another* purpose in the case – to show knowledge or motive, etc. She recalled the *Henthorn* case out of the Tenth Circuit in which the court approved evidence that the defendant had killed and made attempts to kill his wife on other occasions to demonstrate that he killed his wife on the occasion in question and that her death was not an accident. She noted that the prior attempts could show the defendant's propensity to kill his wife but that they were properly admitted because they also showed the absence of mistake or accident.

The Chair noted that Rule 404(b) evidence is commonly admitted in more typical drug cases where a defendant denies knowledge of drugs or the intent to distribute them. He explained that a defendant's other drug offenses arguably depend for their relevance on some propensity inference but that they are routinely admitted. He questioned how an amendment outlawing propensity inferences would affect such common cases. The Reporter explained that adding a reverse balancing test to Rule 404(b) to protect criminal defendants is the optimal fix for Rule 404(b) because it would not foreclose all reliance on propensity inferences but would require courts to decide that the probative value of a defendant's other crime, wrong, or act for a permitted purpose outweighs any prejudicial propensity use.

The Federal Public Defender suggested that the Committee should continue exploring amendments to Rule 404(b) at its Spring 2025 meeting. He opined that Professor Bavli is correct and that Rule 404(b) evidence is admitted improperly in far too many cases and that the proposed amendment could remedy the situation. He acknowledged that the Committee needed to consider whether there had been sufficient time since the 2020 amendment to justify renewed consideration of Rule 404(b). Still, he argued that the current proposal to amend the admissibility standard in Rule 404(b) would be distinct from the 2020 amendment that addressed only notice and further that approximately seven years would have passed since the prior amendment if the Committee were to propose a new Rule 404(b) amendment.

Ms. Shapiro pointed out that the Committee engaged in the exact same debate with respect to the 2020 amendment about the propriety of propensity inferences under Rule 404(b), considered substantive amendment proposals, and reached a compromise with the amendment to the notice requirement. She opined that the Rule 404(b) debate had ended in a good place not long ago and that, were the Committee to revive that debate, the Justice Department would take issue with several of Professor Bavli's characterizations of Rule 404(b) cases as wrongly decided. She noted that there would be a fundamental disagreement about the proper role of Rule 404(b).

Another Committee member also took issue with Professor Bavli's characterization of the percentage of cases decided incorrectly under Rule 404(b), arguing that most of the reported opinions ruled correctly on Rule 404(b). This Committee member urged the Committee to leave Rule 404(b) alone. The Federal Public Defender noted that reasonable minds might disagree about the extent of the problem with Rule 404(b) but that the cases clearly reveal that there is a problem that the Committee should consider. The Reporter suggested that there are some Rule 404(b) purposes that courts get wrong but that it would not make sense to waste time looking at Rule 404(b) again if the Committee could not potentially come to some consensus about a remedy. Ms. Shapiro replied that the Committee should not revisit Rule 404(b) again so soon after a recent amendment and that the Department would strongly oppose a proposal to alter the Rule 404(b) admissibility standard. Judge Bates agreed that it was very soon to reconsider Rule 404(b) where the notice amendment took effect less than four years ago.

Another Committee member agreed that the Committee should not keep Rule 404(b) on the agenda if there was no chance of reaching consensus about amendment but noted concerns that other acts evidence should not be admitted in the government's case in chief and should be used only in rebuttal if appropriate. The Chair explained that Rule 404(b) should be taken off the Committee's formal agenda where there was no groundswell of support for revisiting the provision so soon. He noted that the Reporter would certainly bring the issue back up if the federal cases were to reveal concerns about Rule 404(b) rulings going forward. The Federal Public Defender objected to removing Rule 404(b) from the agenda, but a majority of the Committee agreed to remove it for the time being.

VI. Rule 702 Suggestion Regarding Peer Review

The Chair next directed the Committee's attention to Tab 7 of the agenda materials and a proposal from two lawyers to amend Rule 702 to address specifically in rule text the relevance of peer review to a court's *Daubert* analysis. The Reporter explained that the two lawyers expressed concern that peer review should not be important to the Rule 702 analysis, particularly because many peer-reviewed studies cannot be replicated. Although the lawyers did not propose a concrete amendment to address this concern, they suggested that Rule 702 should be amended to reflect the problems with peer review.

The Reporter opined that it would not be prudent to amend Rule 702 to address peer review specifically for a few reasons. First, he noted that Rule 702 had been amended effective December 1, 2023, and apropos of the Committee's Rule 404(b) discussion, it would be far too soon to tinker with Rule 702 again. Furthermore, he offered that peer review is simply one of many *Daubert* factors that courts may consider and that it would be anomalous to include a specific reference to only one of many factors in rule text. Finally, he noted that courts have ample discretion to evaluate which of the *Daubert* factors they utilize in a given case and that courts can and have taken various views of peer review. In short, the Reporter explained that he did not see any problem with the peer review factor that would justify a Rule 702 amendment. The Committee unanimously rejected any proposal to amend Rule 702 to address peer review.

VII. Supreme Court Updates

The Chair explained that the next two items on the agenda were updates on recent Supreme Court opinions relevant to the Federal Rules of Evidence. He recognized Professor Richter and the Reporter to give updates on *Diaz v. United States* and on *Smith v. Arizona*.

A. Diaz v. United States

Professor Richter explained that the Supreme Court had interpreted Federal Rule of Evidence 704(b) in *Diaz v. United States*, 602 S. Ct. 1727 (June 20, 2024). She reminded that Committee that Rule 704(b) prohibits expert opinion testimony in a criminal case "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense" because those matters are "for the trier of fact alone."

She explained that *Diaz* was a prosecution of a defendant for transporting illegal drugs into the United States after the defendant was arrested driving a vehicle with over 54 pounds of methamphetamine hidden in door and trunk panels across the border. To secure a conviction, the prosecution had to prove that the defendant "knowingly" transported the drugs. The defendant asserted a "blind mule" defense, arguing that she did not know the drugs were hidden in her vehicle. Over a defense Rule 704(b) objection, the prosecution was permitted to offer expert opinion testimony concerning drug distribution networks, explaining the risks to the operation and the contraband with the use of blind mules. The expert was permitted to testify that "most drug couriers know" what they are transporting. Following her conviction, Diaz appealed arguing that the expert erroneously testified about whether she had the requisite state of mind required to convict. The Ninth Circuit found no Rule 704(b) error and Diaz sought a writ of certiorari in the Supreme Court, which was granted.

Professor Richter explained that the majority affirmed Diaz's conviction, finding no Rule 704(b) error. The majority interpreted Rule 704(b) narrowly to prohibit only expert testimony that draws the final inference regarding a defendant's state of mind, explaining that testimony that "Diaz knew" what she was transporting or that "all drug couriers know" what they are transporting would violate the Rule 704(b) prohibition. Where the prosecution expert testified only that "most" drug couriers know what they are carrying and acknowledged on cross-examination that some drug couriers are blind mules who do not know what they are transporting, the expert left the final inference about Diaz's state of mind for the jury to draw and the testimony did not violate Rule 704(b). Professor Richter explained that Justice Jackson wrote a concurrence to emphasize that Rule 704(b) should be interpreted narrowly because it applies equally to the prosecution and defense and that a broader prohibition could foreclose important expert opinion testimony offered by the defense. She noted that Diaz had offered an automotive expert who testified that occupants of her vehicle "would not know" drugs were hidden inside that could also be excluded by a broader interpretation of the Rule 704(b) prohibition. Justice Jackson also emphasized that Rules 402, 403, and 702 operate to limit improvident expert opinion testimony without a broad exclusionary interpretation of Rule 704(b). Professor Richter explained that Justice Gorsuch was joined by Justices Kagan and Sotomayor in a vigorous dissent. Justice Gorsuch interpreted Rule 704(b) as foreclosing expert testimony "regarding" or

"in relation to" the defendant's *mens rea* and argued that the government's testimony that "most drug couriers know" ran afoul of that prohibition.

Notwithstanding the conflict on the Court regarding the proper interpretation of Rule 704(b), Professor Richter suggested that there was no need for an amendment to the provision. She explained that the majority's narrow interpretation of Rule 704(b) was consistent with the majority of Circuit precedent and that Rules 402, 403, and 702 can regulate expert opinion testimony without expanding the scope of Rule 704(b). She noted that a more expansive interpretation would affect criminal defendants, as well as prosecutors, as noted by Justice Jackson. Finally, Professor Richter explained that it would be very difficult to amend Rule 704(b) in a manner that would foreclose the prosecution testimony in *Diaz* that would not also capture and exclude much helpful testimony about a criminal defendant's mental state, symptoms, and diagnoses that have long been well-accepted.

The Chair agreed that Rules 402, 403, and 702 regulate expert opinion testimony well without an expansive interpretation of Rule 704(b). The Reporter also agreed that there was no need to amend Rule 704(b), opining that the majority opinion offered a mild improvement for criminal defendants with respect to the provision. The Federal Public Defender agreed that there was no need to consider an amendment to Rule 704(b) in response to the Supreme Court's interpretation. He opined that Justice Jackson's suggestion that Rule 704(b) affects the prosecution and defense equally may be unduly optimistic and that the Court's narrow interpretation of Rule 704(b) may ultimately play to the prosecution's advantage. But he concluded that the Committee could revisit Rule 704(b) if the cases started to show government overreach. The Chair noted the Committee's consensus that there is no current need to amend Rule 704(b) and explained that the issue would be removed from the Committee's agenda.

B. Smith v. Arizona

The Reporter next discussed *Smith v. Arizona*, explaining that the prosecution in a state drug case offered the expert opinion testimony of a substitute forensic expert after the original forensic analyst who tested the contraband confiscated from the defendant became unavailable. The testifying expert based his opinion that the defendant possessed illegal drugs exclusively on the notes and report made by the unavailable testing forensic analyst. The testifying expert relayed to the jury in detail the contents of the unavailable analyst's notes and report as the "basis" for his opinion. The defendant objected that the revelation of this testimonial hearsay to the jury violated his Sixth Amendment right to confront his accusers. The prosecution argued that the defendant's confrontation rights were not violated because the expert revealed the underlying notes and report only as "basis" for the testifying expert's opinion and not for their truth.

The Supreme Court disagreed. The majority assumed that the notes and report constituted testimonial hearsay and examined whether revealing them to the jury only as "basis" avoids a confrontation violation. The Court held that testimonial hearsay revealed to the jury as basis for the expert's opinion does violate the defendant's Sixth Amendment rights when the underlying information only supports the testifying expert's opinion if it is true. In that circumstance, the

"basis" information is offered for its truth and violates the defendant's right to confront the unavailable analyst.

The Reporter explained that this holding could have an impact on Federal Rule of Evidence 703 depending upon how broadly it is interpreted. He explained that if the opinion in *Smith v. Arizona* is interpreted only as foreclosing the *revelation* of inadmissible basis information by an expert, it is completely consistent with Rule 703 because that Rule also prohibits revelation of inadmissible basis information by a testifying expert without satisfaction of an onerous reverse balancing test that requires the probative value of the inadmissible information to show the basis for the expert's opinion to substantially outweigh the prejudicial risk that it will be used substantively. Interpreted in that way, both the Supreme Court and Rule 703 prohibit disclosure to the jury of inadmissible basis information. If, however, *Smith v. Arizona* is read to prohibit a testifying expert from *relying* on inadmissible testimonial hearsay (even without disclosure to the jury), that interpretation would create a conflict with Rule 703 because Rule 703 specifically authorizes expert witnesses to rely upon inadmissible basis information in forming trial opinions so long as the information is of a type upon which other experts in the field would reasonably rely. The Reporter noted that this interpretation would have a huge impact on federal cases because experts on drug distribution networks or gang operation frequently rely upon inadmissible, testimonial hearsay to develop trial opinions.

The Reporter explained that, while the Supreme Court's opinion was not crystal clear with respect to the disclosure/reliance distinction, it could be fairly read as foreclosing only disclosure of inadmissible basis information and as consistent with Rule 703. In that case, the Committee would not need to propose any amendment to Rule 703 to conform the Rule to the holding. He noted, however, that Circuit opinions subsequent to *Smith v. Arizona* appeared to interpret the holding more broadly to prohibit expert reliance of testimonial hearsay – even if not disclosed to the jury during testimony. The Reporter suggested that the Committee should monitor the cases regarding expert reliance on inadmissible basis information and should revisit the need to amend Rule 703 if the appellate opinions start to foreclose reliance on inadmissible information and conflict with the Rule.

Ms. Shapiro informed the Committee that the United States had filed an amicus brief in *Smith* supporting neither party but conceding that the prosecution had violated the defendant's Sixth Amendment rights in the case. Based upon the colloquy in the oral argument, Ms. Shapiro explained that it was clear that the Court's concern was the disclosure of the inadmissible basis information and not any expert reliance on inadmissible information. She noted that the Department of Justice takes the position that government experts can rely on testimonial hearsay so long as they do not disclose it to the jury at trial. She explained that the Department takes the position that *Smith* forecloses disclosure only and not reliance and that Rule 703 is consistent with the holding. The Federal Public Defender noted disagreement with the Department's interpretation of *Smith*. The Reporter explained that he would monitor the federal cases interpreting *Smith* and would bring the issue back to the Committee if a conflict with Rule 703 develops. The Chair thanked the Reporter and suggested that there was no need to bring the issue back to the Committee until a conflict with Rule 703 does materialize.

VIII. Self-Authentication of the Records of Federally Recognized Indian Tribes

The Reporter stated that the Committee had received a recommendation from Judge Frizzell from the Northern District of Oklahoma just two weeks before the meeting to amend Federal Rule of Evidence 902(1) to add the records of federally recognized Indian Tribes to those that may be self-authenticated. The Reporter noted problems with authenticating the records of Indian tribes in two recent circuit court cases that found the purported authentication to be insufficient and reversed the convictions in those cases. Those cases are *United States v. Harper,* 2024 WL 4376127 (10th Cir.) and *United States v. Wood,* 109 F.4th 1253 (10th Cir 2024)

The Reporter explained that the Committee had considered this very issue previously and had declined to add federally recognized tribes to Rule 902(1). He noted that the Supreme Court's decision in *McGirt v. Oklahoma* was an intervening development that requires federal prosecutors in many cases to prove that a defendant has Indian blood and is a member of an Indian tribe to acquire criminal jurisdiction and that this development could impact the Committee's interest in amending Rule 902. The Reporter opined that the problems in the two recent cases resulted from the government's failure to properly authenticate business records that could easily be resolved under the existing rules.

The Federal Public Defender informed the Committee that he had conferred with the offices that had handled the problematic cases and that those offices reported that there was no defect within the Federal Rules of Evidence that caused jurisdictional issues and that the problems that arose in those cases could easily have been remedied by proper prosecutorial handling of the evidence. Accordingly, he suggested there is no problem with the Rules that needs to be remedied. The Reporter agreed and added that it might be problematic to add the records of all federally recognized tribes to Rule 902(1) because some tribes may not have record-keeping practices akin to other governmental entities recognized by the Rule. The Chair asked whether the records of small towns that are currently self-authenticating under Rule 902(1) might present similar concerns of inconsistent reliability. The Reporter replied that if such reliability issues exist, they are not litigated because small locality records are automatically authenticated without a reliability inquiry due to their inclusion in Rule 902(1).

Another Committee member queried whether the Committee has the power to declare records self-authenticating that have jurisdictional consequences, asking whether the question of authenticity and reliability is a political question beyond the Committee's ken. Another participant explained that there is a much wider variation in the record-keeping of Indian tribes than there is among state and local governments. He noted that the tribes admit the inability to ensure consistent and reliable record-keeping in many cases. He suggested that the jurisdictional problem in federal prosecutions is very easy to resolve using existing authentication standards and that it would be problematic for the Committee to recognize the reliability of tribal records that the tribes concede they do not possess.

The Chair queried whether the authentication problem identified by Judge Frizzell was a Federal Rules of Evidence problem or a prosecutor problem. Ms. Shapiro responded that she could not speak to what happened in the two specific cases but that she had conferred with the Office of Tribal Justice on this issue and that the Office explained that a number of federally

recognized tribes issue sophisticated identification cards that are recognized as travel documents for crossing the Canadian and Mexican borders. She explained that adding federally recognized tribes to Rule 902(1) could serve an important dignity interest. Because the issue was added to the Committee's agenda only two weeks before the meeting, Ms. Shapiro explained that the Department was interested in keeping the proposal on the Committee's agenda to allow for more in-depth review of the issue. The Reporter noted that an identification card that was sufficient for border crossing would be very easy to authenticate under Rule 901. He asked whether the Department of Justice wanted to submit a memo to the Committee for the Spring 2025 meeting regarding tribal record-keeping practices and variations among tribes.

The Chair noted there were two issues for consideration: (1) whether an amendment would open a can of worms due to the record-keeping variation among federally recognized Indian tribes and (2) whether a proposal to amend Rule 902(1) represents a solution in search of a problem due to the ease of authentication under evidentiary provisions already in existence. The Reporter suggested the Committee would benefit from a memo on both issues from the Department of Justice, as well as from Federal Public Defenders. The Federal Public Defender reiterated that the variation in record-keeping among federally recognized tribes is enormous and stated that the Federal Public Defenders would welcome the opportunity to submit a memorandum on the issue.

The Chair closed the discussion by recognizing that the ball is in the Department of Justice's court on the issue of amending Rule 902(1). He suggested that the Committee consider a submission from the Department at its Spring 2025 meeting. If the Department recommends no amendment at that time, the Chair noted the discussion of the issue would be brief. If, however, the Department recommends proceeding with an amendment, there would be issues for the Committee to sort through. The Chair suggested that the Committee could turn to the Federal Public Defenders for their input at or after the Spring 2025 meeting if the Department recommends action that merits further inquiry.

IX. Closing Matters

The Chair closed the meeting by thanking everyone for attending and for their helpful input. He thanked the Rules Committee staff for their support and thanked NYU Law for hosting the meeting. The Chair informed the Committee that the next meeting will be held on May 2, 2025, in Washington DC.

Respectfully submitted,
Liesa L. Richter

TAB 4

TAB 4A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Allison Eid, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 16, 2024

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, October 9, 2024, in Washington, DC. The draft minutes from the meeting accompany this report.

The Advisory Committee has no action items for the January 2025 meeting.

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed

amendments to Form 4, the form used for applications to proceed in forma pauperis, were published for public comment in August 2024. The text of those proposed amendments, with Committee Notes, are included in the 2024 Preliminary Draft of Proposed Amendments found at this link. The Advisory Committee expects to present both proposed amendments (changed if appropriate in light of public comment) for final approval at the June 2025 meeting. (Part II of this report.)

Other matters under active consideration (Part III of this report) are:

- creating a rule dealing with intervention on appeal;
- addressing the "incurably premature" doctrine regarding review of agency action under Rule 15;
- addressing issues concerning reopening of the time to appeal under Rule 4(a)(6);
- amending Rule 8 to provide limits on administrative stays;
- providing greater protection for Social Security numbers in court filings; and
- expanding electronic filing by self-represented litigants.

The Advisory Committee also considered several items and removed them from the Committee's agenda (Part IV of this report):

- a belated comment on Rule 39 that was docketed as a suggestion;
- a new suggestion prohibiting the use of all caps for the names of persons and requiring the use of proper diacritical marks;
- a new suggestion calling for common local rules to be moved into the national rules;
- a new suggestion that similar rules across the various rule sets be moved to a set of Federal Common Rules;
- a new suggestion that page equivalents for words be standardized and length limits simplified and
- a new suggestion that Rule 29 be amended to provide guidance about standards of review.

II. Items Published for Public Comment

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The proposed amendments to Rule 29 address two major areas.

First, they address disclosures by amici. The Advisory Committee has been working on this issue for years and has received considerable feedback from the Standing Committee, feedback that has been incorporated into the proposal published for public comment.

The Advisory Committee has received several public comments since publication, in addition to ones received before the comment period opened and docketed as new suggestions. It expects still more before the comment period ends on February 17, 2025. It has also received requests to testify at hearings scheduled for early 2025.

Because the Advisory Committee has been considering disclosures by amici for many years and will receive additional public comment before its spring meeting, it decided to await full public comment before discussing this issue further.

Second, the proposed amendments address an issue that arose later in the process: whether to change the requirements for filing an amicus brief. Current Rule 29(a)(2) permits a nongovernmental party to file an amicus brief during a court's initial consideration of a case either by making a motion or by obtaining the consent of the parties. Current Rule 29(b)(2) requires a motion at the rehearing stage.

The proposal published for public comment would eliminate the consent option from Rule 29(a)(2), requiring a motion during a court's initial consideration of the case. There was substantial concern about this proposal at the Standing Committee meeting in June of 2024, particularly about the additional work for lawyers and courts on motions that are not currently required.

Representatives from several circuits (Second, Ninth, and Tenth) at the Advisory Committee meeting voiced support for requiring a motion at the initial hearing stage. The major concern is with the interaction of amicus filing on consent and recusals. The filing of an amicus brief on consent can lead the clerk's office, operating under a computer program that checks for recusals, to block a case from being assigned to a judge before the case is assigned to a panel. That means that a judge is stricken from a case at the outset, as a result of the consent of the parties. By requiring a motion, a judge would decide whether to recuse or to strike the brief—as opposed to the computer simply not assigning the judge to the case in the first

place. The Court of Appeals for the Ninth Circuit is considering a local rule that would eliminate the consent option; its attorney advisory group is supportive.

This problem may not arise in circuits where cases are assigned to panels earlier in the process. The Advisory Committee is surveying the circuits. One approach would be a national rule with the ability of some circuits to opt out.

At its April 2025 meeting, the Advisory Committee will consider the public comments. It expects to seek final approval, taking into account public comment, at the June 2025 meeting of the Standing Committee.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The proposed amendment to Form 4 would make that form—which applies when seeking in forma pauperis status—simpler and less intrusive.

At the time of the Advisory Committee's meeting in October, it had received only one comment, a favorable comment. Since then, it has received requests to testify about the proposed amendments to this Form.

The Advisory Committee decided to await full public comment before discussing this issue further.

At its April 2025 meeting, the Advisory Committee will consider the public comments. It expects to seek final approval, taking into account public comment, at the June 2025 meeting of the Standing Committee.

III. Other Matters Under Active Consideration

A. Intervention on Appeal (22-AP-G; 23-AP-C)

The Advisory Committee is continuing its work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal, fearing that creating such a new rule would invite more motions to intervene on appeal.

The Advisory Committee is exploring both whether there is a sufficient problem to warrant rulemaking and whether it is possible to create a useful rule. At this point, it appears that there is little problem in most agency cases that go directly to the courts of appeals. Intervention on appeal is common there, particularly by a

party who appeared before the agency and prevailed there. Similarly, there does not appear to be a problem in cases presenting constitutional challenges and the government entity whose action is challenged seeks to intervene, or where the interest of a foreign sovereign or tribe becomes clear for the first time on appeal.

Problems are more evident in high profile cases where an ideological plaintiff or a state files a case and later there is a change in the administration of the government (President or Governor) whose law or policy is challenged. Similarly, there can be problems in cases involving universal remedies, that is, remedies that grant relief not only to the parties but also for the benefit of nonparties. In addition, some circuit judges (so far, in separate opinions rather than majority opinions) appear to view Civil Rule 24 as applying to intervention on appeal more directly, as opposed to the traditional view that intervention on appeal is available only in exceptional cases for imperative reasons.

Developments in these areas may make it more or less important to create a new rule governing intervention on appeal. To the extent that non-party remedies become less prevalent, the need for a rule may be reduced. If the view that Civil Rule 24 governs more directly prevails in a circuit, the need for a new rule may be great.

The Federal Judicial Center is doing research to support this project. Its research reaches well beyond high profile cases and reported decisions.

The Advisory Committee may decide to leave agency cases, or agency cases that go directly to the courts of appeals, to current practice rather than address them with a new rule. It may be able to craft a rule that provides guidance, limits the range of debate, puts the right factors on the table, structures the analysis, requires timeliness, and makes clear that intervention on appeal is rare.

There seems to be a consensus that it would be better if there had been an appellate rule governing intervention on appeal for decades. But the question remains whether the benefits of adding one now are outweighed by the risk of inviting more motions to intervene on appeal.

B. "Incurably Premature"—Rule 15 (24-AP-G)

The Advisory Committee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine, which governs in the D.C. Circuit and maybe in others, holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is

dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The suggestion is to do for Rule 15 what was done for Rule 4.

A similar suggestion was considered in the wake of the 1993 amendment to Rule 4. But it was dropped due to the strong opposition of the D.C. circuit judges who were active at the time. Technology and administrative changes might reduce the concerns that motivated the D.C. circuit judges in the past. In addition, this is not just a D.C. Circuit issue.

The Advisory Committee is seeking a sense of the current views of the D.C. Circuit, as well as the view of others, before proceeding down this path again.

C. Reopening Time to Appeal—Rule 4 (24-AP-M)

The Advisory Committee has begun to consider a suggestion by Chief Judge Sutton addressing Rule 4(a)(6), which permits a district court to reopen the time to appeal in limited circumstances. In *Winters v. Taskila*, 88 F.4th 665 (6th Cir. 2023), a habeas petitioner did not receive notice of the district court's decision denying relief until long after the time to appeal. The court of appeals held that the district court properly treated the notice of appeal as a motion to reopen the time to appeal and granted that motion. There was no need to file an additional notice of appeal because the original notice of appeal ripened once the motion to reopen the time to appeal was granted. In addition, the notice of appeal was construed as a request for a certificate of appealability.

Chief Judge Sutton noted that one could fairly wonder about allowing a single two-sentence document to be a notice of appeal, a motion for an extension of time, a motion to reopen, and a request for a certificate of appealability. He pointed out the lack of agreement in the courts of appeals on these issues, and suggested the Advisory Committee take a look.

Later, the Court of Appeals for the Fourth Circuit insisted that an appellant must file a notice of appeal after a motion to reopen the time to appeal is granted—and cannot rely on an earlier notice of appeal that was treated as a motion to reopen. *Parrish v. United States*, No. 20-1766, 2024 WL 1736340 (4th Cir. Apr. 23, 2024). Judge Gregory, joined by three other judges, dissented from rehearing en banc, and urged the Advisory Committee to provide guidance.

D. Administrative Stays—Rule 8 (24-AP-L)

The Advisory Committee has begun to consider a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. Several justices of the Supreme Court have noted problems with the use of administrative stays. A rule could make clear the purpose of administrative stays and perhaps limit their length, by analogy to the way Civil Rule 65 treats temporary restraining orders.

E. Security Numbers in Court Filings—Rule 25 (22-AP-E)

The Advisory Committee defers to Mr. Byron for the update regarding the joint project dealing with full redaction of social security numbers and other privacy matters, but adds the following:

Because Appellate Rule 25 incorporates the other rules, it may not be necessary to amend the Appellate Rules. On the other hand, if there are few if any appellate cases in which it would be necessary for a publicly filed brief or appendix to include a social security number, perhaps the Appellate Rules should broadly require full redaction.

In addition, some members of the Advisory Committee voiced concern that we not wait for problems to develop before acting to protect information such as a date of birth and personal phone numbers and before reconsidering the exemption for court records.

F. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for the update regarding the joint project dealing with electronic filing and service by unrepresented parties.

IV. Items Removed from the Advisory Committee Agenda

A. Belated Comment on Rule 39 (24-AP-F)

The Advisory Committee received a belated comment on the proposed amendment to Rule 39, dealing with costs. The Advisory Committee considered this comment when it was received, and no member sought to reopen discussion of Rule 39. It was, however, docketed as a new suggestion and the Advisory Committee has voted to formally remove the suggestion from the agenda.

B. Correct Case and Diacritics (24-AP-H)

The Advisory Committee considered a new suggestion from Sai, who suggested that filings avoid using all caps for the names of persons and that proper diacritics be used. Sai's approach appears to be the better approach, but the Advisory Committee did not want to add such a new requirement that would give the clerk's office one more task in bouncing briefs.

The Advisory Committee, without dissent, removed this item from its agenda.

C. Widespread Local Rules (23-AP-I)

The Advisory Committee considered a new suggestion from Sai, who suggested that many local rules are universal or nearly so and could usefully be moved into the national rules. Members thought that this undertaking would be a lot of work and did not see a real problem that needed to be solved here.

The Advisory Committee, without dissent, removed this item from its agenda.

D. Federal Common Rules (23-AP-J)

The Advisory Committee considered a new suggestion from Sai, who noted that the various rule sets have similar provisions and suggested that such provisions be moved to a set of Federal Common Rules. Instead of coordinating any changes to such provisions across the various rule sets, they could be done in one place. The individual rule sets could provide for differences from the Common Rules where appropriate. If starting from scratch, there is much to be said for such an approach. But it would be a massive undertaking, and there is no particular problem requiring a solution.

The Advisory Committee, without dissent, removed this item from its agenda.

E. Standardizing Page Equivalents for Word Limits (23-AP-K)

The Advisory Committee considered a new suggestion from Sai, who noted that the Federal Rules of Appellate Procedure do not use a uniform words-to-page ratio in setting length limits. The reason for the disparity is historical: in setting these limits, the Advisory Committee selected a 260 word per page ratio as the most accurate ratio, but it chose a 30-page limit for principal briefs on the merits of an appeal as a safe harbor (which results in a 433 word per page ratio) for those without access to word processing software.

Other simplifications, such as deleting references to monospace fonts and lines of text or even requiring all filers to use word limits, might be possible. But the Advisory Committee did not see a sufficient real-world problem worth fixing.

The Advisory Committee, without dissent, removed this item from its agenda.

F. Standards of Review (24-AP-E)

The Advisory Committee considered a new suggestion from Jonathan Cohen that Rule 29, which requires a statement of the standard of review, be amended to provide guidance about those standards. Members saw no identified problem that called for a rules amendment and expressed concern that such an amendment could be distracting and invite lots of discussion.

The Advisory Committee, without dissent, removed this item from its agenda.

TAB 4B

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 9, 2024

Washington, DC

Judge Allison Eid, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 9, 2024, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on the Appellate Rules were present in person: George Hicks, Professor Bert Huang, Judge Carl J. Nichols, Judge Sidney Thomas, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Christopher Wolpert, Clerk of Court Representative; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Shelly Cox, Management Analyst, RCS; Kyle Brinker, Rules Law Clerk, RCS; Rakita Johnson, Administrative Analyst, RCS; Tim Reagan, Federal Judicial Center; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure, attended via Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and noted that she was excited and honored to be chairing the committee. She suggested that everyone keep in their thoughts those dealing with the impact of the hurricane. She asked those participating in the meeting to introduce themselves, and welcomed everyone, including members of the public.

Mr. Byron called attention to the rules tracking chart and noted that the amendments to Rules 35 and 40 are scheduled to go into effect this year, and that the amendments to Rules 6 and 39 have been sent to the Supreme Court. (Agenda book

page 22). These amendments have been sent to Congress for review and include the substantial revisions of Rules 35 and 40 that this Committee put a lot of work into.

Mr. Brinker referred to the pending legislation chart and noted that there is no recent Congressional action regarding the Federal Rules of Appellate Procedure. (Agenda book page 29).

Mr. Reagan described the FJC's report to the rules committees as explaining what the FJC is doing so that the committees know what it can do and what the committee can ask it to do. The report also contains information about educational activity by the FJC, because one often hears at meetings of the rules committee that education rather than a rule amendment is the proper response to a problem. (Agenda book page 35).

Judge Eid noted the draft minutes of the meeting of the Standing Committee. (Agenda book page 45). The proposed amendments to Rules 6 and 39 were approved, with very minor tweaks. There was also discussion of the pending amicus proposal, which will be taken up later in this meeting.

II. Approval of the Minutes

The reporter noted two typographical corrections to the minutes of the April 10, 2024, Advisory Committee meeting. (Agenda book page 97). "Team" should be Teams" on page 97 and "undated" should be "updated" on page 98. With these two corrections, the minutes were approved without dissent.

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for self-represented parties. (Agenda book page 117). She noted that there had been a very good discussion at the Bankruptcy Rules meeting; perhaps this group can help with some of the concerns.

The working group has two big ideas. The first is that since filings made by non-electronic filers is uploaded by the clerk's office, triggering a notice to electronic filers, there does not seem to be a need to require the non-electronic filer to make copies and mail them to other parties. The second involves making electronic filing more available to self-represented parties.

The first is reflected in a sketch of a possible amendment to Civil Rule 5. It could be adapted to other rule sets, including Appellate Rule 25. In accordance with a suggestion by Ed Hartnett, the sketch flips the order in current Civil Rule 5, making service pursuant to electronic filing primary, and then listing the other alternatives. It also adds a provision allowing service by email to the address that the court uses for Notices of Filing. Such service by email is conditioned on the sender designating

in advance the email address from which service will be made, enabling the receiver to know that the email is not spam and should not be filtered out.

The second is also reflected in a sketch of Civil Rule 5 that would flip the presumption that a self-represented litigant may not file electronically to a presumption that a self-represented litigant may file electronically. A court's ability to bar self-represented litigants from using the court's electronic filing system would be preserved, but a local rule or general court order doing so would have to either allow reasonable exceptions or allow the use of some other electronic method of filing. There are a wide range of views regarding this second proposal, which is less controversial in this committee, because the courts of appeals have been in the forefront of allowing CM/ECF access.

Members of the Bankruptcy Rules Committee support the idea of access and alleviating unnecessary burdens, but they have some resistance and are concerned about having sufficient safeguards. The full sketch may be too adventurous; perhaps simply flipping the presumption is the place to start.

One possible problem with the service aspect of the proposal is if there is more than one self-represented party in a case. How does a self-represented party know that there is another self-represented party who needs to be served outside of the court's electronic system? When we raised the issue earlier, the district court clerks thought that this was just not a real problem because it would be an issue in so few cases. But in bankruptcy, there may well be multiple self-represented creditors. Is there a technical fix to this problem? Is it a problem only in bankruptcy cases?

Judge Eid invited suggested solutions.

Mr. Wolpert stated that in the Tenth Circuit, a pro se litigant is required to file a consent to electronic service. That goes on the docket with the litigant's email address, so it is clear who has and who has not consented. He understands that things may be different in bankruptcy, but that the additional effort may be worth it compared to the benefit of not having to chase down service issues.

A judge member added that it hasn't been an issue allowing pro se litigants to file in the court of appeals but recognized that it may be different in bankruptcy.

Mr. Wolpert noted that he had some concerns about reasonable conditions, and added that the Tenth Circuit local rules make clear that electronic service is not for case initiating documents, such as those filed under Rules 5, 15, and 21. Professor Struve explained that the point of the "reasonable conditions" provision was to deal with districts that might say, "No, never," and prompt them to do something. Mr. Wolpert replied that this is a wonderful initiative and that the benefits will outweigh the potential for problems.

A judge member asked if anyone was proposing requiring everyone to file electronically, unless allowed not to file electronically. That would solve the notice issue. There is a risk of abuse, but that can be dealt with on an ad hoc basis with individual litigants. Professor Struve stated that she can imagine that world someday, but that we aren't there yet. For many people, their only access to the internet is via a smartphone. Trying to deal with documents on a phone is a recipe for things going disastrously wrong. Such a proposal could cause access problems.

A different judge member added that one kind of reasonable restriction is to limit access to the litigant's own case. That is especially important for prisoners, who may try to learn about cooperating witnesses. A mandate would not work for them. Barring case initiating documents is another reasonable restriction, but case initiation can be done via a form on a website, thereby creating legible filings.

Mr. Wolpert noted that electronic filing is not a problem for appellate courts and that it is nothing but positive. With regard to service by litigants using the email address used by the court, he added that he didn't see a need for a provision requiring the designation for a sending email address. It should be on lawyers to manage their spam filters, just as they have to deal with junk mail.

Professor Struve invited any other input, including any drafting particulars, via email.

Mr. Byron presented an update concerning privacy matters. (Agenda book page 131). The reporters' working group has been considering the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. That proposal was not immediately acted upon so that the working group could consider a more general review of privacy concerns across all four sets of rules.

The working group considered a variety of potential issues—including ambiguity in the existing exemptions, the scope of the existing waiver provision, the possible expansion of protected information subject to redaction, and the possible addition of other categories of information to be protected—but did not identify a real-world problem demonstrating a need for amendment. It therefore recommends not addressing these additional issues at this time.

Mr. Freeman asked what would be a demonstrated need in this area, a data breach? Mr. Byron responded that the general approach is to look for real world problems that a rule amendment can solve, but he acknowledged that a different approach might be appropriate here: taking a prophylactic step to protect personal information. Mr. Freeman suggested that dates of birth, for example, might be protected.

A liaison member agreed with Mr. Freeman. With the ability to scrape information and attack people for filing, it may be especially important to consider the exemption for court records. Mr. Freeman added, for example, that one court of appeals that requires personal phone numbers on oral argument forms does not make those numbers publicly available.

Professor Struve presented the report of a joint subcommittee on attorney admission. (Agenda book page 140). This joint subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees, and has been considering a suggestion to make it easier to become a member of a district court's bar. A major issue involves districts that require admission to the state bar where the district court is located—especially if that state requires lawyers admitted elsewhere to take the local bar exam. This is not an item for the Appellate Rules Committee, because Appellate Rule 46 makes an attorney eligible for admission to the bar of a court of appeals if the attorney is admitted in any state. Other committees have discussed this issue, including whether admission to the bar of a district court is within the scope of the Rules Enabling Act.

This committee might have experience with Appellate Rule 46, including problems, that would be relevant. A judge member noted that he has chaired the grievance committee in the Second Circuit and that it is very active, with a central staff, an attorney's committee for factfinding, hearings, and reports, and close cooperation with the state bars.

A different judge member noted in the Ninth Circuit they have a different process and are hampered by some state bars. District courts would not want such changes. Pro hac vice lawyers can be a problem, and referrals to bars outside the state are not very effective. Professor Struve noted that it is frequently said that it is a very different world in the district courts than in the courts of appeals.

Mr. Wolpert stated that Rule 46 works fine. When problems arise, it is important to remember that Rule 46 sets forth eligibility requirements but does not require admission. For example, someone was admitted to a tribal court, used that to become in-house in Wisconsin, and used that (in turn) to be admitted to the Eastern District of Wisconsin, but had never taken a bar exam. The Court of Appeals for the Tenth Circuit denied admission.

IV. Discussion of Matters Published for Public Comment

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The Reporter presented the report of the amicus subcommittee. (Agenda book page 170). Proposed amendments to Rule 29 were published for public comment. (Agenda book page 173).

The proposed amendments address two major areas.

First, they address disclosures by amici. The committee has been working on this issue for years. It has received considerable feedback from the Standing Committee that has been incorporated into the proposal published for public comment. As of the meeting of the subcommittee, we had received two comments (in addition to ones received before the comment period opened and docketed as new suggestions). Since then, more have come in. We expect still more before the comment period ends on February 17, 2025. We also expect that there will be people who wish to testify at the hearing scheduled for January and February of 2025.

Second, the proposed amendments address an issue that arose later in the process, whether to change the requirements for filing an amicus brief. Current Rule 29(a)(2) permits a nongovernmental party to file an amicus brief during a court's initial consideration of a case either by making a motion or by obtaining the consent of the parties. Current Rule 29(b)(2) requires a motion at the rehearing stage.

The proposal published for public comment would eliminate the consent option from Rule 29(a)(2), requiring a motion during a court's initial consideration of the case. There was substantial concern about this proposal at the Standing Committee, particularly about the additional work for lawyers and courts on motions that are not currently required.

The Reporter suggested that the Advisory Committee might wish to focus its discussion on the second issue. It has discussed the first issue at length and will revisit it in light of full public comment. But it has not discussed the second issue as extensively and may want to consider the concerns of the Standing Committee.

A judge member stated that he had no problem with the disclosure requirements. The consent option is an issue in the Ninth Circuit and other circuits. An amicus brief that is filed by consent can lead to the recusal of a judge. In one case, an amicus brief required the recusal of 10 judges. Striking a brief doesn't solve the problem, especially at the en banc stage. A judge who is recused is not eligible to be drawn for an en banc panel. If as many as 10 judges are recused from being eligible to be drawn, something is amiss.

And the consent option does affect cases from the beginning. Many judges in the Ninth Circuit are recusal hawks. The computer program checks for recusals and will block a case from being assigned to a judge before the case is assigned to a panel. No judge decides whether to strike the brief; the judge is stricken at the outset as a result of the consent of the parties. The Court of Appeals for the Ninth Circuit is considering a local rule that would eliminate the consent option. The attorney advisory group is supportive. Whatever happens with the national rule, there should be at least a Ninth Circuit carve out.

Mr. Wolpert favored eliminating the consent option. The Tenth Circuit also has recusal hawks. Having a single track for amicus briefs and requiring a motion would be good.

A different judge member from a different circuit agreed that requiring a motion at both the initial hearing and rehearing stage should be required.

A liaison member noted that he has had a brief bounced at the panel stage because a judge would otherwise be recused. Apparently, different circuits do things differently. Would the result of eliminating the consent requirement be that, in the Ninth Circuit, if any judge were recused, the brief would be bounced?

The first judge said no. Instead, eliminating the consent option would give a judge the option to decide whether to recuse or not and whether to strike the brief. The point is to have a judge decide rather than simply have the computer not assign the judge in the first place.

The liaison member suggested surveying the circuits for the Standing Committee. Judge Bates added that it is important to get some sense of every circuit; at least one had a quite different reaction at the Standing Committee.

The liaison member added that a motion is not a major undertaking, but that local rules generally require stating the position of other parties regarding a motion, so it will be necessary to ask for consent anyway.

Mr. Wolpert noted that if the position he favors—eliminating the consent option—does not carry the day, he can manage.

A circuit judge added that circuits should be allowed to opt out. Some states hire law firms in order to knock out certain judges. If a circuit assigns cases to panels as they come through the door, consent amicus briefs are okay. But if a circuit assigns cases to panels later, the result can be that a judge gets disqualified without any involvement in that decision.

The Reporter asked and received confirmation that the Advisory Committee did not want to discuss the disclosure amendments today, but instead would await full public comment.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Reporter stated that the IFP subcommittee did not meet to discuss the proposed amendments to Form 4 because no comments had been received before the agenda materials were prepared. (Agenda book page 228). Since then, one favorable comment has been received.

The Advisory Committee declined to discuss the proposed amendments at this time, awaiting the completion of the public comment period.

The Advisory Committee took a short break before resuming at approximately 10:45.

V. Discussion of Matters Before Subcommittees

A. Intervention on Appeal (22-AP-G; 23-AP-C)

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 235). There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal.

At the last meeting, we decided to step back and ask, "What is the problem?" Judge Bybee asked the FJC to research the actual circumstances in which intervention is sought. The vast majority of decisions on such motions are not reported, so the FJC can use its access to ECF filings and dispositions. We will hear about the FJC research in a moment. The Reporter did some research into reported cases, and Mr. Freeman gathered information from the Department of Justice.

That DOJ information is not complete or systematic. But the impression it provides is that the cases in which intervention on appeal is sought fall into distinct categories.

First, there are big national cases where an ideological plaintiff or a state files a case and later there is a change in the administration of the government (President or Governor) whose law or policy is challenged. These are high profile, but small in number.

Outside of these cases, there does not seem to be a functional problem,

There are agency direct review cases. Here, the person who lost before the agency seeks review, and the person who prevailed before the agency seeks to intervene to support the agency. The court of appeals is the first Article III court to consider the case, and the proposed intervenor participated in and shaped the record in the agency proceeding.

There are cases presenting constitutional challenges and the government entity whose action is being challenged seeks to intervene. These are typically granted. Similarly, sometimes the interest of a foreign sovereign or a tribe becomes clear for the first time on appeal.

There are environmental cases involving matters such as grazing rights. These tend not to be problematic because the interests are quite concrete. They tend to be resolved the way we would expect: if the person passed up an opportunity to intervene in the district court, the motion is denied. But if it just became clear now that the person's interests are at stake, the motion is granted.

Another set of cases involves persons who move to appeal in the court of appeals rather than appeal from the denial of intervention in the district court (with its deferential standard of review). These motions are typically denied.

The first category might become much larger. But creating a rule might invite more opportunistic behavior.

The report identifies some possible takeaways.

First, it might be that agency review cases are sufficiently different that they can be handled separately from appeals from district courts. The FJC research is relevant here.

Second, there are some recent cases in which some judges appear to view Civil Rule 24 as applying to intervention on appeal more of its own force, as opposed to the traditional statement that intervention on appeal is available only in exceptional cases for imperative reasons. If that view prevails in a circuit, clarification may be particularly important.

Third, the problem of intervention on appeal may be acute in cases involving universal remedies. One common response 15 years ago to a motion to intervene would be, "File your own lawsuit, and appeal." But if the remedy at issue applies to you already, your desire to intervene increases. We may want to see how this plays out. In the *Labrador* case, five justices expressed interest in prohibiting such remedies, but have not done so yet. There is some movement on that front.

Mr. Reagan from the FJC began by stating that the FJC provides objective independent research; it does not solve problems identified by an Advisory Committee or tell an Advisory Committee what to do. The FJC has access to all cases, run of the mill cases, not just those few that result in decisions on Westlaw or memorable cases. So far, he has done a feasibility study to see what can be done, checking all docket sheets in a given period for the string "interven"; that string should appear on the docket of any case where there is a motion to intervene. He has selected random cases from that group. They fall into two major categories, agency appeals and appeals from district courts in civil cases. There does not appear to be a significant issue in criminal cases. Going forward, he can be more targeted on civil appeals in all circuits.

Circuits vary on who decides motions to intervene: 3 judge panels, 2 judge panels, single judges, and the clerk. Except in the Sixth Circuit, which issues short opinions, there are almost never reasons.

His plan is to use a filing cohort, appeals that were filed during a certain period. He noted that the Reporter had pointed out that we might be interested in motions to intervene late in a case. At some point, it might be worth looking at a termination cohort. But he does not want to start there, because some recently terminated appeals may involve appeals filed decades ago. He expects that it would be a one-to-two-year project; if the committee would like, he would be happy to do it.

Judge Bates asked Mr. Freeman if he was lumping together vacatur of agency rules with universal injunctions. Mr. Freeman responded that there is pressure on both, but that they might change differently, referring to the quip that DC circuit judges vacate 5 rules before breakfast. Nationwide injunctions are declining sharply; vacatur may continue. A lawyer member of the committee expressed interest in this area, noting that apart from the issue of universal injunctions, there are different approaches in the circuits. It would be nice to have a uniform rule.

Mr. Freeman stated that nationwide courts draw on Civil Rule 24 and that there is a body of caselaw that says that intervention on appeal should be rare. Adopting a rule can change behavior, not only based on the content of the rule, but the existence of a rule can appear to bless the idea of intervention on appeal and lead to more motions.

A liaison member asked if there was any sense of where the issue is most in play. Sometimes the issue arises at a very late stage, where the government changes position or does not want to seek further review.

Mr. Freeman noted that the Supreme Court has granted cert on this issue three times. There is no political valence; it happens both ways. Often there is a question of timeliness. There is also a question of who represents, and what it means to represent adequately. For example, the SG may decide not to seek en banc rehearing in a particular case, but a private party might care about *this* case.

A different liaison member observed that there is a real difference between cases that originate in the courts of appeals (where the DOJ is okay with intervention) and cases in the district court seeking universal vacatur (where the DOJ often opposes intervention). He agreed with Judge Bates that the APA is different. He is more concerned that once a district judge grants a universal remedy, people want to intervene. If the government accedes to a universal remedy, that can be a shortcut to repealing a rule and avoiding notice and comment.

There are a bunch of cases where the issue arises, and there is a serious problem with the lack of standards. The stakes of the case have changed, or the

government's position has changed. There are reasons to have a rule that addresses it. Civil Rule 24 isn't focused on the key issue of what changed.

Judge Bates added that he sees the merits of a broad intervention rule. Maybe there are three or four different rules, dealing with agency cases, APA cases that were filed in the district court, universal injunctions, and the rest of the civil docket.

A liaison member noted that it is kaleidoscopic. But it is possible to find general principles. Civil Rule 24 has sort of worked to focus the inquiry. Keep Rule 15 the way it is; focus on other cases. I think it is possible to identify the process and considerations and provide a structure.

Mr. Freeman stated that he appreciated the comments. There are several different problems. Civil Rule 24 is ambiguous; it uses the term "interest," not "legal interest," but the Supreme Court in *Cameron* used the phrase "legal interest." The subcommittee does not want to take a position on Civil Rule 24 or replicate its problems. If someone who seeks intervention is denied in the district court, the proposed intervenor can appeal. If intervention is granted, the intervenor is a party, is bound by the judgment, and engages in discovery.

But the DOJ thinks that is different on appeal. Someone who has not been a part of discovery in the district court and is not bound by the district court judgment now seeks to intervene. That feels different, including as a matter of fairness to litigants. What is an appeal? It is a proceeding to determine whether there was error in the judgment. Intervenors with new claims and theories are not showing that there was error in the district court's judgment.

Settlement presents different questions, questions that the Supreme Court has been unable to resolve.

Is there a useful rule that we could draft, putting aside agency cases? It could require timeliness, reasons, interest, why amicus status is insufficient, and state that allowing intervention on appeal is uncommon. The hard question is what interests are sufficient. Some are not controversial. But should the possibility of a future claim against the proposed intervenor be enough?

The Reporter asked if the consensus was that the FJC should continue its work but not focus on appeals from administrative agencies that go directly to the courts of appeals. Mr. Freeman said yes, but that some agencies, like the NLRB, are structured so that they bring enforcement proceedings in the courts of appeals.

Mr. Reagan stated that, methodologically, the FJC would continue to look at all case types. Concentration on case types of greatest interest can come later.

A judge member stated that we have not answered the earlier question of the liaison member. In hard cases, courts are probably asking the right questions in the absence of a rule. Is there some benefit here, some problem being fixed, other than that there is no rule. By comparison, in the costs on appeal area, the Supreme Court had identified a problem. Maybe the absence of a rule is enough, but there are possible negative effects. Can we set a standard that we all agree is correct? Can we get there? Will it dictate particular outcomes?

Mr. Freeman stated that he has the same questions. A draft could clarify that there are two aspects to the timeliness analysis, both timely in the appeal and timely in the case as a whole. There is also the harder question of what is a valid basis for intervening.

The Reporter said that on the harder question, there is the hope of limiting the range of debate. Even if the question of whether an interest is sufficient is a hard question in particular cases, a rule might avoid replicating the ambiguity of Rule 24 and make clear that only a legal interest counts. That would be especially useful if a court of appeals adopts the apparent view of some circuit judges that Rule 24 applies without the filter of "exceptional cases for imperative reasons."

There are two possible developments that the committee might decide to wait for. First, there are some circuit judges who seem to view Civil Rule 24 as more directly applicable and therefore view intervention on appeal more widely available than the traditional doctrine that calls for intervention on appeal to be rare. The committee might wait to see if that view ever carries the day in a circuit. Second the committee might wait to see what develops regarding universal or nonparty injunctions. Should we wait? Or should we keep going, knowing that the need will be greater or less depending on those developments?

A liaison member said that the timelines question is a real question. Plus, a rule can put the right factors on the table and be more cabined. A lawyer member added that borrowing from Civil Rule 24 is not doing everything we need in this context, and that while a definitive new rule might be too difficult, a new rule might be able structure the analysis, make clear that most prior caselaw is still good law, and help frame things,

A judge member noted that this proposal puts pressure on the question of whether there is really a problem. If there had been a rule in place for 50 years, that would be great, but we don't. Maybe the absence of a rule is itself enough of a problem.

Judge Bates observed that it is about more than just timing. Some problems cannot be solved by a rule. We won't solve government transitions by rule.

Mr. Freeman stated that a rule may not be worth the candle. But it could require timeliness, make clear that intervention on appeal is rare, that intervention

requires showing that amicus participation is not adequate, and clarify that an interest in precedent is not enough. There are then the harder questions about the nature of the interest. There is not a reason to give up yet.

A judge member stated that he did not favor tabling the matter. We should keep thinking about it and trying to size it correctly. The subcommittee should keep thinking, with the FJC's research, and we should talk about it again in six or twelve months.

A different judge member noted that intervention on appeal comes in so many different flavors that it is hard to craft a rule that applies to all cases. Sometimes someone will seek to intervene solely to be able to file a cert petition. Courts can reach a fair resolution in the absence of a rule. A rule could produce a lot more motions to intervene.

Mr. Reagan confirmed that the FJC was happy to continue to work on this project. It's busy, but busy doing things like this.

B. Rule 15 (24-AP-G)

Professor Huang presented the report of the Rule 15 subcommittee. ((Agenda book page 271). The subcommittee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine, which governs in the D.C. Circuit and maybe in others, holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way with regard to various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The suggestion is to do for Rule 15 what was done for Rule 4.

Mark Freeman and his team discovered that this suggestion was previously made by Judge Williams in 1995. Some of the material from the committee's prior consideration of that suggestion is in the agenda book at page 202. The suggestion advanced far enough to be published for public comment, and the latest version of the proposal before the committee is in the agenda book at page 272.

The committee dropped the proposal due to the strong opposition of the D.C. circuit judges who were active at the time. Based on a reading of the minutes from that prior consideration, it seems that the committee favored the proposal and was

not terribly persuaded by the D.C. circuit judges. But it nevertheless dropped the proposal due to their opposition.

The subcommittee thinks that it could make some changes to improve the prior proposal and is open to studying the matter further. Technology and administrative changes might reduce the concerns that motivated the D.C. circuit judges in the past. Plus, while this is very much a D.C. Circuit issue, a broader range of circuits deal with agency challenges. Should we see what that D.C. Circuit thinks now? Its docketing statement asks if there has been a motion for reconsideration.

A judge member noted that this is not just a D.C. Circuit issue. Some 38% of the cases in the Ninth Circuit are agency cases. A different judge member noted that he is open to taking a look at this. A liaison member added that the D.C. Circuit is not as dominant in this area as it used to be. Mr. Freeman observed that he is not sure that the issue arises in immigration cases, with a judge member adding that in the immigration context a motion for reconsideration does not affect the finality of a removal order. Mr. Freeman added that the governing statutes vary on this issue from one agency to another. The doctrine puts the government in an uncomfortable position of winning by default rather than on the merits. It is particularly uncomfortable dealing with self-represented litigants who ask if their petition for review is still good; DOJ can't give them legal advice, but there is a trap for the unwary.

A judge member noted that the subcommittee report which suggests (Agenda book 273) that a premature petition could be "treated as filed" on the date the reconsideration motion is decided doesn't solve the problem. There is still an open appeal that is abated. Professor Huang responded that the time it is deemed filed may affect things other than the stats, such as the statute dealing with petitions filed in multiple circuits. The subcommittee has not studied that possible interaction.

Judge Eid said that she would follow up with chief judge of the D.C. Circuit. Judge Bates suggested other circuits would be interested as well. A judge member noted that the Ninth Circuit sees lots of FERC cases.

The committee took about a one-hour break for lunch and resumed at approximately 1:05.

VI. Discussion of Recent Suggestions

A. Reopening Time to Appeal (24-AP-M)

The Reporter presented a new suggestion from Chief Judge Sutton regarding Rule 4. (Agenda book page 292). Rule 4(a)(6) permits a district court to reopen the time to appeal in limited circumstances. In the *Winters* case [*Winters v. Taskila*, 88

F.4th 665 (6th Cir. 2023)], a habeas petitioner did not receive notice of the district court's decision denying relief until long after the time to appeal. The court of appeals held that the district court properly treated the notice of appeal as a motion to reopen the time to appeal and granted that motion. There was no need to file an additional notice of appeal because the original notice of appeal ripened once the motion to reopen the time to appeal was granted. In addition, the notice of appeal was construed as a request for a certificate of appealability.

Chief Judge Sutton noted that one could fairly wonder about allowing a single two-sentence document to be a notice of appeal, a motion for an extension of time, a motion to reopen, and a request for a certificate of appealability. He pointed out the lack of agreement in the courts of appeals on these issues, and suggested this committee take a look.

Later, the Court of Appeals for the Fourth Circuit insisted that an appellant must file a notice of appeal after a motion to reopen the time to appeal is granted—and cannot rely on an earlier notice of appeal that was treated as a motion to reopen. [*Parrish v. United States*, No. 20-1766, 2024 WL 1736340 (4th Cir. Apr. 23, 2024)]. Judge Gregory, joined by three other judges, dissented from rehearing en banc, and urged this Committee to provide guidance.

In light of these opinions, the Reporter suggested the creation of a subcommittee. Judge Eid appointed Mr. Hicks, Judge Nichols, Judge Wesley, and Mr. Wolpert.

B. Administrative Stays (24-AP-L)

The Reporter presented a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. (Agenda book 307). Several justices of the Supreme Court have noted problems with the use of administrative stays. A rule could make clear the purpose of administrative stays and perhaps limit their length, by analogy to the way Civil Rule 65 treats TROs. Mr. Freeman agreed that the matter deserves exploration, even if the rules may not be able to solve all the issues.

Judge Eid appointed a subcommittee consisting of Mr. Freeman, Professor Huang, and Mr. Pincus.

C. Various Suggestions from Sai (24-AP-H through K)

The Reporter presented a series of suggestions from Sai. (Agenda book page 237).

Sai suggests that filings avoid using all caps for the names of persons and that proper diacritics be used. Sai appears to be correct, but there is a question whether

this is the sort of problem that is well addressed through rule making. Rule 32 does have some rather precise formatting requirements.

In response to a question, Mr. Wolpert stated that courts of appeal use the district court docket to set up the docket in the court of appeals. He worried about policing the kinds of requirements suggested. A judge member agreed that Sai's approach is better, but deferred to Mr. Wolpert, not wanting to give the clerk's office one more task in bouncing briefs.

The Reporter mentioned that there is a typography guide in the Seventh Circuit. A lawyer member did not think that this is much of an appellate problem.

Without opposition, the committee agreed to remove this item from its agenda.

Sai suggests that many local rules are universal or nearly so and could usefully be moved into the national rules. A judge member stated that there does not appear to be an identified problem and without that would not undertake such significant work. A lawyer member agreed that it would be a lot of work, and he wasn't sure what the payoff would be without a real problem. The judge member moved to remove the item from the agenda, and the Committee agreed without opposition.

Sai suggests that, where the various rules have similar provisions, they be moved to a set of Federal Common Rules. That way, instead of having to coordinate any changes to such provisions across the various rule sets, they could be done in one place. The individual rule sets could provide for differences from the Common Rules where appropriate. If starting from scratch, there is much to be said for such an approach. It is, for example, the way that New Jersey Court Rules work. A judge member agreed that this makes sense in an ideal world. But it would be a lot of work, a massive undertaking, and there is no particular problem. It's not worth the candle. The Committee, without opposition, approved a motion to remove the item from the agenda.

Sai suggests standardizing the page equivalents for words and lines in the various provisions of the Federal Rules. The ratio of words to page in some rules is 260, but in another is about 433 words per page. Sai also suggests eliminating the option of using monospace.

Professor Struve explained that reducing length limits for briefs was the most contentious issue this Committee has faced. The 260-word ratio was selected as the most accurate one; the 30-page limit (which results in the 433 word/page ratio) was chosen as a safe harbor.

The Reporter suggested that it could be simplified today, with the greater availability of word processing. Only briefs prepared without a word processor would need a page or line count option. Mr. Freeman asked how many non-word-processed

briefs are filed. Mr. Wolpert responded that they are mostly by pro se prisoners. If someone uses a word processor, they can use the word limits.

The Reporter suggested that the word limits could be made primary, and the page limit available only for those submitting non-word-processed briefs. Professor Struve said that those who made the earlier changes thought that's what they were doing.

A judge member suggested that there was no real problem and not worth it. A different judge member suggested that maybe everyone should have to comply with the word limit; what would happen if a self-represented person simply stated a word count? Mr. Wolpert said that the clerk's office would generally trust that word count unless a judge cried foul. There is not a problem that needs fixing; he has never seen a line count and doesn't know what monospace is.

Mr. Freeman clarified that if the word to page ratio were fixed, that would allow for more pages by pro se litigants. A lawyer member wondered whether any pro se briefs were long enough for this to matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

D. Standard of Review (24-AP-E)

The Reporter presented a suggestion from Jonathan Cohen that Rule 29, which requires a statement of the standard of review, be amended to provide guidance about those standards. (Agenda book page 334). He doubted the Federal Rules of Appellate Procedure were an appropriate vehicle for such guidance, but perhaps brief mention of the major examples of standards of review could be helpful to litigants.

A judge member stated that he would not want a brief from someone who needs this and that there is no identified problem. A lawyer member agreed, adding that it could be distracting and invite lots of discussion. Mr. Freeman stated that the most useful clarification regarding standards of review could be whether it should be a freestanding part of the brief or part of the argument section. It seems that whichever one is picked, the brief gets bounced. This is a local rules matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 339). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed

things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. Old Business

The Reporter suggested formal action on suggestions that had been previously considered by not formally acted upon. (Agenda book page 342). These include two suggestions that are being held awaiting action by the Criminal Rules Committee (24-AP-B and 24-AP-C), a comment regarding amicus briefs that was submitted prior to the publication of a proposal for public comment that has been treated as comment by the amicus subcommittee (24-AP-F), and a belated comment on Rule 39 (24-AP-F).

No member of the Committee voiced any concerns about these actions. Mr. Byron stated that no formal action was required on the first three. A judge member moved to remove the final item from the agenda. This motion was approved without opposition.

IX. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Eid thanked everyone for their hard work. She announced that the next meeting will be held on April 2, 2025. The location has not been decided, but it will most likely be somewhere east of the Mississippi.

The Committee adjourned at approximately 1:50 p.m.

TAB 5

TAB 5A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 4, 2024

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 12, 2024. Three Committee members attended remotely; the rest of the Committee met in person. The draft minutes of that meeting are attached.

At the meeting the Advisory Committee voted to seek publication for comment of proposed amendments to Bankruptcy Rule 2002(o) (Notices) and Official Bankruptcy Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).

Part II of this report presents those action items.

Part III of this report presents four information items. The first is a report on a suggestion regarding social-security-number redactions from public court filings. The second deals with a suggestion to propose a rule requiring random assignment of mega bankruptcy cases within a particular district. The third concerns a suggestion to allow appointment of masters in bankruptcy cases and proceedings. The fourth relates to a proposed amendment to Official Form 318 and Director's Forms 3180W and 3180WH dealing with unclaimed funds.

II. Action Items

Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2025. Bankruptcy Appendix B includes the rule and form that are in this group.

Action Item 1. Rule 2002 (Notices). The first sentence of Rule 2002(o) currently reads: "The caption of a notice given under this Rule 2002 must conform to Rule 1005." The clerk of court for the Bankruptcy Court for the District of Minnesota submitted a suggestion—in which clerks for 8 other bankruptcy courts in the Eighth Circuit joined—that this rule be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

Rule 1005 specifies the information that the caption of a bankruptcy petition must contain. Five items of information about the debtor are required, including "the last 4 digits of the social-security number or individual taxpayer identification number." If someone other than the debtor files the petition, the rule also requires that the caption include "all names that the petitioner knows have been used by the debtor."

The clerks of court state that the caption requirements "are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice." They also note that, despite the requirements of Rule 2002(n), the "general long-standing practice for the bankruptcy courts in the Eighth Circuit is to only provide the Rule 1005 caption requirements on the Notice of Bankruptcy Case [Official Forms 309A-309I]." Thereafter, the clerk's office uses a shorter caption that "generally follows Official Form 416B." Official Form 416B includes a caption setting forth the court's name, the debtor's name, the case number, the chapter under which the case was filed, and a brief designation of the document's character.

At the request of the Advisory Committee, the Federal Judicial Center surveyed bankruptcy clerks regarding the suggestion, and they overwhelmingly supported eliminating the requirement of a full Rule 1005 caption for all notices under Rule 2002. Members of the Advisory Committee also favored reducing the number of documents containing the last 4 digits of the debtor's social security number.

Accordingly, the Advisory Committee approved for publication a proposed amendment to Rule 2002(o) that would provide that the caption of a notice given under Rule 2002 must include

the information that Official Form 416B requires. The caption of a debtor's notice to a creditor would continue to also require inclusion of the information that § 342(c) requires.

The Advisory Committee recommends that the amended Rule 2002(o) be published for public comment.

Action Item 2. Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). The Advisory Committee received a suggestion from the clerk of court for the Bankruptcy Court for the District of Maryland. He suggested a modification of the prompt for Question 4 in Part 1 of Official Form 101. Currently the question asks for "Your Employer Identification Number (EIN), if any." Some pro se debtors are providing the employer identification number of their employers, not realizing that the question is attempting to elicit the EIN of the individual filing for bankruptcy if that individual is himself or herself an employer. Because multiple debtors who have the same employer may file and list that employer's EIN, the CM/ECF monitoring for repeat filings triggers a report erroneously suggesting that the debtor is not eligible because of prior filings. The proposed amendment would modify the language to read as follows:

> "EIN (Employer Identification Number) issued to you, if any.
>
> Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

The Advisory Committee approved the proposed amendment for publication for public comment.

III. Information Items

Information Item 1. Suggestion to Remove Redacted Social Security Numbers from Filed Documents. Senator Ron Wyden of Oregon sent a letter to The Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees.

The Advisory Committee worked with the Federal Judicial Center to survey debtor attorneys; chapter 7, 12, and 13 trustees; creditor attorneys; various tax authorities; and representatives of the National Association of Attorneys General about whether bankruptcy forms that currently require inclusion of the debtor's redacted SSN should continue to do so. Concurrently, reactions from bankruptcy clerks of court on the issue were obtained.

Meanwhile, the Committee on Court Administration and Case Management of the Judicial Conference of the United States ("CACM") requested the Federal Judicial Center ("FJC") to design and conduct studies regarding the inclusion of sensitive personal information in court filings and in social security and immigration opinions that would update the 2015 FJC privacy study and

gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings. That study was completed in April 2024.

After reviewing the privacy study and the results on the surveys, the Advisory Committee decided to take no action on Senator Wyden's suggestion for three reasons.

First, as far as the Advisory Committee knows, there is no demonstrated problem of SSN fraud stemming from the disclosure of either full or truncated SSN in bankruptcy filings. Senator Wyden pointed to the last FJC report on protecting privacy and noted that full SSNs have been disclosed in court filings (including in bankruptcy court filings). But he provided no evidence that these disclosures have in fact led to "identity theft, stalking or other harms" about which he is concerned. Moreover, the FJC's 2024 Privacy Study indicates the disclosure of full SSNs in bankruptcy filings is very low—approximately 0.1% of the filings checked. Even if the Advisory Committee recommended modifications to the rules and forms to eliminate redacted SSNs from most bankruptcy court filings, mistakes would be made (as they are today). The bankruptcy clerks and courts cannot guarantee that any rules would be followed, especially in connection with proofs of claim where most of the errors are made. As the 2024 Privacy Study pointed out, although there are very few disclosures of full SSNs in filed bankruptcy documents, the vast majority of such disclosures that do occur appear to violate the existing privacy rules. The various rules committees have consistently tried to limit disclosure of personally identifiable information in filed documents to the redacted SSN in an effort to protect the privacy of debtors. The Standing Committee in the past has declined to go beyond the current requirements, and although the suggestion is well-meant, it may not be addressing a real-world problem.

Second, with respect to every form that now includes a truncated SSN, the surveys indicate that a significant number of bankruptcy specialists oppose the idea of removing that information from the form. Comments suggest that the truncated SSN continues to be an important piece of information needed by some parties to distinguish debtors with similar or identical names. Perhaps over time those parties will become less reliant on inclusion of the truncated SSN on some of the forms, but it seems unwise to pursue changes that are both unnecessary and potentially detrimental.

Third, there are other ways to address the very valid concerns expressed in the suggestion. It is clear from the 2024 Privacy Study that significant progress has been made since the last survey in protecting SSNs from disclosure, and it is anticipated that such progress will continue. For example, the proposed amendment to Bankruptcy Rule 2002(o) discussed above at Action Item 1 would eliminate the use of a caption on most Rule 2002 notices that currently include the redacted SSN and replace it with a caption that does not include that information. If adopted, this change should decrease the number of filed documents with the truncated SSN.

For these reasons, the Advisory Committee decided to take no action on the suggestion at this time, but it will continue to monitor discussions and developments in the other advisory committees.

Information Item 2. **Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases Within a District.** A group of nine individuals and one organization,

calling itself the Creditor Rights Coalition, has submitted a suggestion requesting the promulgation of a new Bankruptcy Rule "requiring random assignment of all mega bankruptcy cases to all bankruptcy judges within a particular district." Such a rule would prohibit the practice of some districts of assigning large bankruptcy cases to a member of a pre-selected panel of judges or limiting assignment to the judge or judges sitting within the division where the case was filed. The suggestion posits that "[l]ocal judicial assignment rules that concentrate mega bankruptcy cases within a district to small subsets of bankruptcy judges undermine public confidence in the Chapter 11 system."

The Advisory Committee tabled consideration of this suggestion pending consideration of a similar issue by the Committee on the Administration of the Bankruptcy System.

Information Item 3. Suggestions to Allow Appointment of Masters in Bankruptcy Cases and Proceedings. Rule 9031 provides: "Fed. R. Civ. P. 53 does not apply in a bankruptcy case." As declared by its title, the effect of this rule is that "Using Masters [Is] Not Authorized" in bankruptcy cases. Since the rule's promulgation in 1983, the Advisory Committee has been asked on several occasions to propose an amendment to the rule allowing the appointment of masters in certain circumstances, but each time the Advisory Committee has decided not to do so. Now two new suggestions to amend Rule 9031 have been submitted to the Advisory Committee by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey and by the American Bar Association ("ABA").

At its spring 2024 meeting, the Advisory Committee directed the Business Subcommittee to gather more information before making a recommendation. Specifically, it was agreed that a survey of bankruptcy judges should be undertaken to learn whether the judges thought the rules should allow masters to be used in bankruptcy cases and in what circumstances, if any, they had ever needed such assistance.

Dr. Carly Giffin of the Federal Judicial Center has conducted some preliminary interviews and is assisting the Advisory Committee in devising a survey to go to the bankruptcy judges and potentially a broader group to share with the Advisory Committee. The Advisory Committee will also consider the issue of whether bankruptcy judges have the authority to appoint special masters.

Information Item 4. Recommendation Concerning Proposed Amendment to Official Form 318 (Discharge of Debtor in a Chapter 7 Case) and Director's Forms 3180W (Chapter 13 Discharge) and 3180WH (Chapter 13 Hardship Discharge). Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, suggested that language be added to the form Order of Discharge used in Chapter 7 and Chapter 13 cases notifying recipients that unclaimed funds may be available and suggesting that they check the Unclaimed Funds Locator to ascertain whether they are entitled to any.

The Advisory Committee declined to take action on this suggestion for several reasons.

First, although it is true that the Order of Discharge must be mailed by the clerk under Bankruptcy Rule 4004(g) to all creditors, the Advisory Committee does not believe that the order

is an appropriate vehicle for notices about unclaimed funds. The existence of unclaimed funds has nothing to do with discharge, and the Advisory Committee believes that the discharge order should be kept free of extraneous matter.

Second, often courts do not receive unclaimed funds until months after the discharge order is issued, so even if a creditor saw the notice and immediately communicated with the clerk's office, the clerk would only be able to tell the creditor to check back later.

Third, if the reason that the funds are unclaimed is that the creditor has failed to update its address, the discharge order will be sent to the same erroneous address and therefore will not reach the creditor with a right to the funds.

Fourth, including this notice in the discharge order may encourage fraudulent claims by creditors who are not entitled to the funds. Such fraudulent claims seem to be increasing, and having the notice in the discharge order might encourage creditors to "try their luck" in securing unclaimed funds.

Finally, including that statement in the explanation of the nature of a bankruptcy discharge in the discharge order, which was drafted more for debtors than for creditors, could confuse debtors who might think that there is leftover money that belongs to them.

Although the Advisory Committee is sympathetic to the goals of the Unclaimed Funds Expert Panel, it does not believe this is the appropriate approach, and it therefore declined to take action on the suggestion.

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

Rule 2002. Notices

* * * * *

(o) Caption. The caption of a notice given under this Rule 2002 must ~~conform to Rule 1005~~ include the information that Form 416B requires. The caption of a debtor's notice to a creditor must also include the information that § 342(c) requires.

* * * * *

Committee Note

The amendment to Rule 2002(o) eliminates the requirement that all notices given under Rule 2002 include the caption required for the bankruptcy petition under Rule 1005. That caption requires, among other things, the debtor's employer-identification number, last four digits of the debtor's social security number or individual debtor's taxpayer-identification number, any other federal taxpayer-identification number, and all other names used within eight years before filing the petition. Instead, most Rule 2002 notices may use the caption described in Official Form 416B, which requires only the court's name, the name

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

of the debtor, the case number, the chapter under which the case was filed, and a brief description of the document's character. Rule 2002 notices sent by the debtor must also include the information that § 342(c) of the Code requires. The notice of the meeting of creditors, Rule 2002(a)(1), will continue to include all information required by Official Forms 309(A-I).

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 12/26

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

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

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names and any assumed, trade names and *doing business as* names. Do NOT list the name of any separate legal entity such as a corporation, partnership, or LLC that is not filing this petition.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition.	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Tell the Court About Your Bankruptcy Case

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

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

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

8. How you will pay the fee

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

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

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

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

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

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

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

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

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

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

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

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

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

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

❑ No. I am not filing under Chapter 11.

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

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

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

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

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

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

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

About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
You must check one:	*You must check one:*
❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.	❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.
❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.	❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.
❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy. If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.	❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy. If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.
❑ **I am not required to receive a briefing about credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.	❑ **I am not required to receive a briefing about credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

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

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

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

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

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

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

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

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

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

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

For you if you are filing this bankruptcy without an attorney

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

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

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

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

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

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

- ❑ No
- ❑ Yes

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

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

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

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

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Committee Note

Question 4 has been amended to make it clear that only debtors who themselves have an employer identification number (EIN) should list it; they should not include the EIN of their employer or any other entity not filing the petition.

TAB 5B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of Sept. 12, 2024
Washington, D.C. and on Microsoft Teams

The following members attended the meeting in person:

Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
Bankruptcy Judge Catherine Peek McEwen
Professor Scott F. Norberg
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
Nancy Whaley, Esq.
District Judge George H. Wu

The following members attended the meeting remotely:

Circuit Judge Daniel A. Bress
District Judge Jeffery P. Hopkins
District Judge Joan H. Lefkow

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Bankruptcy Judge Laurel Isicoff, liaison from the Committee on the Administration of the Bankruptcy System
H. Thomas Byron III, Administrative Office
Shelly Cox, Administrative Office
Allison A. Bruff, Administrative Office
Dana Elliott, Administrative Office
Scott Myers, Administrative Office
Kyle Brinker, Rules Law Clerk
Carly E. Giffin, Federal Judicial Center

Rebecca Garcia, Chapter 12 & 13 Trustee
Merril Hirsh, Academy of Court-Appointed Neutrals
Kaiya Lyons, American Association for Justice

The following persons also attended the meeting remotely:

Professor Daniel R. Coquillette, consultant to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Tim Reagan, Federal Judicial Center
Molly Johnson, Federal Judicial Center
Rakita Johnson, Administrative Office
Alane Becket, Esq., Becket & Lee (member of Committee effective Oct. 1)
District Judge James Browning (member of Committee effective Oct. 1)
Bridget M. Healy, Administrative Office
Hilary Bonial, Esq. Bonial PC
John Hawkinson, journalist
Daniel Kamensky, Esq., Creditor Rights Coalition
Alan Morrison, George Washington University
John Rabiej, Esq., Rabiej Litigation Law Center

Discussion Agenda

1. **Greetings and Introductions**

Judge Rebecca Connelly welcomed the group and thanked everyone for joining this meeting, including those Committee members attending virtually. She acknowledged the two members of the Committee for whom this is the last meeting – Jeremy Retherford and Judge George Wu – and thanked them for their service. She announced that the new members of the Committee will be District Judge James Browning and Alane Becket, who were attending the meeting remotely.

Judge Connelly thanked the members of the public attending in person or remotely for their interest and she noted that the meeting would be recorded.

2. **Approval of Minutes of Meeting Held on Apr. 11, 2024**

The minutes were approved.

3. Oral Reports on Meetings of Other Committees

(A) *June 4, 2024, Standing Committee Meeting*

Judge Connelly gave the report.

(1) Bankruptcy Rules Committee Business

Final Approval

The Standing Committee gave final approval to the proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R. The Standing Committee also gave final approval to the proposed amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals) and Official Form 410 (Proof of Claim relating to Uniform Claim Identifier) after making one technical change to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on Dec. 1, 2024.

Approval for Publication for Public Comment

The Standing Committee approved for publication a revised version of amendments to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan); and amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions) dealing with the certificate of completion of financial management course.

Amendments to Rule 9014 (Contested Matters), 9017 (Evidence) and new Bankruptcy Rule 7043 (Taking Testimony) dealing with remote testimony in contested matters were approved for publication by electronic vote after the meeting after extensive changes were made to the committee note for Rule 9014 that addressed concerns raised during the Standing Committee meeting that it inadequately explained why remote testimony was needed in contested matters as compared with adversary proceedings.

(2) Joint Committee Business

Professor Catherine Struve and Tom Byron also reported to the Standing Committee on the Pro Se Electronic-Filing Project, the Redaction of Social Security Numbers Project, and the Joint Subcommittee on Attorney Admission. Judge Connelly noted that they would be reporting to this Committee on these projects later in the meeting.

(B) *Meeting of the Advisory Committee on Appellate Rules*

The Advisory Committee on Appellate Rules will meet on Oct. 9, 2024. No report.

(C) ***Meeting of the Advisory Committee on Civil Rules***

The Advisory Committee on Civil Rules will meet on Oct. 10, 2024. No report.

(D) ***June 13-14, 2024, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

As previously reported, the Judicial Conference on recommendation of the Bankruptcy Committee has adopted a legislative proposal related to chapter 7 debtors' attorney fees. This proposal would amend the Bankruptcy Code to (1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. This legislative proposal seeks to address concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys.

The Administrative Office (AO) transmitted the legislative proposal to Congress most recently in July 2023. The proposal continues to be reviewed by Congressional staff, and several bankruptcy judges and AO staff have met with members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, conforming changes to the Bankruptcy Rules would be required. The Bankruptcy Committee will continue to update the Advisory Committee on any progress in this area.

Remote Testimony in Bankruptcy Contested Matters

Last year the Bankruptcy Committee preliminarily reviewed suggested amendments to the Bankruptcy Rules concerning remote testimony in bankruptcy contested matters that were being considered by the Advisory Committee, with a focus on whether those amendments conflict with the Judicial Conference remote public access policy. The Bankruptcy Committee determined that the proposed amendments would not conflict with existing Conference policy. It then communicated this view, through staff, to the CACM Committee. The CACM Committee chair later sent a letter to Judge Connelly conveying the views of the two committees. The proposed amendments were submitted to the Standing Committee for publication and were published for public comment last month. The Bankruptcy Committee will continue to discuss these proposed amendments when it meets in December.

Masters in Bankruptcy Cases

The suggestion to allow appointment of masters in bankruptcy cases is an area in which the Bankruptcy Committee was historically very engaged, and Judge Isicoff is personally interested in it.

If the Advisory Committee or the Standing Committee is interested in working with Bankruptcy Committee to evaluate this issue at any stage, the Bankruptcy Committee would be honored and happy to assist.

4. **Intercommittee Items**

(A) ***Report of Reporters' Privacy Rules Working Group***.

Tom Byron gave the report.

The Rules Committees have received several suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers in federal-court filings and a suggestion relating to initials of known minors in court filings. The Advisory Committees will continue to consider those suggestions.

The Working Group has met a couple of times to consider whether additional privacy-related issues should be addressed by the Advisory Committees. After considering a number of issues that are highlighted in the memorandum included in the Agenda Book, the Working Group recommends that the Advisory Committees should not address these additional issues at this time. Each of the issues represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But the consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues because there is no real-world problem that we need to solve right now.

Judge Isicoff noted that in the S.D. Fla. there is a large number of persons of Hispanic origin with the same name, and it would be difficult to distinguish between them without the last four digits of the social security number.

Jenny Doling suggested that we should consider potential changes to Rule 9037 to add "teeth" to the rule to address situations when attorneys willfully violate the privacy rule.

(B) ***Report on Unified Bar Admissions***.

Judge Oetken and Professor Struve gave the report.

The Subcommittee chaired by Judge J. Paul Oetken has been considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.

The suggestion that there be a national rule that would create a national "Bar of the District Court for the United States" administered by the Administrative Office of the U.S. Courts was rejected by the Subcommittee. In addition to its practical challenges, the

Subcommittee was concerned that the Rules Enabling Act may not authorize a rule to create a new bar. The Standing Committee supported the Subcommittee's decision.

Other approaches may be more promising, including a rule that would bar U.S. district courts from having a local rule requiring (as a condition to admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

The Subcommittee believes that there may also be other models to consider, including a extending the approach of Appellate Rule 46. The Standing Committee provided a lot of valuable feedback on the suggestion at its meeting in January. Tim Reagan of the Federal Judicial Center and former Rules Clerk Zachary Hawari have provided valuable research support. Many more comments were made at the Civil Rules Committee meeting on April 9.

During the summer the Subcommittee met virtually and reviewed Tim Reagan's research concerning local-counsel requirements and admission fees. The Subcommittee also discussed issues relating to the unauthorized practice of law and noted that it would be useful to ask state bar authorities whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. More information about practices under Appellate Rule 46 would also be useful. The Subcommittee is currently making inquiries with Circuit Clerks to ascertain how Appellate Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits. However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level.

An additional consideration is that some courts require local counsel be associated with an attorney admitted pro hac vice to the district court. Although Dean Morrison and his fellow proponents for rule change appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case, that is not necessarily true. One might question whether the proposed rule change would have the effect desired by its proponents if the local district responded by expanding their local-counsel requirement to encompass out-of-state attorneys admitted in the district but not to the state bar.

There was spirited discussion about the suggestion. Judge Wu noted that, in his district, the requirement for associating local counsel had grown out of the need to have physical access to counsel without delay – contact rather than expertise – and in light of modern communication methods it need not be problematic to remove that requirement.

Judge McEwen invited Judge Isicoff to comment. Judge Isicoff said that the bench-bar funds come from attorney admission fees, so there are financial impacts to the proposals. Judge McEwen noted that civic outreach is paid for out of those funds and that changing the rules for

admission to the district bar could alter the proportion of pro hac vice fees versus general admission fees.

Professor Struve noted that some proposals would have no financial impact, and others would have a greater impact. The Subcommittee is certainly aware of issues relating to financial impact.

Damian Schaible asked the judges in the room how they would feel about not having local counsel involved. Judge Oetken said that there is wide variation between districts as to whether they require local counsel, as the study showed. This proposal does not deal with the local counsel requirements. Mr. Schaible thinks that this has to be part of the proposal if the goal is to streamline the process.

Judge Harner said the Subcommittee may want to consider differences in the bankruptcy courts where the out-of-district lawyers may include a greater number of repeat players than in district-court litigation.

Professor Coquillette said that the fees for admission pro hac vice were not a big concern; hiring a local counsel was the major concern because of the cost involved. The two big issues are local-counsel requirements and requirements for in-state bar admission in states where admission requires taking the bar exam.

Judge Bates congratulated the Subcommittee for the work it has done so far and said that the work is obviously not over. There is an underlying issue under the Rules Enabling Act as to whether the rules can address this. The question of rulemaking authority would become even more acute if a proposal were to address local-counsel requirements. Professor Struve said the Subcommittee will continue to consider the issue of rulemaking authority.

Judge Lefkow reported on the local counsel rule in her district, which had been required for service only, and was abrogated because of electronic service rules.

The Subcommittee will continue to consider the suggestion, keeping in mind the importance of providing access to attorneys without undue time and expense, the interest of the district courts in controlling who may practice before them in order to maintain the quality and integrity of the district court bar, and the effect any approach may have on court revenue.

(C) ***Report on the Work of the Pro-Se Electronic Filing Working Group***

Professor Struve gave the report and thanked those who have participated in the project.

The Working Group has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing) (which includes a notice of docket

activity) through the court's electronic-filing system or through a court-based electronic-noticing program.

The Working Group has collaborated on a very tentative sketch of a possible amendment to Civil Rule 5. The sketch implements two policy choices. First, as to service, it eliminates the requirement of separate paper service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or court-based electronic-noticing program. In a conceptually separate change, the proposal would also allow service by email to the address used by the court when sending notices by email. She invited comments on this aspect of the proposal.

Professor Gibson noted that electronic service also got moved up to the top of the methods of service in the proposed sketch.

Judge Harner said that the proposal makes great sense for most situations, but in bankruptcy there often are many people (creditors) who are not yet on CM/ECF. Professor Struve said that the proposal applies only to those being served who are registered to receive electronic service. For service on others this provision would not apply. Judge Harner thinks that point should be made more clearly so the pro se litigant will not be misled. Ken Gardner said that if the litigants do not effectively serve, they will get deficiency notices and there will be more work for the clerks. Judge Kahn suggested language *requiring* physical service on those who are not registered in subsection (b)(3) of the proposal. He also questioned the email service option.

Professor Scott Norberg agreed with Judge Harner that pro se litigants are not likely to understand the difference between registered and unregistered parties. Perhaps the electronic system could alert the filer that the service is effective only on those registered. Professor Struve responded that the difficulty is that these pro se filers will not get the bounceback notice because they do not have the electronic access themselves. The question is how much should be handled by national rule and how much by local provisions and guidance documents.

Judge McEwen agreed that some list should be given to the pro se litigants so they know who will receive electronic service and who needs to be served by another method. And if that list has to go out to the pro se litigant by mail, then they will be late in serving those who need to be served by another method. The only way to do it quickly is if it is sent by email originally.

Nancy Whaley shared her experience. She receives everything electronically. Looking at the current system through the eyes of a non-attorney, it is very complicated and difficult to explain and comply with. She thinks the pro se litigant should have the same rights as the attorneys who use electronic filing, but it is difficult. Professor Struve noted that pro se litigants may be on both sides, serving and receiving service.

Judge Harner thinks we are assuming everyone has an email address and access to the internet, which may not be true. Should we require email addresses on the proof of claim? Ken Gardner said it is a nightmare on the proof of claim form, which creates problems no matter what

we do. There are already two addresses on the form, and even someone who knows bankruptcy has trouble understanding which to use. BNC reconciles the addresses for service in bankruptcy, and it may be different for district court.

Damian Schaible asked whether we can end paper service on those who are registered for electronic filing. Ken Gardner said that is a local requirement. Mr. Schaible asked whether this could be dealt with in a national rule. Mr. Gardner said in some places people are not as comfortable with electronic filing. Ms. Whaley noted that BNC allows you to elect not to receive paper filings if you are receiving electronic filings.

Professor Struve said she is hearing that attempting to deal with electronic service for pro se litigants is a worthy project, but that the drafting should be further refined; she invited any interested participants to let her know if they would be willing to assist in the drafting effort.

Second, as to filing, the sketch presumptively permits self-represented litigants to file electronically on the court's electronic filing system, or alternatively allows a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system so long as the court permits the use of another electronic method (like email) for filing documents and receiving electronic notice of activity in the case. This is likely to be controversial in many districts.

The Working Group supports the publication and adoption of the proposed rule changes concerning service, whether or not included with the provisions regarding filing. Professor Struve asks for the reactions of the Advisory Committee.

Judge McEwen wants some gatekeeping function to prevent litigants from putting inappropriate material on the electronic filing system, and that requires resources. Professor Struve said either that will be built into CM/ECF, or the courts will use the alternative process. Perhaps, Judge McEwen suggests, the litigants must take a course, or someone must look at it before it is posted. Judge Isicoff said her district eliminated email access for pro se litigants because it was being abused. The documents were not always in pdf format and could not be opened. The filings included grocery lists, family photos, etc., and the clerk's office would have to examine them manually on limited resources. The clerks have to be able to refuse access to their electronic filing system. Professor Struve said that the proposal allows the court to take a litigant who abuses the system off CM/ECF. Judge Isicoff suggested that the power to exclude litigants should be extended to alternative electronic-filing systems like email.

Ken Gardner opposes having separate systems for filing. His court has an email system and the filing of inappropriate materials exists today, even from lawyers. He noted that the litigants think they have filed a document when they use the email system, despite clear documentation noting that a document is not filed through these alternative systems until it has been accepted. He wants to have equal access to justice, and that means using the court's electronic filing system.

Judge Harner thinks perhaps we could start just by reversing the presumption to allow pro se litigants to file electronically unless the court adopts a local rule to preclude it rather than allowing it only if the court orders. Also, the rules should continue to be clear that the clerk cannot reject a litigant's filings. Ken Gardner likes not having to make the judgment and thinks current Rule 5005(a)(1) is appropriate. He agrees with Judge Harner that perhaps incremental changes would be appropriate.

Judge Kahn observed that an alternative to CM/ECF does not have a provision for original signatures and that can create problems.

Again, Professor Struve indicated that the Working Group will continue to analyze the proposal and thanked the Advisory Committee for its valuable contributions.

5. **Report by the Consumer Subcommittee**

(A) ***Proposed Amendment to Rule 2003***

Judge Harner and Professor Gibson provided the report.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, has submitted a suggestion (Suggestion 24-BK-G) to amend Rule 2003(a) and (c) as pertains to the timing, location, and recording of meetings of creditors in chapter 7, 11, 12, and 13 cases. She makes this suggestion, which has been endorsed by the Association of Chapter 12 Trustees and the National Association of Chapter 13 Trustees, in response to the current practice of conducting the meetings remotely by means of Zoom. The proposed amendment would (1) authorize remote meetings of creditors, (2) create a preference for virtual meetings over ones held in person, (3) allow video recording of meetings, and (4) provide the same timeframe in all chapters for holding the meetings.

As to the first issue, the question is whether an amendment to Rule 2003 is needed. The Justice Department (through the USTP) and the AO (through the bankruptcy administrators) have already established a nationwide program of remote meeting of creditors under the existing rule. The Subcommittee is supportive of remote meetings but is seeking feedback from the Advisory Committee on several issues. The first is whether an amendment to the Rule is needed. Can Rule 2003(a)'s authorization of meetings "at any . . . place designated by the United States trustee within the district convenient for the parties in interest" be read to encompass remote meetings?

If an amendment to expressly authorize remote meetings is needed, the Subcommittee also asks whether there be concerns about the Advisory Committee proposing another "remoteness" amendment on the heels of the proposed amendments regarding remote hearings in contested matters. Subcommittee members discussed a number of reasons why allowing remote meetings of creditors should not raise concerns. These meetings are not judicial proceedings. Section 341(c) of the Code prohibits judges from attending the meetings, and it allows creditors to participate on their own without

attorney representation. Moreover, the experience to date shows that the nationwide program of Zoom meetings is being conducted with few problems or concerns.

The Subcommittee invited the views of the Advisory Committee on whether to pursue an amendment to authorize expressly remote 341 meetings. (The Subcommittee does not recommend amending the rule to create a preference for remote meetings.)

Nancy Whaley said there was concern under the current rule as to where the trustee was located to conduct the meeting of creditors. During Covid in their district they had to be in their office, not in their homes. U.S. trustees around the country have different views on where the trustee had to be sitting. And some trustees do not live within their district. Chapter 7 trustees have to be within the district to be appointed, but chapter 12 and 13 trustees do not.

Scott Norberg said that if the rule is not broken, we should not fix it. He does, however, see that there could be an issue interpreting the phrase "place within the district." Perhaps the words "within the district" should be struck from the rule.

Judge Harner expressed concerns about making a change that suggests previous practice (the current practice of remote 341 hearings) violated the rule.

Ramona Elliott said that she thinks the rule is working as it is, so no change is necessary.

Judge Bates, while not wanting to speak for the Standing Committee on its reaction to another remote proceeding, acknowledged that this is different from the existing proposal for remote contested matters, but says some members of the Standing Committee might not be happy to see another remote proceeding.

Ken Gardner said this suggestion really cannot be extended to chapter 13 cases.

Nancy Whaley suggested taking this back to the Subcommittee to discuss how to define "place in the district."

Judge Harner asked Ramona Elliott if the U.S. trustees will continue to regulate where the trustees must be located if the rule did not require the meeting to be at a place within the district. Ramona Elliott says that the statute is not limited to chapter 7 trustees. During the pandemic there were trustees who moved across the country and were conducting 341 meetings from there. She asked whether we want the perception that trustees are not near the court. This is generally the only contact the debtor has with the bankruptcy system. She has also heard that there may be a new proposal coming from the National Association of Bankruptcy Trustees (NABT) related to Rule 2003.

Assuming that the rule is not changed to allow remote hearings, Professor Gibson suggested that the Advisory Committee would not pursue the portion of the suggestion

allowing video recording. Ramona Elliott told the Subcommittee that the USTP has declined to allow video recording of debtor examinations, allowing only audio recording, and she opposed amending the rule to allow video recording.

As to the final portion of the suggestion that recommends that time periods for setting the meeting of creditors be the same for all chapters (no fewer than 21 days and no more than 60 days after the order for relief), the justification was that it would "streamline the time frames." Professor Gibson reviewed the history of the changes to the time periods in Rule 2003, and noted that because other time periods in the Bankruptcy Code and Rules are expressed in relation to the meeting of creditors, a change to the times in Rule 2003(a) would have a ripple effect elsewhere. She recommended to the Subcommittee that, in the absence of a good reason to make this change, the Subcommittee not make this amendment.

Nancy Whaley told the Subcommittee, and explained to the Advisory Committee, that the impact of such a change on other provisions would be less than might otherwise appear. In a chapter 12, having a 341 meeting 35 days after filing is too short. She explained that under the current rule meetings of creditors are often set for 60 days after the order for relief. That scheduling relies on the provision that allows an extended 60-day deadline "if the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside." The proposed amendment for a uniform 60-day deadline, Ms. Whaley said, would merely reflect the current practice. She supports the extension of time.In response to a question from Professor Gibson, Nancy Whaley said the problem of insufficient time for chapter 12 meetings of creditors is not eliminated by holding such meetings remotely. Judge Kahn said he is reluctant to go to 60 days because in subchapter V that is the date of the status conference. He does not oppose some extension, perhaps 50 days for chapter 12 and chapter 13.

Judge Harner thought it would be helpful to have more information from the chapter 12 and 13 trustees before making any recommendations. Ken Gardner said that he does not think the time frame for a chapter 7 should be extended at all because debtors move after filing, creating difficulties in finding them for a 341 meeting. Judge Harner suggested that the first issue on amending the rule to reflect remote hearings be tabled for now until the NABT suggestion is made. As to the issue regarding time frames for the meetings, the Subcommittee should ask for more information from the chapter 12 and chapter 13 trustees and continue to consider it with respect to those chapters.

6. **Report by the Forms Subcommittee**

(A) ***Proposed Technical Amendments to Official Forms 122A-2 and 122C-2 to conform to Connecticut Housing and Utilities Standards***

Judge Kahn and Scott Myers provided the report.

The U.S. Trustee Program recently updated the Means Testing page on its website to reflect that, effective May 15, 2024, "the Housing and Utilities Standards for Connecticut shall be broken down by planning regions rather than counties, to reflect the Census Bureau's use of the State of Connecticut's nine Regional Councils of government, or Planning Regions, as the county equivalent for purposes of the statistical data that informs the Housing and Utilities Standards."

In completing Official Form 122A-2, lines 8 and 9a, a debtor must consult the Housing and Utilities Standards for the debtor's "county" to determine the appropriate income deduction amount. To conform to the revised terminology now used for Connecticut, lines 8 and 9a should be revised to add "or planning region" after the word "county." The same changes should be made to lines 8 and 9a of Official Form 122C-2.

The Advisory Committee has the authority to make "non-substantive, technical, or conforming amendments" to official forms, subject to later approval by the Standing Committee. The Subcommittee recommended that the Advisory Committee approve the changes effective December 1, 2024, and ask the Standing Committee to approve the changes when it meets in January 2025.

Scott Norberg asked about the terminology in Louisiana where they have parishes rather than counties. Scott Myers said no one had raised that as a problem. Judge Wu said the language in the committee note should be "almost all" states rather than "most states" and moving the "However" to the beginning of the next sentence. The Advisory Committee agreed to that amendment to the committee note.

The Advisory Committee approved the changes, but after the meeting voted by email to recommit the matter to the Forms Subcommittee to reconsider the proposal in light of the fact that states other than Connecticut have geographic subdivisions that are not called "counties."

(B) ***Recommendation for Publication of Amendments to Official Form 101***

Judge Kahn and Professor Bartell provided the report.

Mark A. Neal, Clerk of the Bankruptcy Court for the D. Md., submitted a suggestion (24-BK-I) to modify the prompt for Question 4 in Part 1 on the Voluntary Petition for Individuals Filing for Bankruptcy (Official Form 101). Currently the question asks for "Your Employer Identification Number (EIN), if any." Mr. Neal notes that some pro se debtors are providing the employer identification number of their employers, not realizing that the question is attempting to elicit the EIN of the individual filing for bankruptcy if that individual is himself or herself an employer. Because multiple debtors may file who have the same employer and list that employer's EIN, the CM/ECF monitoring for repeat filings triggers a report erroneously suggesting that the debtor is not eligible because of prior filings.

The Subcommittee agrees that the prompt may be confusing, and recommends to the Advisory Committee for publication an amendment to the existing language of the prompt in Question 4 and the addition of a new paragraph so that the prompt would read as follows:

"EIN (Employer Identification Number) issued to you, if any.

Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

A suggested committee note follows:

Committee Note

Question 4 has been amended to make it clear that only debtors who themselves have an employer identification number (EIN) should list it; they should not include the EIN of their employer or any other entity not filing the petition.

Professor Harner said that this amendment will be very useful.

The Advisory Committee approved the proposed amendment and committee note and will recommend them to the Standing Committee for publication.

(C) ***Consider Instructions for Forms Implementing Rule 3002.1***

Judge Kahn and Professor Gibson provided the report.

At its June meeting, the Standing Committee gave final approval to the proposed amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) and the six new forms proposed to implement its new provisions. The forms, if approved by the Judicial Conference, will go into effect on December 1, 2025, simultaneously with the amended rule. In the meantime, instructions for completing the forms need to be drafted.

The instructions for some official forms are relatively short and straightforward, but these are likely to be more detailed. In response to publication of the forms, several commenters asked for instructions, and one commenter raised a number of questions about the meaning of terms used in the forms, to which the Advisory Committee responded that the instructions would address those issues.

During the Subcommittee's meeting on July 29, a group was formed to draft the instructions. It will work on them this fall, and the Subcommittee will present recommended instructions to the Advisory Committee at the spring meeting.

(D) ***Recommendation Concerning Proposed Amendment to Official Form 318 and Director's Forms 3180W and 3180H***

Judge Kahn and Professor Bartell provided the report.

We have received a suggestion from Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, that language be added to the form Order of Discharge used in Chapter 7 and Chapter 13 cases notifying recipients that unclaimed funds may be available and suggesting that they check the Unclaimed Funds Locator to ascertain whether they are entitled to any. Although there are comparable forms of Order of Discharge used in Chapter 12 and Subchapter V of Chapter 11, the Panel believes that there are fewer unclaimed funds in those cases and inclusion of the language is not necessary but could be done for consistency. The Panel notes that the Orders of Discharge "reach a wide audience, including those for whom Bankruptcy courts hold unclaimed funds, making the forms an ideal vehicle to inform potential claimants of available funds." The Panel suggests that the following language be inserted in each form:

Money may be left over in this case.

Unclaimed funds are held by the court for an individual or entity who is entitled to the money but who has failed to claim ownership of it. To search unclaimed funds, use the Unclaimed Funds Locator at https://ucf.uscourts.gov/.

The Subcommittee recommends that no action be taken on this suggestion for several reasons.

First, although it is true that the Order of Discharge must be mailed by the clerk under Bankruptcy Rule 4004(g) to all creditors, the Subcommittee does not believe that order is the appropriate vehicle for admonitions about unclaimed funds. The existence of unclaimed funds has nothing to do with discharge. The Subcommittee believes that the discharge order should be kept clean of extraneous matter.

Second, often courts do not receive unclaimed funds until months after the discharge order is issued, so even if a creditor saw the notice and immediately communicated with the clerk's office – and this might increase the number of such calls -- the clerk would only be able to tell the creditor to check back later.

Third, if the reason that the funds are unclaimed is that the creditor has failed to update its address, the discharge order will be sent to the same erroneous address and therefore will not reach the creditor with a right to the funds.

Fourth, including this in the discharge order may encourage fraudulent claims by creditors who are not entitled to the funds. Such fraudulent claims seem to be increasing,

and having the notice in the discharge order might encourage creditors to "try their luck" in securing unclaimed funds.

Finally, including that statement in the explanation of the nature of a bankruptcy discharge in the discharge order, which was drafted more for debtors than for creditors, could confuse debtors who might think there is left-over money that belongs to them.

Although the Subcommittee is sympathetic to the goals of the Unclaimed Funds Expert Panel, it does not believe this is the appropriate approach and recommends that no action be taken on the suggestion.

The Advisory Committee agreed with the recommendation to take no action.

(E) ***Suggestion to Amend Official Form 106C***

Judge Kahn and Professor Gibson provided the report.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, has submitted a suggestion (Suggestion 24-BK-H) to amend Official Form 106C (Schedule C: The Property You Claim as Exempt). The suggestion, which has been endorsed by the Association of Chapter 12 Trustees and the National Association of Chapter 13 Trustees, proposes amending the form to include a total amount of assets being claimed exempt, similar to Schedule C in use prior to 2015. Ms. Garcia explains that "28 U.S.C. Sec. 589b(d)(3) requires the uniform final report submitted by trustees to total the 'assets exempted.' Without the amount totaled on the form, the Trustee is required to manually add up the amounts on each form in preparation of the required final report."

The current form resulted from several years of deliberation by the Advisory Committee and represents a compromise of competing interests. Professor Gibson reviewed the history of the changes made to the form in response to the S. Ct. opinion in *Schwab v. Reilly*, 560 U.S. 770 (2010).

Members of the Subcommittee understood the desire of trustees to have a total dollar amount of claimed exemptions listed on Form 106C in order to simplify their task of reporting "assets exempted" to the U.S. trustee under 28 U.S.C. § 589b. But because the form − in response to *Schwab* − allows an unspecified dollar amount to be claimed, simple addition to arrive at a total amount is not always possible. The value of an asset claimed as 100% exempt might be unliquidated or in dispute. Requiring a debtor to assign a definite value to such property in order to arrive at a total amount would be contrary to the option recognized in *Schwab*.

A suggestion was made that the form be revised to place in separate columns the two categories of exemption amounts: "☐ $_____" and "☐ 100% of fair market value, up to any applicable statutory limit." With that design the column for specific dollar amounts could be totaled. Consideration of that possibility led to a

discussion of the trustees' statutory duty to report "assets exempted." Several questions were raised:

- Does reporting only exemptions claimed in a specific dollar amount satisfy the statutory requirement?
- Are unspecified amounts currently being reported and, if so, how?
- Are assets claimed as exempt on Form 106C the same as "assets exempted?

The Subcommittee intends to explore these issues further, assisted by Ramona Elliott, who will gather further information about the purpose and use of the reports to U.S. trustees on exemptions. The Subcommittee welcomes any thoughts and suggestions from the Advisory Committee about issues to pursue.

Judge Connelly said that it is important to recognize that the trustees are required to report this figure, and they are doing it manually now. The request is to have the form provide a total.

Judge Bates asked whether the trustee would have to double-check the total in any event if the debtor did the addition. Nancy Whaley said that the software would total the number. She said that there may be variations around the country about the computation and it is worthwhile to continue the conversation.

Judge McEwen noted that even if the software totaled the figures, pro se litigants often file schedules that are handwritten and would have to do it themselves.

Judge Kahn said that many exemptions do not have a limit in dollars, and the exempt value will not be reflected in the schedule.

The Subcommittee will continue to consider the suggestion.

(F) ***Conforming Changes to Director's Form 2000 concerning Pending Elimination of Official Form 423***

Judge Kahn and Scott Myers provided the report.

The pending amendments to Rule 1007(b)(7) on track to go into effect this December eliminate the requirement that the debtor file a statement on Official Form 423 *Certification About a Financial Management Course*. Instead, it requires that the debtor file the certificate of course completion provided by the approved course provider, unless the course provider notifies the court of course completion. The amendments also eliminate the requirement that a debtor who has been excused from taking such a course file Official Form 423 indicating the court's waiver of the requirement. As a result, Official Form 423 will be abrogated this December.

Abrogation of Official Form 423 requires conforming changes to Director's Form 2000, *Required Lists, Schedules, and Fees.* That form serves as a checklist for debtors of various requirements under chapter 7, 11, 12, or 13 of the Bankruptcy Code. Revisions are needed to the chapter 7, 11, and 13 checklists to remove references to Official Form 423, and to reflect that the debtor will no longer have to affirmatively assert the applicability of an exemption from taking the course.

Because Form 2000 is a Director's Form, the Advisory Committee's role is to review and, if appropriate, endorse any changes to the form. The Subcommittee recommends that the Advisory Committee endorse the proposed changes to Form 2000.

The Advisory Committee endorsed the proposed changes to Form 2000.

7. **Report of the Technology, Privacy and Public Access Subcommittee**

(A) ***Continued Consideration of Suggestion 22-BK-I Concerning SSN Redaction in Bankruptcy Filings***

Judge Oetken and Professor Bartell provided the report.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees. The Bankruptcy Rules suggestion has been given the label of 22-BK-I.

When the Advisory Committee last considered the suggestion, it concluded that it needed more information before formulating a response. Specifically, it decided to defer consideration until two different tasks were completed.

First, the Committee on Court Administration and Case Management of the Judicial Conference of the United States (CACM) requested the Federal Judicial Center (FJC) to design and conduct studies regarding the inclusion of sensitive personal information in court filings and in social security and immigration opinions that would update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings. That study, completed in April 2024, is included in the agenda book.

Second, the Subcommittee decided that it was important to survey debtor attorneys, chapter 7, 12, and 13 trustees, creditor attorneys, various tax authorities, and representatives of the National Association of Attorneys General about whether bankruptcy forms that currently require inclusion of the debtor's redacted SSN must or should continue to do so. Concurrently, the Subcommittee decided to ask for reactions

from bankruptcy clerks of court on the issue. Working with the FJC, the reporters and members of the Subcommittee developed two surveys and sent them electronically to the various bankruptcy parties. The responses to the surveys are included in the agenda book.

After reviewing the privacy study and the results on the surveys, the Subcommittee recommends that the Advisory Committee take no action on Sen. Wyden's suggestion for three reasons.

First, as far as the Subcommittee knows there is no demonstrated problem of SSN fraud stemming from the disclosure of either full or truncated SSN in bankruptcy filings. Sen. Wyden pointed to the last FJC report on protecting privacy and noted that full SSNs have been disclosed in court filings (including in bankruptcy court filings). But he provided no evidence that these disclosures have in fact led to "identity theft, stalking or other harms" about which he is concerned. Moreover, the FJC's 2024 Privacy Study indicates the disclosure of full SSNs in bankruptcy filings is very low – approximately 0.1% of the filings checked. Even if the Advisory Committee recommended the extensive modifications to the rules and forms to eliminate redacted SSNs from most bankruptcy court filings, mistakes would be made (as they are today). The bankruptcy clerks and courts cannot guarantee that any rules would be followed especially in connection with proofs of claim where most of the errors are made. As the 2024 Privacy Study pointed out, although there are very few disclosures of full SSNs in filed bankruptcy documents, the vast majority of such disclosures appear to violate the existing privacy rules. The various rules committees have consistently tried to limit disclosure of personally identifiable information in filed documents to the redacted SSN in an effort to protect the privacy of debtors. The Standing Committee in the past has declined to go beyond the current requirements, and although the suggestion is well-meant, it may not be addressing a real-world problem.

Second, the surveys indicate a significant number of bankruptcy specialists oppose the idea removing the truncated SSN with respect to every form listed. Perhaps over time those parties could be made comfortable with the deletion of the truncated SSN in many of the forms, but it seems unwise to pursue changes that are both unnecessary and potentially unpopular.

Third, there are other ways to address the very valid concerns expressed in the Suggestion. It is clear from the 2024 Privacy Study that significant progress has been made in protecting SSNs from disclosure, and it is anticipated that such progress will continue. At this meeting the Subcommittee is recommending for publication an amendment to Bankruptcy Rule 2002(o) to eliminate the requirement that notices sent under Bankruptcy Rule 2002 use the full caption described in Bankruptcy Rule 1005 (which includes the truncated SSN) and instead use a shorter caption that does not include that information. This may decrease the number of filed documents with the truncated SSN.

As described in Part II of the 2024 Privacy Study, there are a number of ongoing approaches to protect privacy in court filings and opinions, including continued outreach

and educational efforts. In May 2023 CACM sent a memorandum to the courts sharing suggested practices to protect personal information in court filings and opinions. The memorandum urged the courts to continue or to consider initiating outreach efforts to litigants and members of the bar to ensure that they are aware of redaction obligations and the need to minimize personal identifiers in certain court filings. In addition, CACM recently requested the AO and FJC to explore other ways to increase awareness about ways to protect privacy in court filings and opinions.

The current case management system notifies filers via a prominent banner titled "Redaction Agreement" that appears immediately after a filer logs in to remind them of the redaction requirements. The instructions to Official Form B410 (Proof of Claim) include a warning that "A Proof of Claim form and any attached documents must show only the last 4 digits of any social security number …." Continuing advances in court management software may alert filers and courts of possible violations of the privacy rules so that corrective action can be taken.

For these reasons, the Subcommittee recommended that the Advisory Committee take no action on Suggestion 22-BK-I.

Tom Byron noted that that the other Advisory Committees must also address Senator Wyden's suggestion and that it would be helpful to get feedback from the Advisory Committee on its reasoning. For example, while the Bankruptcy Rules Advisory Committee has identified benefits of having the last four digits of the SSN for bankruptcy purposes, should uniformity prevail across the other Advisory Committees? Which of the reasons for declining to take action are compelling to the Bankruptcy Advisory Committee? Judge Bates asked whether the Advisory Committee should make a final "no action" decision today or simply indicate the direction in which it is leaning.

Judge Isicoff repeated a statement she made earlier in the meeting about the need for truncated SSNs to assist in debtor identification in her district.

Judge Connelly said the most compelling reason for the recommendation is that there is no demonstrated problem that rule amendments would solve.

Judge Harner asked whether the discussion is likely to be different in the other committees because they don't use the SSN in the same way. She has no concern about deferring decision on this suggestion until the other Subcommittees consider it.

Judge Lefkow thought perhaps it would help the other Advisory Committees because they might want to know what the Bankruptcy Advisory Committee thinks. Tom Byron assured the Advisory Committee that its preliminary assessment would be shared.

Professor Gibson sees no reason why bankruptcy privacy rule cannot be different from the other privacy rules. There was extensive discussion about whether the Advisory Committee should take action today.

Judge Kahn said that today it seems that the cost of disclosing truncated SSN does not outweigh the need that the bankruptcy community has for the SSN. But we may get additional information in the future, and we can decide to make a different decision then.

Jenny Doling pointed out that there are full SSNs on the notice of 341 meeting sent to creditors but that version of the 341 notice is not publicly docketed. Judge Harner also expressed concern about shadow dockets which may disclose a full SSN number found in a filing even if that filing is later shielded on the court docket.

For the reasons set forth in the memorandum, the Advisory Committee decided to take no action on this Suggestion at this time but to continue to monitor discussions and developments in the other Advisory Committees.

(B) ***Suggestion to Amend Rule 2002(o) to allow short-form captions for Rule 2002 Notices***

A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the Eighth Circuit joined, suggesting that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

When it last considered the suggestions, the Subcommittee decided to survey bankruptcy clerks on their reaction to the suggestion. The results of that survey are included in the agenda book. The clerks overwhelmingly (19 out of the 21 respondents) stated that they endorsed the suggestion and, in fact, many ignore the requirements of Rule 2002(n) in their current practice.

The Subcommittee recommends an amendment to restyled Rule 2002(o) to the Advisory Committee for publication. The amended rule would read as follows:

> **(o) Caption.** The caption of a notice given under this Rule 2002 must include the information that Form 416B requires. The caption of a debtor's notice to a creditor must also include the information that § 342(c) requires.
>
> Committee Note
>
> The amendment eliminates the requirement that all notices given under Rule 2002 include the caption required for the bankruptcy petition under Rule 1005. That caption requires, among other things, the debtor's employer-identification number, last four digits of the debtor's social security number or individual debtor's taxpayer-identification number, any other federal taxpayer-identification number and all other names used within eight years before filing the petition. Instead, most Rule 2002 notices may use the caption described in Official Form 416B,

> which requires only the court's name, the name of the debtor, the case number, the chapter under which the case was filed, and a brief description of the document's character. Rule 2002 notices sent by the debtor must also include the information that § 342(c) of the Code requires. The notice of the meeting of creditors, Rule 2002(a)(1), will continue to include all information required by Official Forms 309(A-I).

Professor Gibson suggested that the words "to Rule 2002(o)" be inserted in the first line of the committee note after the word "amendment." The Advisory Committee approved the amended rule and committee note with that change and recommended it to the Standing Committee for publication.

8. **Report of the Business Subcommittee**

(A) ***Report Regarding Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases within a District***

Judge McEwen and Professor Gibson provided the report.

A group of nine individuals and one organization, calling itself the Creditor Rights Coalition, has submitted Suggestion 24-BK-B, which requests the promulgation of a new Bankruptcy Rule "requiring random assignment of all mega bankruptcy cases to all bankruptcy judges within a particular district." Such a rule would prohibit the practice of some districts of assigning large bankruptcy cases to a member of a pre-selected panel of judges or limiting assignment to the judge or judges sitting within the division where the case was filed. The suggestion posits that "[l]ocal judicial assignment rules that concentrate mega bankruptcy cases within a district to small subsets of bankruptcy judges undermine public confidence in the Chapter 11 system."

The Subcommittee recommends that the Advisory Committee table consideration of this suggestion pending consideration of a similar issue by the Committee on the Administration of the Bankruptcy System ("the Bankruptcy Committee").

The Subcommittee also noted that it is not clear that the assignment of cases within a district comes within the bankruptcy rulemaking authority under 28 U.S.C. § 2075, which does not allow the Bankruptcy Rules to supersede statutes. Section 154(a) of Title 28 provides that "[e]ach bankruptcy court for a district having more than one bankruptcy judge shall by majority vote promulgate rules for the division of business among the bankruptcy judges to the extent that the division of business is not otherwise provided for by the rules of the district court." Whether that statute leaves room for a national rule prescribing how bankruptcy cases are to be assigned within a district is a question that will need to be explored if and when the Advisory Committee takes up consideration of the Creditor Rights Coalition's suggestion.

The Advisory Committee agreed with the recommendation and tabled consideration of the suggestion.

(B) ***Consideration of Suggestion 24-BK-A to Allow Masters in Bankruptcy Cases and Proceedings***

Judge McEwen and Professor Gibson provided the report.

Rule 9031 (as restyled) provides: "Fed. R. Civ. P. 53 does not apply in a bankruptcy case." As declared by its title, the effect of this rule is that "Using Masters [Is] Not Authorized" in bankruptcy cases. Since the rule's promulgation in 1983, the Advisory Committee has been asked on several occasions to propose an amendment to it to allow the appointment of masters in certain circumstances, but each time the Advisory Committee has decided not to do so. Now two new suggestions to amend Rule 9031 have been submitted to the Advisory Committee by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and by the American Bar Association (ABA) (24-BK-C).

At its spring meeting, the Advisory Committee directed the Subcommittee to gather more information before making a recommendation. Specifically, it was agreed that a survey of bankruptcy judges should be undertaken to learn whether the judges thought the rules should allow masters to be used in bankruptcy cases and in what circumstances, if any, they had ever needed such assistance.

Carly Giffin of the Federal Judicial Center offered the FJC's services in creating and conducting such a survey, and she suggested that it might be helpful to begin with interviews of some bankruptcy judges in order to determine the types of questions that might be asked in the survey. There was also a suggestion at the meeting that a separate survey might be conducted of district judges to learn how they had used masters.

At the Subcommittee's July 26 meeting, members agreed that it would be helpful for Dr. Giffin to begin by interviewing a group of bankruptcy judges regarding the need for masters in bankruptcy cases. The Subcommittee suggested the names of several bankruptcy judges from a variety of districts and with differing points of view. Dr. Giffin completed the interviews and provided information to the Advisory Committee about the results.

She interviewed nine judges, and they identified several tasks that would be facilitated by the ability to appoint a special master, such as discovery disputes and claims estimation or valuation. Unlike an examiner, a master would work for the court. Some judges thought use of special masters could speed up cases, ultimately saving the estate money and benefitting all parties. A special master might have expertise that the judge does not, and utilizing an expert's knowledge could help the judge make decisions and speed the case along.

The major concern expressed was the increased cost of having a master. Even judges who supported allowing appointment of special masters thought that it should be done only when the case was large enough to absorb the associated cost. Another concern expressed was that appointment of a special master would take the judicial decision-maker out of the picture. Litigants want to be heard by a judge directly rather than on review of a special master's decision. Another issue deals with appointment of special masters, and potential favoritism. Repeated appointments of the same people could give the appearance that the judge was benefitting certain cronies.

In addition, some judges expressed concern that bankruptcy judges do not have authority to appoint special masters because no such authority is granted by the Bankruptcy Code. Others thought a revised rule could confer the authority, while some thought they already had inherent authority to appoint a special master notwithstanding the rule.

Some judges thought the rule should set out special factors that should be required before appointments were made, or who could request appointment. Some thought only other bankruptcy judges should serve as special masters, which would solve the cost issue, but there were some objections to that idea.

In sum three judges supported amending the rule to permit appointment of special masters. Two judges said they would not need a special master, but were not opposed to permitting others to appoint them. Three judges opposed amending the rule. One judge said he would have no objection to another judge serving as a special master, but was otherwise against amending the rule.

The Advisory Committee discussed the issue. Judge Wu said he is sensitive to cost, but noted that there are certainly cases where bankruptcy judges should have the resource of a special master. Judge Harner said she sees the potential value. Judge Isicoff said she used a special master for discovery disputes (not realizing it was prohibited) and suggested that perhaps special masters should be used only for matters that an examiner cannot do. She thinks using special masters for discovery dispute would be tremendously valuable. Using other bankruptcy judges as a special master may raise issues of judicial immunity, even if judges were willing to do that.

Judge Bates said that he thought that if a special master were supposed to be functionally the same as a magistrate judge, that creates complications; magistrates are statutory, cost-free, and judicial parties, unlike special masters. He also questions whether bankruptcy judges should look to outside masters to have expertise on the law. There are real complications here and the Subcommittee should think about what needs masters would serve.

Judge McEwen identified fee disputes as an area that would be appropriate for a master. Judge Kahn said that there are various other parties involved in a bankruptcy

case, like the examiner and mediators, who can handle discrete issues. He thinks we cannot do this without knowing the extent of authority these special masters would have. He would prefer developing a more limited bankruptcy rule rather than extending Rule 53 to bankruptcy cases. Judge Wu said he assumes that any special master would only make proposed findings and conclusions and refer them to the bankruptcy judge.

Judge Kahn said he wants to ask bankruptcy judges who oppose the appointment why they do so. Dr. Giffin thinks the opposition comes from lack of statutory authority or the appearance of impropriety having an outsider performing what is an essential judicial function. Damian Schaible stated that using other bankruptcy judges seems a different question than appointing masters.

Dr. Giffin does think that gathering more information is valuable, and the Subcommittee will assist Dr. Giffin in devising a survey to go to the bankruptcy judges and potentially a broader group to share with the Advisory Committee. The Subcommittee will also consider the issue of whether bankruptcy courts have the authority to appoint special masters.

Judge Connelly invited any non-members of the Subcommittee to submit any questions or thoughts to the Subcommittee.

9. **New Business**

There was no new business.

10. **Future Meetings**

The spring 2025 meeting has been scheduled for April 3, 2025, at a location to be determined.

11. **Adjournment**

The meeting was adjourned at 2:10 p.m.

TAB 6

TAB 6A

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

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 13, 2024

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on October 10, 2024. Members of the public attended in person, and public on-line attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

Part I of this report will present two action items. During its October 10 meeting, the Advisory Committee voted to recommend publication in August 2025 of amendments to two rules:

(a) Rule 81(c): The Advisory Committee proposes publication of an amendment to Rule 81(c) that clarifies when a jury demand must be made after removal if no jury demand has been made at the time of removal.

(b) Rule 41(a): The Advisory Committee proposes publication of amendments to Rule 41 to better facilitate voluntary dismissal of one or more claims in a litigation, as opposed to the entire action.

Part II of this report presents several additional matters under consideration by the Advisory Committee, but there are no current proposals for Standing Committee action on these topics.

(a) Rule 45(b) manner of service of subpoena: The uncertainty about what constitutes "delivering" a subpoena to the witness has produced problems in practice and some conflicting court decisions. After considering a variety of explications, the Discovery Subcommittee is focused on a rule amendment that would authorize certain specific methods already recognized in Rule 4 for service of original process, and authorize a party that has attempted unsuccessfully to employ those methods to seek a court order for an alternative method.

(b) Rule 45(c) subpoena for remote testimony: A new Rule 43/45 Subcommittee has been formed, chaired by Judge M. Hannah Lauck (E.D. Va.). In part, this subcommittee has focused on *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a witness by subpoena to provide that testimony from a remote location that is within 100 miles of the witness's residence or place of business but more than 100 miles from the courthouse.

In addition, this new subcommittee is reviewing proposals that Rule 43 be amended to relax the limitations on remote testimony. Presently, Rule 43(a) authorizes remote testimony at trial only upon a showing not only of good cause, but also of "compelling circumstances," in addition to "adequate safeguards." This provision was added in 1996, with a Committee Note saying that such circumstances would usually depend on a last-minute development, and also that deposition testimony (particularly a video deposition) often is preferable to live remote testimony.

Pandemic experience indicates that there may be reason to consider relaxing the restrictions on remote testimony, but the subcommittee is still reviewing these issues. The Bankruptcy Rules Committee has published draft rule amendments to authorize remote testimony in "contested matters," but not adversary proceedings, upon a showing of good cause and adequate safeguards, but not to require "compelling circumstances." In some state courts remote testimony has been used widely. The subcommittee wants to proceed with the proposed revisions to Rule 45 regarding subpoenas for remote testimony while it continues to gather information on Rule 43(a).

(c) Rule 55 use of verb "must" with regard to action by clerk: Rule 55(a) presently says that the clerk "must" enter the default of a party that has failed to plead or otherwise defend, and Rule 55(b)(1) says that when the claim is for a "sum certain" the clerk "must" enter default judgment. An extensive study by the Federal Judicial Center (FJC) of practices in different courts shows that methods of handling defaults vary from district to district. Though it is not clear that this strong command to the clerk ("must") often produces difficulties, it does seem that in several districts the norm is to present applications for entry of default or default judgment to the judge

rather than the clerk. It may be that the rule can be clarified in a helpful manner, and the rule remains under study.

(d) Third Party Litigation Funding: For more than a decade the Advisory Committee has had before it proposals for some sort of disclosure requirements regarding litigation funding. In addition, bills have been introduced in Congress to require such disclosure under various circumstances, and some state legislatures have adopted disclosure requirements.

During its October 2024 meeting, the Advisory Committee appointed a TPLF Subcommittee, chaired by Chief Judge David Proctor (N.D. Ala.). That subcommittee has begun its work and expects to be gathering information about experience with such funding. One possible source of insight is the District of New Jersey's local rule adopted a few years ago; it may be possible to determine whether that local rule has produced benefits or created problems.

At the same time, the litigation funding "industry" seems to continue to evolve, and reports indicate both that there is a great deal of money involved and that large players like insurance companies may be offering competing products.

(e) Cross-border discovery: Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (Univ. of Oklahoma) have proposed a study of whether the rules should be amended to provide for better treatment of cross-border discovery. That topic could include situations in which a party to federal-court litigation argues that the Hague Convention should be applied rather than the federal rules on discovery because the information sought is located abroad (*see* 28 U.S.C. § 1981), and situations in which a party to non-U.S. litigation seeks the assistance of an American federal court to obtain discovery from a nonparty subject to the American court's jurisdiction (*see* 28 U.S.C. § 1982).

This project is being examined by the Cross-Border Discovery Subcommittee chaired by Judge Manish Shah (N.D. Ill.), and is presently focused on the first situation -- discovery of information from outside the U.S. sought from a party to U.S. litigation. Representatives of the subcommittee have already met with bar groups interested in these questions, and at least one additional event is on the calendar.

(f) Rule 7.1: A subcommittee is addressing whether and how to expand the requirement that nongovernmental corporate parties disclose affiliated business organizations that own or control them, in order to better facilitate judges' compliance with their ethical and statutory duty to recuse in cases in which they hold a financial interest in a party.

(g) Use of the term "master" in the rules: The term "master" appears many times in Rule 53, and also in quite a few other rules. It also appears in the rules of the Supreme Court and in a number of statutes. The Advisory Committee has not appointed a subcommittee to study these questions. For the present, the Committee is monitoring developments, including whether the term is being changed in other relevant contexts (including other sets of rules) and whether a widely-recognized substitute term has been recognized.

(h) Random case assignment: Various submissions have urged development of a new Civil Rule to require random assignment across the district in at least a subset of civil cases. For the present, the Advisory Committee is monitoring developments, including the Guidelines recently adopted by the Judicial Conference.

I. ACTION ITEMS

(a) Rule 81(c) -- jury demand after removal

The Standing Committee first saw this issue at its June 2016 meeting, based on submission 15-CV-A, from a lawyer who interpreted restyled Rule 81(c) to mean that he did not need to demand a jury trial in his removed case because state practice did not require that he make such a demand prior to the time of removal. Before 2007, Rule 81(c) said: "If state law *does* not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." In the 2007 restyling the verb was changed to "did."

That change could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. As written before 2007, the rule excused a jury demand only when the case was removed from a state court that *never* requires a jury demand.

When this matter came before the Standing Committee in 2016, two members of the Committee proposed an alternative that would have mooted the Rule 81(c) concern -- that Rule 38 be amended (parallel with the analogous Criminal Rule) to direct that there always be a jury trial unless both parties consented to a court trial and the court agreed to hold a court trial. That proposal led to an FJC research study that eventually persuaded the Advisory Committee that making such a change to Rule 38 would not be warranted. So the Rule 38 proposal was dropped from the agenda and the Rule 81(c) proposal came back to the fore.

It seems that the former provision exempting parties accustomed to state courts that don't ever require a jury demand unless the court establishes a deadline may have been meant to protect them against losing the right to a jury trial because they assumed they did not have to take any action after removal to obtain a jury trial since that would not be required in the state court.

It is not entirely clear how many states provide a jury trial without requiring a demand at some point. Research by the Rules Law Clerk indicates that there seem to be some such states and that there is considerable variety in the timing requirements of state courts that don't entirely excuse jury demands. A link to that research is provided below.

During the Advisory Committee meeting, two possible amendments were proposed. One would simply change the verb tense from "did" back to what the rule said before 2007 -- "does." That could avoid confusing lawyers who faced very prompt removal. At least they would know that they were not exempt from demanding a jury trial after removal because the state court case had not reached the point where that was required by state court practice.

But that solution could leave uncertainty about whether a given state practice "does" require a jury demand. The Rules Law Clerk research suggests that such uncertainty might exist in some instances.

On the other hand, lawyers who never had to demand a jury trial to get one in state court might be surprised to find that they had to make a formal jury demand in federal court.

The Advisory Committee chose the other alternative -- requiring a jury demand in all removed cases by the deadline set in Rule 38. One point raised during the Oct. 10 meeting was that it be made clear that even when a party fails to meet the Rule 38 deadline the court may, under Rule 39(b), order a jury trial despite the belated request.

So the Advisory Committee unanimously voted to propose that the following draft Rule 81(c) amendment and Committee Note be published for public comment:

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

* * *

(3) ***Demand for a Jury Trial.***

(A) ***Before Removal*** ~~***As Affected by State Law***~~**.** A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) ***After Removal.*** If no demand is made before removal, Rule 38(b) governs a demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal. But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

Suggestion 15-CV-A was submitted by Mark Wray. Rules Law Clerk memos can be found in the October 2024 agenda book starting on page 105 (February 28, 2024) and page 121 (June 26, 2024).

(b) Rule 41(a) -- voluntary dismissal

At its October 2024 meeting, the Advisory Committee unanimously voted in favor of publication of amendments to Rule 41. This subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), was formed at the March 2022 Advisory Committee meeting in response to submissions (21-CV-O; 22-CV-J) noting a widespread disagreement among the circuit and district courts regarding the interpretation of the rule. In sum, although the rule is currently entitled "Dismissal of Actions," and describes circumstances in which a plaintiff may dismiss "an action," in most courts parties and judges use the rule to dismiss less than an entire "action." That is, although a minority of courts have concluded that the rule permits voluntary dismissal only of entire cases, most courts deploy the rule to dismiss some but not all claims in the case, leaving others to continue.

After several years' worth of study, outreach, and deliberation, the Advisory Committee has concluded that the rule should be amended to permit dismissal of one or more claims in a case, rather than permitting dismissal of only the entire action. Not only would this change provide nationwide uniformity and conform to most district courts' practice, such an amendment would further the Federal Rules' general policy in favor of narrowing the issues during pretrial proceedings of complex cases. The language referring to "actions" has been unchanged since the rule was promulgated in 1938. Even at the time of the rule's promulgation, one of its drafters indicated that one of several "causes of action" asserted in a complaint could be dismissed under the rule.[1] But since then the prevalence of multiparty, multiclaim litigation has grown exponentially, as has the importance of judicial case management, as reflected in Rule 16. A more flexible rule that permits dismissal of individual claims would therefore further support the goal of simplifying complex cases. Rule 41(d) is also amended to reflect this change, as explained in the Committee Note.

Over the course of the last two years, the subcommittee conducted extensive outreach, meeting with representatives from Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sought feedback from federal judges, via a letter to the Federal Judges Association. The consistent message that emerged from this outreach was that most district judges were far more flexible about dismissing individual claims than the text of the rule suggests, and that such activity was helpful in narrowing the issues involved in cases during pretrial proceedings. There was no opposition voiced to making the rule more flexible in this way.

The subcommittee has also reached consensus around another amendment to the rule regarding who must sign a stipulation of dismissal of a claim. Currently, the rule states that "all parties who have appeared" must sign such a stipulation. The Eleventh Circuit, however, recently held that the plain text of the rule demands signatures not only from the parties currently involved in the litigation, but also former parties who no longer are part of the case. The Advisory Committee concluded that such a requirement is unnecessary and that the text of the rule should be clarified to require that only *current* parties to the litigation must sign a stipulation of dismissal of a claim.

[1] Remarks of Edgar B. Tolman, *Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938* at 348-50.

The subcommittee considered narrowing this requirement further to require signatures only by the parties to the claim to be dismissed (leaving out other existing parties to the case) but concluded that this would potentially sacrifice notice to all existing parties of the dismissal. In a case in which dismissing a claim may affect other parties, the subcommittee concluded that seeking the signatures of all existing parties served important purposes of notifying both the court and all parties of the potential dismissal. Should one or more parties in the case refuse to sign a stipulation of dismissal, the court may of course still order that dismissal under Rule 41(a)(2).

The draft Rule 41(a) amendment and Committee Note is as follows:

Rule 41. Dismissal of ~~Actions~~ Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an action~~ a claim or claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared and remain in the action.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), ~~an action~~ a claim or claims may be dismissed at ~~the~~ a plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ claim or claims may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

***

(d) Costs of a Previously Dismissed ~~Action~~ Claim. If a plaintiff who previously dismissed ~~an action~~ a claim in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Committee Note

References to "action" have been replaced with "a claim or claims," in order to clarify that this rule may be used to effect the dismissal of one or more claims in a multi-claim case, whether by a plaintiff prior to an answer or motion for summary judgment, stipulation, or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who are no longer parties. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the existing parties at the time of the stipulation provide both sufficient notice to those involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

II. INFORMATION ITEMS

The following matters are still under review by the Advisory Committee. The Standing Committee has discussed some of them during its past meetings. The Advisory Committee welcomes thoughts from Standing Committee members on these topics.

(a) Rule 45(b) -- manner of service of a subpoena

The Discovery Subcommittee has continued to consider the problems that can result from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." In addition, the subcommittee has focused on the requirement that, when the subpoena requires attendance by the person served the witness fees and mileage be "tendered" to the witness.

Numerous submissions have been made for amending Rule 45(b)(1) over the years, often invoking the provisions of Rule 4 for service of initial process. As the Standing Committee has heard in past meetings, one proposal was to incorporate several provisions of Rule 4 by reference. But the differences between the summons and a subpoena were emphasized. Nonparty witnesses may not be aware of the possibility of litigation in the same way that potential parties are.

Subpoenas can come with a "short fuse" calling for very prompt compliance, while the time to answer may provide more time for reaction.

In addition, some Rule 4 methods that had been considered at first seemed on refection not to work. For example, waiver of service under Rule 4(d) is ineffective unless the recipient waives service, and the time lag before that decision must be made could be too long in many instances. Rule 4(d)(1(F) provides that the defendant must get "at least 30 days after the request was sent" to return the waiver.

Another possibility considered was to invoke state law. Rule 4(e)(1) says that a summons may be served by the method authorized by state law. Perhaps a similar analogy could be to draw on state law for service of subpoenas. But very thorough Rules Law Clerk research showed that there was huge variation among states on that subject. In some states, even a telephone call suffices.

Moreover, one goal of a revision would be to install a clear nationwide rule, making it seem unwise to incorporate widely diverging state law practices. In the same vein, authorizing local rules to adopt local practices seemed out of step with a push toward national uniformity.

There was also some discussion whether service by mail or "commercial carrier" might be desirable options under an amended rule. Courts continue to use U.S. mail, and many important matters are delivered by FedEx, UPS, DHL and the like. But whether "Fast Frank's Delivery Service" should also suffice under a "commercial carrier" rule provision might pose challenges. U.S. mail, meanwhile, may be a very poor way to serve 20-somethings, some of whom may not have much to do with it.

Instead, the focus changed to Rule 4(e)(1) and (2), which adopt what might be time-honored methods of serving a person. Then -- on analogy to Rule 4(f)(3) with regard to service on a person outside the U.S. -- by authorizing the court to approve an alternative method "reasonably calculated to give notice." Rather than trying to prescribe in advance what is per se acceptable in all instances, it seemed preferable to leave the decision what to employ for a given witness in a given case to the presiding judge. At the same time, the notion is that some showing ought to be made to justify substitute means of service -- ordinarily attempting the "traditional" methods or explaining why that would be futile.

A separate question was whether Rule 41(b)(1) should continue to require that "if the subpoena requires that person's attendance, tendering the fees for 1 days attendance and the mileage allowed by law." The witness fee is required by 28 U.S.C. § 1821, not the rule, and the question is whether the rule should make effective service contingent on tendering this fee.

So two possible courses were suggested -- providing that the fee may be tendered at the time of service or at the commencement of the trial, hearing, or deposition the witness was commanded to attend.

Accordingly, two possible approaches continue under study:

Rule 45. Subpoena

* * * * *

(b) Service.

Alternative 1 -- retaining obligation to tender fees but not as a part of service

(1) ***By Whom and How; Notice Period; Tendering Fees.***

(A) Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named [person] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice.[2]

(B) ~~and, I~~if the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must

[2] Ed Cooper has suggested the following alternative to (A):

> **(A)** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:
>
> (i) delivering a copy to the [person] {individual} personally;
> (ii) mailing a copy to the person['s last known address];
> (iii) leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion [who resides there]; or
> (iv) another means authorized by the court and reasonably calculated to give notice.

Ed adds the following notes:

(a) "delivering" carries forward the ambiguity that some courts resolve by allowing delivery by mail. "to the person personally" reduces the ambiguity, but seems clunky. One alternative would be "delivering a copy to the person in hand," but that has not found favor.

(b) if we want to include commercial carries [cf. Appellate Rule 25] this might be: "sending a copy to the person['s last known address] by mail or commercial carriers." Commercial carriers may be more reliable than mail.

(c) The bracketed phrases were taken from Rule 5(b)(2)(C) {last known address} and 4(e)(2)(B) {who resides there}. Leaving with a transient guest or worker may be reasonable, at least if the named person is hiding behind whoever answers the door . . . .

tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the commencement of the trial, hearing, or deposition. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Alternative 2 -- deleting obligation to tender fees

(1) ***By Whom and How; Notice Period; ~~Tendering Fees~~.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named [person] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice. ~~and,~~ I~~i~~f the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], the subpoena must be served at least 14 days before the date on which the person is commanded to attend. ~~tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.~~

Draft Committee Note

Rule 45(b)(1) is amended to clarify what is meant by "delivering" the subpoena. Courts have disagreed about whether the rule requires hand delivery. Though service of a subpoena usually does not present problems -- particularly with regard to deposition subpoenas -- uncertainty about what the rule requires has on occasion caused delays and imposed costs.

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena. Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, which ordinarily would require at least first resort to the authorized methods of service. The application should also demonstrate that the proposed method is calculated to give notice.

The amendment adds a requirement that the person served be given at least 14 days notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does

not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

Alternative 1

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service and permitting tender to occur instead at the commencement of the trial, hearing, or deposition. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task.

Alternative 2

The amendment deletes the requirement that the party serving the subpoena also tender the witness fee for 1 day's attendance and the mileage allowed by law when serving the subpoena. Experience has shown that requiring this tender in addition to service of the subpoena can unduly complicate the service process. The amendment does not affect the obligation imposed by 28 U.S.C. § 1821, but does remove this complication from the process of serving the subpoena.

* * * * *

The Advisory Committee welcomes Standing Committee reactions to its current approach to these problems, in particular regarding (a) whether adding a 14-day (or other) notice period would be wise, and (b) whether removing the tender of the witness fee as a service requirement would cause or avoid problems.

(b) Remote testimony -- Rules 45(c) and 43(a)

The Advisory Committee received a submission urging substantial changes to Rule 43(a) to make use of remote testimony easier to justify. Under a 1996 amendment to Rule 43(a), remote trial testimony can be ordered only when supported not only by good cause, but also by "compelling circumstances," and then only with "appropriate safeguards." The proposed changes to Rule 43(a) sought to relax these constraints considerably.

Meanwhile, at its June 2024 meeting the Standing Committee authorized publication of Bankruptcy Rule amendments that would permit use of remote testimony regarding "contested matters" in bankruptcy court, but not in adversary proceedings. The public comment period for these amendment proposals ends in mid-February 2025.

The Advisory Committee now has a Rule 43/45 Subcommittee that has begun to study these remote testimony issues, but it has not reached a point of formulating a proposal.

Representatives of the subcommittee have met and will be meeting with interested bar groups to consider the appropriate approach to remote testimony.

At present, there is no consensus on amending Rule 43(c) to relax the limits on remote trial testimony. Any views of Standing Committee members on that question would be welcome.

But another issue is of more immediate importance. In 2023, the Ninth Circuit ruled that Rule 45 does not permit a subpoena to command a distant witness to provide remote trial testimony. *See* *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). Some district courts have reached the same conclusion.

The *Kirkland* decision did not involve the question whether such remote testimony should be authorized under Rule 43(a). Instead -- though a bankruptcy court had found Rule 43(a) satisfied -- it granted a writ of mandate holding that Rule 45 does not permit a court to require a witness to attend and give remote testimony within 100 miles of the witness's home, but more than 100 miles from the courthouse.

In 2013, Rule 45(c) was revised and reorganized, and the place of compliance provisions were all collected in Rule 45(c). The accompanying Committee Note said that once a Rule 43(a) order for remote testimony was entered a subpoena could be used to command the witness to provide such testimony so long as it did not command the witness to travel more than 100 miles from her place of residence or a place where she transacts business in person.

The subcommittee has concluded that it is important to amend Rule 45(c) to make clear that -- once it determines that remote testimony is justified under the rules -- the court may use its subpoena power to require the distant witness to provide that testimony. That would not involve changing Rule 43(a), but would remove the doubt that the Ninth Circuit's decision introduced. Already that doubt has affected other forms of discovery. *See, e.g.*, *York Holding, Inc. v. Waid*, 345 F.R.D. 626, 629-30 (D. Nev. 2024) (rejecting an argument that *In re Kirkland* precludes a subpoena to produce documents within 100 miles of the witness's place of business though more than 100 miles from the courthouse).

As amended in 2013, Rule 45(b)(2) authorizes the court presiding over the action to issue a subpoena that can be served anywhere in the United States. That authority has no bearing on the determination whether, under Rule 43, the court should authorize remote testimony in a trial or hearing. But an amendment could clarify that -- so long as the court finds such testimony warranted under the rules -- the court is not powerless to compel the witness to travel within the limits imposed by Rule 45(c) to provide that remote testimony.

Since the Advisory Committee's October meeting, the subcommittee has held another meeting and has focused on an amendment to Rule 45(c) to clarify that the court has such power. The Ninth Circuit recognized that a rule change could produce that result. *See In re Kirkland*, 75 F.4th at 1047 ("any changes to Rule 45 [are] 'for the Rules Committee, and not for [a] court.'"). The subcommittee's goal is to propose a change that takes up the Ninth Circuit's invitation.

The current inclination is to provide by rule that when a witness is directed to provide remote trial or hearing testimony the "place of attendance" is the place the witness must go to provide that testimony, not the courtroom in which the remote testimony is broadcast.

The question whether opportunities for such remote testimony should be expanded remains open, but should be separate.

The subcommittee welcomes any reactions from Standing Committee members.

(c) Rule 55(a) and 55(b)(1) clerk "must" enter default and default judgment

Rule 55(a) commands actions by clerks that do not correspond to what happens in many districts. The rule says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, "the clerk must enter the party's default." Rule 55(b)(1) then says that if "the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk * * * must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing."

On the face of the rule, there is room for difficult choices in some cases by the clerk. There may sometimes be questions about whether effective service occurred. Given the possibility of extensions of time to respond, the court's records may not show that the defendant has not pled within the allowed time. Once default is entered, the question whether the suit is for a "sum certain" or one that "can be made certain by computation" may not appear so certain to the clerk.

At the Advisory Committee's request, FJC Research did a thorough study of default practices in the district courts. A link to that study appears at the end of this section of the report. The study did not show that the command in the rule ("must") has itself produced significant difficulties. But it did show that there are wide variations among the district courts in handling applications for entry of default or default judgment. In some districts, all these matters are submitted to the judge. In other districts, the clerk's office enters defaults but only the judges enter default judgments. In some districts there is a district-wide written policy on how to deal with questions about whether a default should be entered.

During the Advisory Committee's October 2024 meeting, there was discussion about whether there is reason to pursue a possible amendment to Rule 55. At least some favor changing "must" to "may." At the Advisory Committee meeting, the Committee had before it a draft of a possible amendment:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default [upon finding that the party has failed to plead or otherwise defend].

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the clerk determines that the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

A change along these lines might protect the clerk against undue pressure to enter defaults or default judgments when there are serious questions about whether they are appropriate.

But that sort of change might not be sufficient. Attorney members of the Advisory Committee emphasized at the meeting the uncertainty about how such matters are handled in different districts.

For the present, the Advisory Committee is endeavoring to determine (a) whether a rule change along the lines sketched above would be useful, and (b) whether a national rule adopting (imposing?) a uniform method of dealing with entry of default and default judgments should be developed. The Advisory Committee welcomes Standing Committee reactions.

The FJC's March 2024 study on Rule 55 can be found in the October 2024 agenda book starting on page 129.

(d) Third Party Litigation Funding

Third party litigation funding first appeared on the Advisory Committee's agenda in mid 2014. The Chamber of Commerce proposed that a new Rule 26(a)(1)(A)(v) be added, requiring disclosure of the fact of funding, the identity of the funder, and production of all agreements between the funder and the adverse party. The initial proposal was for this disclosure to apply in all cases. The proponents likened the disclosure to the disclosure already required by Rule 26(a)(1)(A)(iv) of insurance coverage.

At its Fall 2014 meeting, the Advisory Committee decided that litigation funding seemed to be a fast-moving target and that the pending proposal seemed to apply in a very wide variety of situations. It might be extended to apply to a conventional law firm line of credit, secured by the receivables of the firm. It might extend to support from a family member to pay the rent and buy groceries pending success in the lawsuit after a car crash. So there was considerable uncertainty about when a disclosure requirement should apply and what should be disclosed. For example, if the applicant for funding disclosed core attorney work product to obtain the funding, should that presumptively be available to the litigation opponent without any showing of need?

Since 2014, litigation funding activity has reportedly increased and also evolved. A variety of concerns have been raised about litigation funding. Some of these concerns are addressed in a December 2024 GAO report, Information on Third-Party Funding of Patent Litigation. A link to

this report is included below. Bills have also been introduced in Congress. Most recently, Rep. Issa introduced the H.R. 9922, the Litigation Transparency Act of 2024, on Oct. 4. A link to this bill is provided below.

The new TPLF Subcommittee has had one meeting to plan its examination of this topic. There are at least some models to be examined. A few years ago the District of New Jersey adopted a local rule calling for disclosure, though not as much disclosure as the original 2014 Rule 26(a) proposal submitted by the Chamber of Commerce. The FJC may be able to provide empirical data on how that rule has worked. The Wisconsin Legislature adopted a "tort reform" discovery package some years ago that included funding disclosure as one feature in a broader reform. Some other state legislatures have also considered disclosure measures. Obtaining hard data on how those have actually worked is challenging, however.

The Advisory Committee welcomes reactions from Standing Committee members on how best to approach this topic.

Links to H.R. 9922 regarding transparency and oversight of third-party beneficiaries in civil actions and the GAO Report on Third-Party Funding of Patent Litigation from December 2024.

(e) Cross-border discovery

Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (Univ. of Oklahoma) -- both former members of the Advisory Committee -- urged in a *Judicature* article that there be a study of the handling of cross-border discovery with an eye to possible rule changes to improve that process. *See* Baylson & Gensler, *Should the Federal Rules Be Amended to Address Cross-Border Discovery?*, 107 Judicature 18 (2023). A link to this article is included in this report.

The Cross-Border Discovery Subcommittee has held online meetings, and representatives of the subcommittee have met with bar groups. Further meetings with bar groups are planned, and in March 2025 representatives of the subcommittee are expected to attend the annual meeting of Sedona Conference Working Group 6 in Los Angeles that focus on and discuss cross-border discovery issues. For the present, the subcommittee is focused on discovery from litigants that are parties to U.S. litigation (28 U.S.C. § 1981 and the Hague Convention), rather than domestic discovery in the U.S. to obtain evidence for use in non-U.S. litigation (28 U.S.C. § 1982).

The subcommittee has also received initial reactions from representatives of the Federal Magistrate Judges Association and the Department of Justice. From these responses, it appears that there are differing views on whether to attempt rulemaking in the area.

One idea that has been advanced is that such discovery be added to the topics for the Rule 26(f) discovery conference and the Rule 16(b) scheduling order. Other concerns focus on privacy and confidentiality. For example, Rule 34 document requests may seem to run afoul of foreign privacy regulations, particularly the EU General Data Privacy Regulation. In addition,

there may be suggestions to re-examine the criteria articulated in *Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

Arguments have been made about the need for such rulemaking. Thus Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181 (2015), begins with the following sentence: "Perhaps the strangest legal phenomenon of the past decade is the extraordinary surge of U.S. courts ordering individuals and companies to violate foreign law." On the other hand, arguments have been made that companies sometimes seem to exploit these laws to prevent discovery of needed evidence. *See* Relkin & Breslin, *Hidden Across the Atlantic*, Trial Magazine, June 2012, at 14. This article asserts that -- at least in drug and medical device litigation -- defendants "may attempt to hide behind narrower foreign laws that protect an associated entity to prevent important discovery."

The subcommittee's work is ongoing. The subcommittee welcomes thoughts from Standing Committee members on these topics.

The article by Baylson & Gensler, *Should the Federal Rules be Amended to Address Cross-Border Discovery?*, can be found in the April 2024 agenda book starting on page 303.

(f) Rule 7.1

The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland (Texas S. Ct.), has continued its work on the disclosures required of nongovernmental corporations. Currently, the rule requires a "nongovernmental corporate party or a nongovernmental corporation that seeks to intervene" to disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The goal of the rule is to ensure that district judges can comply with their duty to recuse when they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Because the statute requires recusal for both legal ownership and indirect equitable ownership, the current rule does not require that parties disclose sufficient information for judges to evaluate their statutory obligation in all cases.

The subcommittee has been considering whether an expanded disclosure requirement would be feasible and beneficial. Its work is informed by recently revised guidance issued by the Codes of Conduct Committee regarding recusal based on a financial interest. This updated guidance focuses on ownership of an interest in an entity that "controls" a party; that is, if the judge has a financial interest in a parent that "controls" a party, that judge has a financial interest requiring recusal. The current rule likely ensures disclosure of most such circumstances, but not all. Therefore, the subcommittee is considering an amendment that would require parties to disclose not only parents and owners of 10% of a party's stock, but also "any publicly held business organization that [directly or indirectly] controls a party." The subcommittee is currently seeking feedback from knowledgeable parties as to whether this requirement is sufficiently clear based on a shared understanding of the basic legal meaning of the word "control." Ultimately, the subcommittee's goal is to develop language to better ensure that judges can comply with the revised guidance issued by the Codes of Conduct Committee. The subcommittee is making

substantial progress and hopes to present rule and committee note language for the Advisory Committee's consideration at the April 2025 meeting.

(g) Use of the term "master" in Rule 53 and other rules

Rule 53 (entitled "Masters") uses the word "master" repeatedly. In January 2024, the American Bar Association (ABA) submitted 24-CV-A proposing that the word be removed from Rule 53 and from any other place where it appears in the Civil Rules. A link to this submission is provided below in this report. Later in 2024, the Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) submitted 24-CV-J supporting the thrust of the ABA proposal. After that, the American Association for Justice submitted 24-CV-S endorsing the removal of the word "master" but not endorsing a substitute term.

Use of "master" in rules and statutes

The term "master" has been used for centuries in Anglo-American jurisprudence. Supreme Court Rule 37(3) uses the term "Special Master." Besides Rule 53, it appears in at least the following Civil Rules: 16(c)(2)(H); 23(h)(4); 52(a)(4); 54(a); 54(d)(2)(D); and 71.1(h)(2)(D). In addition, it is used in Rule 16.1(b)(3)(F), which was approved by the Standing Committee at its June 2024 meeting and is presently pending before the Supreme Court. This new rule may go into effect on Dec. 1, 2025.

The previous Rules Law Clerk identified a number of places in Titles 18 and 28 in which the word appears. He did not have time to try to identify other statutory provisions that use the word, but that could be undertaken in the future if helpful. Here is a list of the uses of the word identified by the Rules Law Clerk in those titles of the United States Code:

18 U.S.C. § 1836(b)(2)(D)(iv) -- "The court may appoint special . . . master to locate and isolate all misappropriated trade secret information . . ."

18 U.S.C. § 2248 -- the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 2259 -- the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 3507 -- special master at foreign deposition.

18 U.S.C. § 3524(d)(3) -- appointment of special master for protection of witnesses.

18 U.S.C. § 3664(d)(6) -- appointment of special master to make proposed findings of fact and recommendations in regard to enforcement of an order for restitution.

28 U.S.C. §636(b)(2) -- A judge may appoint a magistrate judge to act as a special master without regard to the provisions of Rule 53.

28 U.S.C. § 957 -- The clerk may not appoint "a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment."

28 U.S.C. § 1605A(e) -- In terrorism cases, the courts of the United States may appoint special masters to hear damage claims brought under this section.

28 U.S.C. § 2284 -- In matters required to be heard by a three-judge court, when there is an application for a preliminary injunction a single judge "shall not appoint a master."

A change to the Civil Rules will not change those statutory references. And it might be noted that somewhat frequently courts appoint people to the position of "master" without necessarily doing so under the auspices of Rule 53; there may be inherent authority to make such appointments.

At the Standing Committee's June 2024 meeting, these issues were introduced at pp. 526-27 of the agenda book for that meeting. A link to that agenda book is included below in this report.

The Advisory Committee discussed these issues during its October 10 meeting. Discussion included whether a change is needed, and if so what new term should be substituted. Ultimately the resolution was for the matter to remain on the Advisory Committee's agenda for purposes of monitoring, but not to undertake immediate preparation of amendments to all the affected rules.

Suggestion 24-CV-A was submitted by the ABA. Link to the Standing Committee's June 2024 agenda book.

(h) Random case assignment

The Advisory Committee has received several proposals suggesting amendment of the Civil Rules to require random assignment of district judges in certain types of cases. The Advisory Committee previously noted that the Judicial Conference had issued guidance to all districts earlier this year recommending that they take this action as a matter of local rules and policy. At its April 2024 meeting, the Advisory Committee decided to defer immediate action to observe the districts' response to this guidance. The Reporters are closely following uptake of the guidance in the district courts, which is still in its early stages. This ongoing research reveals that some districts have already decided to follow the JCUS guidance, while others have not yet decided whether they will; things are changing rapidly. This issue is important and will remain on the Advisory Committee's agenda as it monitors the evolving landscape.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 41. Dismissal of ~~Actions~~ Claims

(a) Voluntary Dismissal.

(1) *By ~~the~~ a Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an action~~ a claim or claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

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

(ii) a stipulation of dismissal signed by all parties who have appeared and remain in the action.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), ~~an action~~ a claim or claims may be dismissed at ~~the~~ a plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ claim or claims may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

(d) Costs of a Previously Dismissed ~~Action~~ Claim. If a plaintiff who previously dismissed ~~an action~~ a claim in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Committee Note

References to "action" have been replaced with "a claim or claims," in order to clarify that this rule may be used to effect the dismissal of one or more claims in a multi-claim case, whether by a plaintiff prior to an answer or motion for summary judgment, stipulation, or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a

matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who are no longer parties. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the existing parties at the time of the stipulation provide both sufficient notice to those involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

* * * * *

(3) ***Demand for a Jury Trial.***

(A) ***Before Removal*** ~~***As Affected by State Law.***~~ A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) ***After Removal.*** If no demand is made before removal, Rule 38(b) governs a

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

demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the~~

~~time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal.

But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

TAB 6B

MINUTES
CIVIL RULES ADVISORY COMMITTEE
Washington, DC
October 10, 2024

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, DC, on October 10, 2024. The meeting was open to the public. Participants included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, David Burman, Judge Annie Christoff, Professor Zachary Clopton, Chief Judge David Godbey, Jocelyn Larkin, Judge M. Hannah Lauck, Chief Judge R. David Proctor, Judge Marvin Quattlebaum, Joseph Sellers, Judge Manish Shah, and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper (remotely) as Consultant. Judge John D. Bates, Chair, Judge D. Brooks Smith, Liaison, Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated remotely as Liaison from the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated**.** The Department of Justice was represented by Joshua Gardner in lieu of committee member Brian Boynton, who could not attend due to a court appearance. The Administrative Office was represented by H. Thomas Byron III, Scott Myers (remotely), Rakita Johnson, Shelly Cox (remotely), and law clerk Kyle Brinker. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She then thanked the committee members who have been reappointed: Judges Bissoon and Proctor, whose terms have been extended for three years, and Joseph Sellers, whose term has been extended for one year. She also welcomed new committee members: Judges Marvin Quattlebaum and Annie Christoff, Jocelyn Larkin, and David Wright. Judge Rosenberg also welcomed with gratitude the new Clerk Liaison to the Committee, Thomas Bruton of the Northern District of Illinois. She also noted, with thanks, the attendance of the new Rules Law Clerk, Kyle Brinker. Judge Rosenberg also expressed her and the Advisory Committee's appreciation for the contributions of former Counsel Allison Bruff, who has left the Administrative Office for private practice.

Prior to beginning the day's agenda items, Judge Rosenberg expressed special appreciation to subcommittee Chairs Judge Shah (Cross-Border Discovery), Chief Judge Godbey (Discovery), Chief Judge Proctor (Multidistrict Litigation), Justice Bland (Rule 7.1), Judge Bissoon (Rule 41), Judge Lauck (Rules 43 & 45), and Judge Oetken (Joint Committee on Attorney Admissions). Judge Rosenberg also expressed gratitude to the members of the public in attendance and thanked them for their ongoing interest in the work of the Advisory Committee.

Judge Rosenberg then gave a brief report on the September 2024 meeting of the Judicial Conference of the United States. She reported that the Conference had approved the proposed amendments to Rules 16 and 26, and new Rule 16.1. She indicated that these proposals would be sent to the U.S. Supreme Court by the end of the month. If the Court approves the proposals, it will issue an order that will be transmitted to both houses of Congress by May 1, 2025, and

barring action by Congress the amendments will hopefully then go into effect on December 1, 2025. Judge Rosenberg congratulated the Advisory Committee on the progress of these proposals, each of which was the product of much effort. With respect to pending legislation that would affect the Federal Rules, Judge Rosenberg referred members to the materials in the agenda book.

Action Items

Review of Minutes

Judge Rosenberg then turned to the first action item: approval of the minutes of the April 9, 2024, Advisory Committee meeting, held in Denver, CO. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Rule 81(c)(3)(A)

The next action item involved the process for making a jury demand after removal in Rule 81(c)(3)(A), which the Advisory Committee had discussed at its April 2024 meeting without reaching consensus on a final action. The current version of the Rule, as restyled in 2007, provides, in pertinent part:

> A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law **did** not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. (Emphasis added).

Prior to restyling, the verb "did" (bolded above) was "does." Professor Marcus explained that this change, for which no one involved could remember a specific reason, has introduced some ambiguity into the rule. In at least one instance, a lawyer who had not demanded a jury trial in state court prior to removal (because the deadline to do so under state law had not yet arrived) failed to do so after removal and accidentally waived his client's right to a jury trial. Reverting to "does" would arguably make it clearer that the rule requires a timely post-removal jury demand unless the state court in which the case was filed would *never* require a jury demand, as opposed to cases in which a state-court jury demand would have eventually been required but the deadline had not yet arrived. Based on research by Rules Law Clerk Zachary Hawari, while all states' laws are not entirely clear, it appears that at least 8-9 states never require a jury demand.

Professor Marcus noted three alternatives, originally laid out at pp. 99-103 of the agenda book. The Advisory Committee could, of course, leave the current rule as it is. Alternatively, it could simply change the rule back to its pre-2007 text, replacing "did" with "does" (Alternative 1.) Or, the rule could be more extensively redrafted to make explicit that the deadlines in Rule 38(b) govern jury demands in all removed cases in which the demand has not been made before removal. (Alternative 2, as restyled and presented in a handout that is now included at the end of the agenda book materials posted on uscourts.gov.) One potential virtue of Alternative 2 is to eliminate uncertainty in that it makes clear that parties must always make a timely jury demand under Rule 38(b) if they had not done so in state court prior to removal.

Judge Rosenberg then indicated that all necessary work had been completed on this issue, and the question of whether to move forward was ripe for Advisory Committee consideration. One lawyer committee member favored Alternative 2 because it makes clear that a federal jury demand is necessary regardless of state law. A judge member also expressed support for Alternative 2 because it removes any ambiguity regarding timing. Professor Struve, however, expressed concern that many lawyers will be unaware of Rule 81(c)(3) and their clients may need to be protected from inadvertently losing their jury-trial rights. Alternative 1 may provide better protection for clients under these circumstances since failure to make a post-removal jury demand under Rule 38 will be excused in states that never require such a demand. Professor Coquillette added that this concern may be especially relevant to pro se litigants who may be relying on the law of the state in which they filed. Professor Clopton suggested that the rule make explicit that a judge has discretion in removed cases to allow a jury demand that would otherwise be untimely, as in Rule 39(b).

Professor Marcus, however, suggested that in states where a jury demand is not required, word would get out that such a demand is necessary after removal. A judge member added that Rule 39(b) also always allows a judge to order a jury trial if it is not timely demanded, and perhaps a reference to Rule 39(b) in the rule, or in the Committee Note, would remind judges that they have such discretion in removed cases, as well. Another judge member then asked the Reporters whether they had a preference for whether such a reference to Rule 39 should be in the text of the rule or the Committee Note. Professor Marcus indicated that such a reference to Rule 39(b) would fit well in the Committee Note, and Professor Struve agreed that would be helpful. At that point, Judge Rosenberg suggested that the Reporters work on drafting an amended Committee Note including a reference to Rule 39 during the lunch break, and that the Advisory Committee could subsequently return to the matter.

After the lunch break, the Advisory Committee considered the following additional language to the Committee Note, to be added as a new second paragraph: "When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded."

The Advisory Committee subsequently approved unanimously for publication "Alternative 2," as drafted in the handout provided to committee members and now at the end of the posted agenda book (including the bracketed word, "necessary") with the above-noted addition to the Committee Note.

Rule 55

Judge Rosenberg then introduced the next action item, which has been on the Advisory Committee's agenda for some time: the language in Rule 55 mandating that the clerk enter a party's default under Rule 55(a), and a default judgment under Rule 55(b). Concerns have been raised that the mandatory language (i.e. "must") in Rule 55 requires clerks to take actions they might not be comfortable with. As such, the Reporters have drafted potential amended language replacing the mandatory "must" with "may," as reflected at p. 125 of the agenda book. Aided by a comprehensive report by the Federal Judicial Center, included in the agenda materials, it may be ripe for the Advisory Committee to consider whether Rule 55 as presently written presents a

real-world problem. The FJC report indicates that there is some diversity of practice among the districts regarding judicial involvement in the entry of defaults and default judgments, but the rule does not appear to be causing many difficulties in many actual cases. Given the wealth of information in the FJC report, Judge Rosenberg sought feedback on whether to continue to pursue amendments to Rule 55 or to drop the item from the agenda.

The Clerk Liaison indicated that he would prefer an amended rule to change "must" to "may," since most clerks would prefer not to enter defaults or default judgments without judicial sign-off. In his view, it would be better for districts to decide how to handle this on their own. An attorney member added that the rule should conform to practice so as not to mislead even if the rule does not appear to present much real-world confusion. Another attorney member added that the rule should be clear if judicial sign-off is required before the clerk enters the default, so a party seeking a default will know to address the judge. A judge member agreed, noting that the word "may" signals to the parties that the entry of default is not purely mechanical, and that the judge might be involved. Judge Rosenberg suggested that such a signal could be sent by adding language indicating that the clerk must enter a default "unless ordered by the court." Another judge member suggested language reflecting that the clerk should ordinarily enter defaults, but "may defer to the court." Such language would be capacious enough to reflect the diversity of practice among the districts.

Professor Marcus responded, however, that Rule 55 has remained unchanged for a long time, and that if a clerk's office does not enter a default or default judgment for some reason, a party may always make a motion under Rule 7(a) for an order. Although it is debatable whether the rule accurately reflects current practice, a change might add unnecessary confusion to a process that seems to be working relatively well. Professor Cooper suggested that perhaps the rule would be more precise if it were amended to provide that the clerk or the court must enter a default or default judgment unless directed by the court, since "may" might indicate a rather imprecise element of discretion beyond what really occurs. Professor Cooper suggested, however, that unless the rule appears to cause real confusion, perhaps it is better to leave it alone.

An attorney member raised a concern that while Rule 55(b)(1) requires that the clerk enter a default judgment in cases where the plaintiff's claim is for a sum certain without notice to the defendant, Rule 55(b)(2) requires an application to the court for all other default judgments and that notice of such an application must be served on the defendant. Professor Marcus agreed that the notice requirement does raise interesting issues, but there appear to be few real-world problems in federal cases.

Judge Rosenberg then turned to the Clerk Liaison to ask whether, in his experience, there is a real-world problem. He responded that there does not appear to be one; the rule is working. On the other hand, it's also not clear to attorneys that in many courts clerks actually seek judicial approval before entering defaults. A judge member added that in her district defaults in pro se cases are typically handled in chambers, and it may create suspicion that the court is doing something contrary to the language in the rule. As a result, she prefers changing "must" to "may" in order to reflect that in some cases the clerk will not enter a default without judicial involvement. A pro se litigant seeking entry of default might be rebuffed by the clerk's office and told to seek an order from the judge. The Clerk Liaison indicated that in such circumstances,

given the mandatory text in the rule, a litigant might be tempted to embrace a "conspiracy theory."

An attorney member took a different tack. In his view, the rule is appropriately drafted. In a case where a default or default judgement is warranted, there should not be discretion. The rules are clear as to the requirements of litigants, and a party entitled to a default should be able to get one mechanically without discretion injected into the process.

A judge member then opined that the problem was fascinating because, despite the clear language of the rule, districts handle defaults differently. One benefit of the rule as drafted is that it protects clerks who enter defaults because they are not provided any discretion to refuse. "May" indicates a kind of discretion that clerks are unlikely to substantively exercise. If the real issue is that clerks sometimes seek judicial involvement, perhaps Professor Cooper's suggestion that either the clerk or the court must enter a default judgment when the requirements are met is preferable. This would make clear that it isn't always the clerk's decision to make, but it would not indicate that there is more discretion than the rule contemplates.

An attorney member, however, indicated that judges do appear to exercise some discretion, so perhaps an alternative that would direct parties to seek a default from the clerk in the first instance, but that the clerk may defer to the court, would more accurately reflect current practice.

At this point, Judge Bates suggested that the discussion reflected some complexities here that might benefit from additional study. Professor Marcus agreed and added his view that the Advisory Committee should return to this question at its spring meeting. Judge Rosenberg concurred and thanked the committee for its input. In her view, the discussion indicated that the rule does not reflect current practice and that ideally there should not be ambiguity for litigants, clerks' offices, or courts. The Reporters will draft potential amendments for consideration as an action item at the April 2025 meeting. As a coda, Dr. Lee added that his research revealed that this is indeed a confusing rule and thanked the Rules Committee Staff for their assistance with this project.

Rule 41

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, presented several amendments for approval for publication. This subcommittee was created at the March 2022 Advisory Committee meeting in response to two proposals that revealed significant variation among the districts and circuits regarding interpretation of the rule. In sum, although the rule speaks only of voluntary dismissal of "actions," most courts use it to dismiss less than an entire action. That is, most courts interpret the rule to permit dismissal of one or more claims in a multi-claim case. As detailed in the agenda book, after a lengthy period of study and outreach, the subcommittee reached consensus that the rule should be amended to explicitly permit voluntary dismissal of one or more claims. The subcommittee also reached a consensus that the rule should be amended to make clear that a stipulation of dismissal need be signed only by current parties to the case and not those who were once parties but no longer are.

Judge Bissoon noted that she had struggled with whether a rule amendment was necessary, but she concluded that there was a need for clarity, and that amending the rule to explicitly allow dismissal of one or more claims, rather than only the entire action, would not only better conform to practice but would also further the rules' general policy in favor of narrowing and simplifying the issues in cases prior to trial. Ultimately, the subcommittee concluded that this would make the rule more practical, especially in complex, multi-party, multi-claim cases, which are now far more common than they were in 1938.

Professor Bradt noted the extensive research and outreach done by the subcommittee and agreed that these amendments were consistent with what most judges and lawyers already thought the rule permitted. Moreover, he cited historical materials contemporaneous to the drafting of the rule that indicated that even in 1938 the rulemakers intended the rule to be construed to permit dismissal of one of multiple "causes of action" pleaded in a complaint.

Professor Bradt also noted that the changes to Rule 41(a) necessitate a conforming amendment to Rule 41(d) to reflect that costs may be imposed against a plaintiff who files an action based on or including a previously dismissed claim. At Professor Struve's suggestion, the proposed last sentence of the first paragraph of the committee note was expanded to read: "Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims." No Advisory Committee member expressed disagreement with this change.

An attorney member applauded the work done by the subcommittee and agreed that the proposed amendments better reflect current practice and serve the goal of efficiency. This member questioned, however, whether the amendment requiring signatures on a stipulation of dismissal of current parties to a case might be narrowed to require only the signatures of the parties to the claim to be dismissed. Judge Bissoon responded that the subcommittee had considered this alternative but ultimately concluded that it would be better to ensure that all extant parties receive notice of a dismissal of a claim. Should a party refuse to sign such a stipulation, the court could still order a dismissal. If nothing else, in such a situation, the rule as amended would at least notify the judge of a potential dispute.

Professor Coquillette also applauded the subcommittee's work, particularly its historical research revealing that this amendment is more consistent with the rulemakers' overall approach in 1938, drawn largely from English courts of equity.

Some additional wordsmithing ensued and resulted in adoption of language in the rule referring to "a claim or claims" and ensuring appropriate references to "a plaintiff" as opposed to "the plaintiff" in the rule. There was also some discussion of refining the use of the term "opposing party" in Rule 41(a)(1)(A)(i), but the committee ultimately concluded that the term was used appropriately.

Subsequently, the advisory committee voted unanimously in favor of sending the proposed amendments to the Standing Committee to consider publication.

Almost-Action Items

The Action Items having been completed, Judge Rosenberg turned to the next category of items on the agenda, "almost-action items," or matters further along in consideration or that would benefit from Advisory Committee feedback on next steps.

Remote Testimony Under Rules 43 & 45

Judge Rosenberg began the discussion by referring to the various proposals and extensive materials in the agenda book. She noted that the subcommittee has already spent a lot of time on these issues and has met three times, including with the Discovery subcommittee to elicit its members' views. She then turned the discussion over to the subcommittee's Chair, Judge Lauck.

Judge Lauck noted that the subcommittee was created in part to investigate a possible response to the Ninth Circuit's decision in *In re Kirkland*, but also the proposals that Judge Rosenberg had referenced to relax the standards for using remote testimony at trial. Because both issues implicate overlapping questions of the increased use of remote testimony in the post-pandemic era, when there is now widespread familiarity with remote-meeting software like Zoom and Teams, the subcommittee has been considering changes to both Rule 43 and Rule 45. Rules 43 and 45 are not "apples to apples" in the sense that they address remote testimony in different contexts, but the overarching issues are related.

Judge Lauck explained that remote testimony has become increasingly common at depositions, motion hearings, and trials due to positive experiences with improved technology in the Covid era. Typically, the use of remote testimony in each of these contexts is by stipulation of the parties -- for instance, Rule 77(a) requires that all trials "must be conducted in open court and, so far as convenient, in a regular courtroom," but the parties may consent to remote testimony. Nevertheless, despite the increased acceptance of remote testimony, the Rules must contemplate what to do when a party contests its use.

Judge Lauck explained that currently the standard under Rule 43 for using contemporaneous remote testimony at trial is quite strict, requiring compelling circumstances, good cause, and adequate safeguards. One proposal suggests removing the compelling-circumstances requirement and essentially maintains that the best alternative to in-court testimony is contemporaneous remote testimony and not a deposition transcript.

One question the subcommittee has considered is whether a response to *In re Kirkland* could be handled as a discrete issue, separate from the more multifaceted topic of remote testimony generally. As Judge Lauck explained, in *Kirkland*, the Ninth Circuit held that Rule 45(c)(1)(A) authorizes a subpoena for trial testimony only in 100 miles of where the recipient "resides, is employed, or regularly transacts business in person," regardless of whether that testimony is to be given in person in the courtroom or remotely and transmitted to the courtroom. That is, even when a witness may testify remotely under the terms of Rule 43(a), a subpoena can only command that testimony if the live trial is held within the 100-mile window in Rule 45(c)(1)(A). In other words, a subpoena cannot command a witness to testify remotely from a location within 100 miles of *his* residence, if it will be transmitted to a trial occurring beyond that radius. Although the Committee Note to the 2013 amendment to Rule 45(c) seems to indicate

that the Committee's intent was to permit subpoenas for remote testimony compelling the witness to appear at a location within 100 miles of his home, the Ninth Circuit panel concluded that the note was inconsistent with the plain text of the Rule. The Ninth Circuit suggested that the Rules Committee address the text of the rule to address the issue.

Judge Lauck noted that, *Kirkland* aside, it is uncontroversial that the Advisory Committee's Rule 45 project, which culminated in the 2013 amendments to the rule, was intended to expand the trial court's subpoena power to allow orders that remote testimony be given within 100 miles of the witness's residence, place of employment, or regular business. In light of the Ninth Circuit's decision, one avenue for the subcommittee is to propose an amendment to Rule 45 that would say that a court may require a witness to appear within 100 miles for testimony that will be transmitted live to the trial. One question that arises, however, relates to the mechanics of how one might obtain an order for remote testimony under Rule 43(a), the circumstances of serving such an order along with the subpoena, and identifying the location of the remote testimony. Judge Lauck noted that some subcommittee members had expressed concerns that this would create another opportunity for additional time-consuming satellite litigation over a Rule 43(a) motion. Judge Lauck explained that this is just one example of how Rules 43 and 45 (and perhaps others) interact, so dealing exclusively with the problem raised by *Kirkland* may be tricky, and perhaps the entire set of issues should be handled at once.

Judge Lauck also noted the Bankruptcy Rules Advisory Committee's consideration of rule amendments that ease the requirements for remote testimony in various proceedings, including a blanket permission for remote testimony in "contested matters." Those amendments are out for public comment, and the subcommittee will surely benefit from what the Bankruptcy Committee hears.

Professor Marcus added that the subcommittee faces an array of complications, including: whether the requirements for allowing remote testimony should differ for depositions, hearings, and trials; how to go about getting an order under Rule 43(a) and whether to require that the order be served; and what to do about the requirement of tendering fees for attendance. There is, however, significant appeal to addressing *Kirkland* by making it clear that the judge can command appearance for remote testimony within 100 miles of the witness's residence even if the trial is occurring farther away. If the judge thinks remote testimony should be allowed, and it isn't unreasonably inconvenient for the witness, the witness should be required to appear. This was the intent in 2013 and that intent is reflected in the Committee Note the Ninth Circuit found unclear.

Judge Bates suggested looking at the process from a "20,000-foot perspective." In his view, the process might require getting an order from the judge permitting remote testimony under the strict requirements of Rule 43(a), likely with participation from the other parties as opposed to *ex parte*, followed by service of both the Rule 43(a) order and the subpoena on the witness. This is a change in subpoena practice because often other parties are not currently informed of all subpoenas that issue, so this will create an added piece of litigation for subpoenas commanding remote testimony.

One judge member opined that the problems of Rules 43 and 45 seem to be discrete. That is, the *Kirkland* decision doesn't say that remote testimony is inconsistent with Rule 77 because

it is not in "open court." This member did not see a problem with the requirements in Rule 43(a) and noted that it seems like a significant step to lower those standards. This member would prefer that the rule be amended to state only that remote testimony can be commanded at a location within 100 miles of the witness's residence et al.

Another judge member agreed, noting that when it comes to hearings and depositions the requirements for remote testimony might be relaxed, but for trial, the Rule 43(a) requirements continue to seem appropriate. With respect to trial testimony, the logistics, such as the software used and safeguards against improper communication with the witness, have to be fleshed out by the court and parties well in advance, so a court order specifying those matters seems inevitable and uncomplicated to serve on the witness.

A judge member of the Committee then stated that although there is a consensus that in-person testimony is preferred, in Texas there have been at least 5 million remote proceedings since the pandemic. Due to the massive size of the state, Texas has embraced remote proceedings and they have worked well. Lowering the bar for remote testimony, perhaps by eliminating the compelling circumstances language from Rule 43(a), signals to judges that they have the ability to experiment. This Committee member posited that the world has changed since the pandemic, and that the Committee should consider giving judges more flexibility to allow remote testimony for good cause and with adequate safeguards.

Another judge liaison agreed with these sentiments in favor of increased flexibility. Courts should be able to easily handle whether to allow remote trial testimony on a motion in limine. This judge also noted that the proposed amendments to the bankruptcy rules would allow increased use of remote testimony on both simple and very complex matters.

A judge member then prompted a discussion on whether the standard for allowing remote testimony should vary depending on whether that testimony is at a deposition, hearing, or trial. Rule 43(c) for instance does not have an explicit textual reference to the use of remote testimony at a hearing on a motion. Professor Marcus wondered whether the provision for remote testimony at trial in 43(a) also implicitly allowed the use of such testimony at hearings but agreed that the text of the rules doesn't resolve the question. Both Professor Marcus and the judge member wondered whether the *Kirkland* problem could be addressed for hearings without modifying Rule 43. An attorney member followed up by noting that for both hearings and motions, the judge can address these issues at a pretrial conference under Rule 16, and usually the parties are able to agree. So perhaps the *Kirkland* matter can be addressed via a rule amendment without creating many on-the-ground problems while the subcommittee deals with the broader questions about the use of remote testimony.

Judge Rosenberg then suggested that this productive conversation demonstrated that there are several issues on the table.

First, in light of *Kirkland*, is Rule 45 ripe for an amendment? There appears to be consensus that such an amendment should be developed, and no committee members objected.

Second, how should such an amendment be accomplished?

One judge member prefers explicitly referencing authorization for remote testimony under Rule 43(a) in Rule 45(c), as suggested in the agenda book at page 195, line 602 (i.e., make Rule 45(c) read: "A subpoena may command a person to attend a trial, hearing, or deposition, or to provide trial testimony from a remote location when authorized under Rule 43(a) . . . "). Another judge member expressed a desire for an accompanying amendment to Rule 45(a)(1) to provide explicit authority for remote testimony at a hearing in order to address the lack of text authorizing such testimony in Rule 43(c). This approach is in the agenda book, at page 196, line 631: ((D) **Remote Testimony on a Motion Under Rule 43(c).** A subpoena may command a person to attend a hearing on a motion by remote means.). An attorney member agreed and contended that if remote testimony is allowed for a trial, it should also be allowed for hearings. He noted that often live testimony is necessary for a hearing on a motion for a preliminary injunction, since there is not yet any deposition testimony. There are also myriad other motions for which live testimony is necessary because the outcome may turn on the credibility of a witness. This attorney member suggested that making it clear that remote testimony can be used would be beneficial since many attorneys might read the text of the current rule and think that it cannot be used in those circumstances.

Another judge member, however, expressed that the Committee should deal only with *trial* testimony first, in order to address *Kirkland* promptly, while leaving the question of hearings for later analysis. That is, the Committee should just "tweak" Rule 45(c) now to make clear that a person may be subpoenaed to appear within a hundred miles to testify remotely at trial, and defer other contexts for later. An attorney member agreed. Although Rule 43 contains some matters that need "cleaning up," the best course is to deal with the *Kirkland* problem first by amending only Rule 45(c) while continuing work on Rule 43. Another judge member agreed with this approach.

Professor Cooper also agreed with the sentiment that *Kirkland* should be addressed with a change to Rule 45(c) along the lines of what is suggested at page 195, line 594, of the agenda book, without the bracketed language. That is, amend Rule 45(c)(1) to add the language "or to provide trial testimony from a remote location." Additional questions could be addressed separately.

Judge Lauck thanked the Committee for its feedback and said that the subcommittee would continue its work.

Rule 45(b)(1) Service of Subpoenas

Judge Rosenberg then introduced the Discovery Subcommittee's ongoing project on service of subpoenas under Rule 45(b)(1). The subcommittee's Chair, Chief Judge Godbey, noted that the subcommittee had devoted substantial effort to this question. Earlier efforts had focused on revising the rule to include a "cafeteria plan" with a list of options drawn from Rule 4, but the subcommittee has instead turned toward a simpler approach on which the subcommittee would benefit from feedback.

Professor Marcus then directed the Committee's attention to two alternatives detailed at pages 289-90 of the agenda book. Both alternatives essentially authorize personal service and permit that: "For good cause, the court may by order authorize serving a subpoena in another

manner reasonably calculated to give notice." In essence, the rule requires that the first effort at service be by hand, but then allows the serving party to seek an order from the court authorizing another method likely to be more successful if the recipient is ducking service.

Professor Marcus then noted that there are two other questions addressed in the alternative amendment proposals: (1) whether there should be a requirement that the recipient be served at least 14 days before the required attendance; and (2) how to handle the current requirement of tendering fees for attendance and mileage if the subpoena is served electronically. To some degree, the requirement of tendering fees seems anachronistic and perhaps could be deleted. Alternatively, if the requirement should be retained, perhaps the fees could be tendered when the subpoenaed person shows up, rather than when serving the subpoena.

One attorney member confirmed that the requirement to tender fees is a nuisance, but it exists to ensure that those who are subpoenaed but may not have car fare can get to court. It would be odd for someone in such circumstances to be subject to penalties for non-compliance while not being provided the means to appear. Another attorney member suggested that perhaps the rule should state that fees should presumptively be tendered with the subpoena, unless there is good cause to use other means of service.

A judge member then asked whether the rule should explicitly allow for service by mail to the recipient's last known address, as suggested by Professor Cooper (and laid out in footnote 13 at page 289 of the agenda book). Professor Marcus indicated that the subcommittee had concluded that the rule should be simpler and not identify any other methods for service other than the presumption in favor of personal service. Moreover, a prior attorney member had asserted that young people do not typically look at U.S. Mail, so explicitly endorsing mail as a presumptively proper means of service might be inapt. A liaison member affirmed this view, saying that mail is "worthless," and that email is better.

Professor Cooper noted that he takes seriously the qualms about service by mail, but noted that some courts, including the Seventh Circuit, have held that the current rule permits service by mail, so the suggested amendment would change practice in those courts. Ultimately, Professor Cooper said that the practical question is: whether U.S. Mail is sufficiently unreliable or so commonly ignored that it is better to default to personal in hand service or at home.

One judge expressed the concern that, as she read the amended rule, mail was not permitted even as an alternative method of service and perhaps it should be included. Professor Bradt suggested that perhaps the committee note could make clear that service by mail is among the options the court has in ordering an alternative means of service.

An attorney member expressed the concern that lawyers might seek a case-management order authorizing an alternative method of service applying to all subpoenas in a case. Judge Bates suggested that perhaps the committee note should indicate that this would be inappropriate and that approval of alternative means should be on a subpoena-by-subpoena basis.

Professor Marcus then sought the Committee's views on the 14-day period between service and attendance. Two judge members endorsed this proposal on the ground that subpoenas with a shorter window for compliance or attendance are often unreasonable or difficult to

enforce. An attorney member added that the 14-day period conforms to normal practice, and that if an adjustment to the period is needed the court can adjust. One judge member indicated that she had seen subpoenas issued that require action beyond the close of discovery. Professor Marcus responded that the subcommittee had not yet considered the possibility of a subpoena that conflicts with the close of discovery mandated in a Rule 16(b) scheduling order. In such cases, a 14-day period of compliance should likely not override the scheduling order, but the subcommittee will consider this issue in further discussions.

Use of the Term "Master" in Rule 53 and Elsewhere

Judge Rosenberg then invited discussion on the proposal from the American Bar Association to replace the term "master" in Rule 53 and several other rules where the term appears with "court-appointed neutral." She noted that the proposal had also been endorsed by the Academy of Court-Appointed Neutrals and the American Association for Justice. That said, this would be a potentially extensive change since the word appears in many rules (both civil and otherwise) and there does not appear to be a broad consensus about the appropriate replacement. The current language does not present the kind of problem the Rules Committee usually confronts in that it does not create an ambiguity or procedural obstacle. Indeed, a change in the nomenclature would not be intended to cause any substantive change in practice. The question on the table is whether to proceed with a proposed set of rules changes.

Professor Marcus elaborated. Ultimately, the question is whether this would be a desirable thing to do, but that assessment is different from the problems we normally encounter. The term appears in many places in the law beyond Rule 53: other civil rules, Supreme Court rules and orders, and other court orders issued outside Rule 53. Professor Marcus also sought feedback on whether substituting the term master in all of the areas it appears is an urgent matter or should await further reflection. If the Committee believes the term should be replaced, the next question is what should replace it. There are reasons why "court-appointed neutral" may be inapt, largely because masters can be appointed to do things that are not quite "neutral" as between the parties. Moreover, the term does not capture the likelihood that a court has appointed a person due to her "mastery" of the subject matter or the tasks she has been appointed to perform. This is a "charged topic" about which academic proceduralists have little expertise to add, so the Reporters could benefit from Committee members' feedback.

Professor Coquillette sounded a word of caution about changing the language, unrelated to ideological issues. He explained that many treatises and other research aids now work on word-retrieval systems with keywords, so when the words of a rule are changed it becomes very difficult to access historical records. This creates a real challenge and increases costs for practitioners and students researching the law.

A judge liaison to the committee noted that he had recently been appointed a special master in a case by the Supreme Court, and the Committee should be attentive to any differences between "special masters" and "masters." The role of "special master" is one that exists and is set forth in the Supreme Court's rules. He would not describe his work as a special master as neutral in the way that word might apply to one doing early neutral case evaluation. Another judge member agreed that a "master" is not equivalent to the "neutral," and that this does not seem like a promising avenue for the Committee. A different judge member agreed that the term

neutral seems inapt because it implies a mediator without power to order the parties to act, which is not true of a master in many cases.

Judge Rosenberg then asked whether there was opposition to keeping the matter on the agenda for future study and observation. The Committee may revisit the issue as it learns new information. No members expressed opposition.

Information Items

Rule 7.1 Subcommittee

Justice Bland, Chair of the Rule 7.1 Subcommittee, reported its ongoing efforts to amend the corporate-disclosure requirement to make judges more aware of potential financial interests in a party that would trigger the statutory duty to recuse. She explained that, as laid out in detail in the agenda materials, the Judicial Conference Codes of Conduct Committee had issued recent revised guidance regarding the recusal requirement. This revised guidance, which came out shortly before the April Advisory Committee meeting, can essentially be boiled down to the concept of "control," that is, if a judge holds a financial interest in an entity that "controls" a party, she must recuse. Borrowing from the current version of Rule 7.1, the guidance uses 10% ownership as a benchmark for control. But the guidance also states that irrelevant of control, if the price of stock a judge owns is likely to be substantially affected by the result of a case, the judge should recuse.

From its inception, this subcommittee has been focused on revealing to judges whether entities in which they hold investments own or control a party. The rule currently requires disclosure of "any parent corporation and any publicly held corporation owning 10% or more of its stock," but this requirement may not trigger disclosure of a publicly traded corporate "grandparent" of a party in which the judge may hold an interest.

The agenda materials include preliminary proposed rule language that attempts to effectuate the Codes of Conduct Committee's guidance by requiring disclosure of any parent corporation (or business organization), any publicly held corporation (or business organization) owning 10% or more of a party's stock, and "any publicly held business organization that directly or indirectly controls a party."

Professor Bradt then explained that the subcommittee's outreach had demonstrated that a rule providing a "laundry list" of all corporate connections or affiliations that must be disclosed would be unworkable. Not only does the business landscape change too rapidly to keep such a list up to date, but it can also result in overly onerous requirements that are costly to comply with and risk swamping the judge with unnecessary information. More capacious language is therefore preferable, but of course the broader such language is, the more difficult it becomes to define. The subcommittee's effort here was to use the language of the Judicial Conference guidance, and the subcommittee was eager to hear committee members' reactions.

One judge member voiced a concern that the rule is limited to disclosure of publicly held corporations that are not "parents" but own more than 10% of the party stock or control a party. This judge suggested that there may be non-profits that own parties with which judges might have affiliations, such as churches that own hospitals. Another judge member expressed concern

that the term "control" might not adequately communicate to a party what must be disclosed. Another judge member suggested that feedback would be especially useful on this point. Although "control" may be a vague concept, it might also be clear in most cases, and in any event federal judges have been directed to determine whether a party is "controlled" by another entity in order to decide whether to recuse.

Justice Bland and Professor Bradt noted that the subcommittee's next step is to seek feedback on these questions from knowledgeable parties. One judge member suggested that some professional organizations might be especially knowledgeable, particularly organizations of corporate counsel or the SEC. The Clerk Liaison noted that any such amendment would need to take into account the limitations of the conflicts software embedded in CM/ECF to ensure that reports will be effectively screened.

The subcommittee will next report on its progress in the spring advisory committee meeting.

Filing Under Seal

Chief Judge Godbey, Chair of the Discovery Subcommittee, delivered a brief report about proposals regarding rulemaking on filing under seal. Chief Judge Godbey noted that this issue had been before the subcommittee for some time but was on hold while an Administrative Office project addressed the same issue. Rulemaking on filing under seal has the potential to be very complex because the processes for doing so in different contexts are diverse and detailed. Beyond a minimalist approach drawing lawyers' attention to the distinction between filing under seal and seeking a protective order, it's not clear where such a rule would stop.

Professor Marcus then added that the subcommittee's further work on this subject would rely heavily on information provided by the Clerk Liaison because clerks' offices are on the front lines. There are many specific elements of a possible rule that are laid out in the agenda materials, but they may not all fit together coherently. Moreover, different districts have different practices, and what might work for one district might not work for another. As investigation proceeds, the subcommittee will seek feedback from judges and attorneys, but clerks' offices are also vitally important in learning what is feasible in practice.

Cross-Border Discovery Subcommittee

Judge Shah, Chair of the Cross-Border Discovery Subcommittee, reported that members had been on a listening tour in order to seek feedback on whether the Federal Rules should address cross-border discovery, as had been urged by Judge Baylson and Professor Gensler. The subcommittee first reached out to the Department of Justice, which expressed the view that rulemaking is not necessary in this area, and that judicial education and case management are sufficient to head off potential problems. Judge Shah also noted that former committee member Judge Boal had reached out to magistrate judges, who often address cross-border-discovery issues in the first instance, and they, too, did not see a strong case for rulemaking.

Subcommittee members have also participated in panels on cross-border discovery at meetings held by Lawyers for Civil Justice (LCJ) and the American Association for Justice (AAJ) and an online session put on by the Sedona Conference. Professor Clopton reached out to

the American Bar Association, and Judge McEwen has reached out to bankruptcy judges and lawyers. The feedback from these groups has been uniform that there is not an outcry for rulemaking in this space. Although cross-border discovery is inherently complex and challenging, there is skepticism that rulemaking will provide much improvement. The primary concern that has been raised is when parties are called upon to produce materials in discovery when such disclosure would be illegal under the local law where the materials are held. But those who have faced this issue report that they are often able to develop accommodations tailored to the needs of specific cases, making a uniform rule undesirable. Some attorneys have also expressed skepticism about a rule that would require cross-border discovery to be addressed early in the case at a pretrial conference. These attorneys noted that many problems can be resolved by the parties and those subpoenaed without involvement from the judge, and especially challenging issues are best resolved as they arise.

Professor Clopton confirmed that his conversations with ABA members who specialize in international civil litigation were consistent with Judge Shah's report. Although some lawyers think early attention to cross-border discovery might be beneficial, others thought that accelerating consideration of the issues to an early moment in the litigation would be counterproductive. Often potential problems do not materialize. Moreover, there are other ongoing efforts to simplify this process, such as exchanges between the U.S. and E.U. aimed to simplify the exchange of information. The Chinese government is also considering regulations that may be salutary. Professor Marcus confirmed that the message to the subcommittee from the meeting with attorneys from AAJ in Nashville was that forcing upfront consideration of cross-border discovery was unnecessary. Professor Bradt added that this was consistent with what he and Judge Shah had learned from their meeting with LCJ.

Judge Rosenberg thanked the subcommittee for their extensive outreach. This issue remains on the agenda, and subcommittee members and reporters will continue to attend conferences and seek feedback. The Advisory Committee will revisit the issue in the spring.

Disclosure of Third-Party Litigation Funding

Judge Rosenberg began this discussion by noting that the issue of third-party litigation funding (TPLF) has been on the Advisory Committee's agenda since 2014, since which time it has been monitored by the reporters. Professor Marcus noted that proposals for rules requiring disclosure of TPLF have come before the Advisory Committee several times and that perhaps the time had come to see if a such a rule would be worthwhile. The landscape of TPLF is highly dynamic, making rulemaking a challenge, but perhaps the time was ripe to take that challenge on. Judge Rosenberg noted that TPLF was considered early on as part of the MDL Subcommittee work, which culminated in proposed new Rule 16.1. Rule 16.1 ultimately did not address TPLF, but the MDL Subcommittee received substantial feedback.

One attorney member then noted that her organization has been a third-party litigation funder, in that her organization provides small grants to those bringing public-interest cases. If the case is successful, the organization gets 7% interest on its investment. To her, the biggest concern might be opening the door to discovery, which would be an enormous problem. But a rule that requires only disclosure of TPLF might not present those concerns.

Several other committee members noted limited experience with TPLF but would be interested to see what a subcommittee might learn, especially since they all agreed that TPLF would only become more prominent. For instance, one judge noted her concern about who is calling the shots in settlement discussions, especially in light of the requirement in Rule 16(c)(1) that someone with authority to consider settlement be available at pretrial conferences.

One judge member then added that he is asked often whether TPLF is "good or bad," and there do seem to be some good effects, including creating possibilities for lawyers without a lot of capital to "break in" to leadership structures in MDL. Other lawyers contend that TPLF presents mostly a threat. In this judge's view, now is the appropriate time to take the issue on and study it closely, if for no other reason than "we don't know what we don't know." The landscape is changing drastically, and the mechanisms for funding are diverse. One example is plaintiffs in the NFL concussion litigation who received TPLF from a firm that brought their claims. This judge contended that it would be wise to "peek under the covers" and do as much homework as we can to determine whether there is a problem amenable to a rules-based solution. Since the Advisory Committee has been asked to take this subject on for a while, it would be good to take a close look with an open mind and open eyes.

An attorney member who had been a member of the MDL Subcommittee sounded a note of caution. There are an infinite number of ways to get what might be called "TPLF," including from an uncle, a non-profit, and of course for-profit investors, although in his experience contracts with such investors were carefully drafted to limit the investors' influence. The MDL Subcommittee concluded that the area was not susceptible to a rule. Although this member was not opposed to further study, he cautioned that it was unclear whether there would be a promising rule that would come out of the process.

Judge Bates explained that, in his tenure as Advisory Committee Chair, he had originally assigned this issue to the MDL Subcommittee, although he understood why that subcommittee ultimately decided to leave it to the side when developing Rule 16.1. In his view, the Advisory Committee's usual approach (i.e., identifying a real-world problem and then assessing whether the problem is amenable to a rules-based solution and what the consequences of such a solution might be) applies here. As such, the Advisory Committee should determine whether nondisclosure of TPLF creates a real-world problem, or just a theoretical one.

Judge Rosenberg noted that the MDL Subcommittee had asked the Judicial Panel on Multidistrict Litigation to survey MDL transferee judges to take their pulse on whether TPLF was presenting a practical problem. Those judges had not seen such a problem, but that outreach was several years ago, so there is likely significant new information. It may be time to really focus and try to get as much information as possible from knowledgeable parties. In order to do so, Judge Rosenberg asked Chief Judge Proctor if he would chair a new subcommittee on TPLF. Chief Judge Proctor agreed to do so, and Judge Rosenberg agreed to appoint members to this subcommittee in due course.

Social Security Numbers

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of Social Security numbers (SSN). As detailed in the agenda book at

page 362, the Privacy Rules Reporters Working Group has continued its work on this issue. Three Advisory Committees (Bankruptcy, Civil, and Criminal) have received proposals specific to their rules, all of which remain under consideration. The Working Group's focus has been on issues common to all the committees, including: (1) ambiguity and overlap in exemptions from redaction requirements; (2) the scope of the waiver provisions in the privacy rules; (3) potential expansion of information subject to redaction; and (4) protection of other sensitive information, addressed in part by a submission from Lawyers for Civil Justice (23-CV-W) that remains on this Advisory Committee's agenda. The recommendation of the Working Group is that these cross-cutting issues do not present a real-world problem amenable to a rules-based solution applicable to all of the rule sets. This conclusion is not in any way preclusive of each Advisory Committee taking up new issues related to privacy specific to their rule sets. Although the Advisory Committee on Bankruptcy Rules was comfortable with this conclusion, some members of the Advisory Committee on Appellate Rules expressed a view that the committees should be more proactive before a data breach occurs.

This issue will continue to be raised at all upcoming advisory committee meetings, alongside consideration by the committees of specific proposals addressed to them.

E-filing by Pro Se Litigants

Professor Struve then reported on ongoing efforts by the joint working group considering whether to increase access to electronic filing systems. One possibility is to reduce the burden on pro se litigants by relieving them of the requirement to serve opposing parties by traditional means. One question on which Professor Struve sought input from the Advisory Committee was whether there might be support for allowing pro se litigants to serve by email. Although such a proposal might present particular problems in the bankruptcy courts, it is not clear that it would present any problems for the district courts. The Clerk Liaison, who is a member of the joint working group, described his outreach to colleagues from a diverse array of district courts, all of whom supported such a change as a reasonable step forward that would speed up litigation.

Professor Struve then sought feedback on a "more adventurous" proposal that would provide pro se litigants access to CM/ECF. FJC research has revealed that current approaches vary widely among the federal courts. The courts of appeals all allow access for pro se litigants, whether by default or permission (except for one, which allows service by email). Conversely, the bankruptcy courts do not allow any CM/ECF access to self-represented debtors. Among the district courts, there is a wide spectrum: 10% allow access by default, 15% bar access, while the others are somewhere in the middle, most typically allowing access with permission. The proposal laid out in the agenda materials essentially would presumptively provide access to pro se litigants but allow districts to opt out or create exceptions. The Bankruptcy Rules committee was wary of this proposal, while the Appellate Rules committee was more sanguine.

The Clerk Liaison offered support for such a proposal, noting that electronic filing is more efficient and paper filing eats up dwindling resources. Professor Clopton also voiced support for the proposal, noting that the opt-out possibility would provide opportunities for district variation if needed. An attorney member of the committee also expressed support for the idea and that the rule would not be one size fits all. A judge member, however, cautioned that for some districts this would be a major shift that would require significant adjustment.

Professor Struve thanked the committee for its feedback. She will report developments at the spring meeting.

Unified District Court Bar Admission

Professor Struve reported on the activities of the joint subcommittee formed to consider several proposals spearheaded by Professor Alan Morrison of George Washington University Law School regarding admission to practice in the district courts. These proposals all address the concern that the barriers to district court bar admission are too high. As a condition for membership in a district court bar, most districts require membership in their state's bar, while a small minority require passage of their state's bar exam. These requirements create serious barriers for lawyers, especially those who work for public-interest organizations whose practices are nationwide. Such lawyers often cannot get membership in various districts and have to resort to admission pro hac vice, associating with expensive local counsel, or both.

The subcommittee is most strongly considering a proposal modeled on Federal Rule of Appellate Procedure 46, which conditions eligibility for circuit-court bar membership on membership in good standing of a state bar. The subcommittee is hard at work thinking about costs and benefits of such a rule. It continues to seek feedback from members of the various advisory committees, state bars, and circuit courts, and will report back on further developments at the spring advisory committee meetings.

Random Case Assignment

Judge Rosenberg began the discussion of various proposals seeking random assignment of district judges in certain types of cases by noting that the Judicial Conference had issued guidance to all districts earlier this year recommending that they take this action as a matter of local rules and policy. At its April 2024 meeting, the Advisory Committee decided to defer immediate action to observe the districts' response to this guidance. The Reporters are closely following uptake of the guidance in the district courts, which is still in its early stages. Professor Bradt noted that some districts have already decided to follow the JCUS guidance, while others have not yet decided whether they will; things are changing almost daily. One judge member cautioned that this is a volatile and important issue that raises significant separation-of-powers concerns. Judge Rosenberg noted that these concerns are important, and the Reporters are monitoring the situation and continuing research. This issue will remain on the agenda for the spring meeting.

Privacy and Cybersecurity

Judge Rosenberg noted that the Advisory Committee had received an extensive proposal from Lawyers for Civil Justice regarding privacy and cybersecurity (23-CV-W). The Judicial Conference is actively looking into these issues and developing a judiciary cybersecurity strategy. The Advisory Committee is mindful of the seriousness of these issues and seeks input. But it would be especially helpful to target attention to specific and discrete proposals, because this issue is so complex that it could easily become overwhelming. Judge Rosenberg invited any person or organization to propose a targeted and specific focus for the committee to pay close attention to.

Items to be Dropped from the Agenda

Professor Marcus introduced three issues reviewed by the chair and reporters that did not seem promising and that he recommended be dropped from the agenda:

- A proposal to clarify the requirement in Rule 16(b)(4) of "good cause" to modify a scheduling order (24-CV-K). Although this proposal is backed by strong research that demonstrates that this requirement is interpreted differently in different jurisdictions, there are dangers in providing a specific definition of "good cause," language which is intentionally flexible and used throughout the rules in different contexts. Going down the road of defining good cause precisely in every such context could quickly become a slippery slope.

- A proposal to replace the word "issue" with "factual dispute" in Rules 50(a) and (c), and Rule 52(c). Professor Marcus noted that there are many rules that might benefit from the kind of "disambiguation" the proponent seeks. But this particular use of the word issue does not appear to present a pressing real-world problem that demands Advisory Committee attention.

- A proposal to provide additional time to file an answer after filing a motion to strike under Rule 12(f), similar to the additional time provided after filing a motion to dismiss under Rule 12(b) or for a more definite statement under Rule 12(e). It is unclear, however, that this presents a real-world problem such that those filing a motion to strike impertinent information from a complaint need any additional time to file an answer.

The Advisory Committee unanimously voted to drop these three items from the agenda.

FJC Research Projects

Dr. Emery Lee and Dr. Tim Reagan (remotely) presented on current research, history, and education projects of the Federal Judicial Center, as reflected in a memo in the agenda book at p. 553. Judge Rosenberg noted the importance and reliability of the work of the FJC, including on the ongoing revision of the Manual for Complex Litigation, on whose board of editors Judge Rosenberg serves. The FJC is working tirelessly on that complex project, alongside the valuable work it does for the rules committees.

Conclusion

Judge Rosenberg thanked the Administrative Office staff for its tireless work and responsiveness in support of the Advisory Committee. She then adjourned the meeting.

Members of the Public Joining Via Teams:

Last Name	First Name	Affiliation, if known
Ackerly	Stewart	Statera Capital, LLC
Allman	Thomas	University Of Cincinnati
Anaim	Albert	Student at Catholic University Law
Barto	Raymond	Faruqi LLP
Bays	Leah	RGRD Law
Baggetta	Brian	Skadden Arps
Beisner	John	Skadden Arps
Bruff	Allison	Bailey Glasser
Campisi	John	The American Lawyer
Carback	Joshua	University of Maryland
Cardmen	Denise	American Bar Association
Chin Feman	Dai Wai	Parabellum Capital
Cohen	Andrew	Burford Capital
Coleman	Jennifer	Spencer Fane LLC
Czapla	Chloe	Catholic University Law
Dabre	Caroline	Catholic University Law
Dahl	Alex	Lawyers for Civil Justice
Daubel	Edward	Catholic University Law
Demuth	Bradley	Farugli Law
Dimas	Viktor	Catholic University Law
Fragoso	Michael	Chief Counsel, Office of the Republican Leader
Frank	Nathan	Catholic University Law
Giarrusso	Kierra	Catholic University Law
Gotler	Ross	Paul Weiss
Green	Thomas	American College of Trial Lawyers
Hangley	William	Hangley Aronchick
Hawkinson	John	
Hill	Joseph	Catholic University Law
Homan	Ian	Catholic University Law
Hyatt	Michael	Catholic University Law
Kalil	Danielle	Duke University
Kekis	Lidia	Paul Weiss
Koch	Lucy	Catholic University Law
Levy	Robert	ExxonMobil
Lopes	Joseph	Catholic University Law
Lorber	Leah	GSK
Lyons	Kaiya	American Association for Justice
Monyak	Suzanne	Bloomberg Law
Margolis	Jon	National Employment Lawyers Association

Last Name	First Name	Affiliation, if known
Morrison	Alan	Georgetown University
Mpundu	Chi	Catholic University
Peck	Andrew	DLA Piper
Perez	Valentina	Catholic University Law
Rabiej	John	Duke University
Raymond	Nate	Reuters
Redgrave	Jonathan	Redgrave LLP
Regis	Rebecca	Catholic University Law
Salacuse	Maria	U.S. Equal Employment Opportunity Commission
Siegel	Emily	Bloomberg Law
Steen	Dan	Lawyers for Civil Justice
Tadler	Ariana	Tadler Law LLP
Watkins	Devin	Competitive Enterprise Institute
Webb	Derek	Catholic University Law
Webster	Sarah	Catholic University Law
Williams	Crystal	
Wilson	Ashleigh	
Withers	Kenneth	Sedona Conference
Zoppo	Avalon	National Law Journal

TAB 7

TAB 7A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 13, 2024

I. Introduction

The Advisory Committee on Criminal Rules met in New York, N.Y., on November 6-7, 2024. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents the following information items.

- The Committee voted not to pursue an amendment to Rule 53 that would allow broadcasting of criminal proceedings under some circumstances.

- Continuing its study of a proposal to expand pretrial subpoenas under Rule 17(c), the Committee heard and discussed the views of 12 invited speakers who provided comments on a draft amendment.

- The Committee heard a report from its Privacy Subcommittee regarding proposals to amend Criminal Rule 49.1 to (1) protect minors' privacy by requiring the use of pseudonyms and (2) require redaction of all digits of social security numbers.

- The Committee established a new subcommittee to consider two proposals to amend Rule 40, which governs proceedings when an arrest is made under a warrant issued in another district.

- The Committee established a new subcommittee to consider a proposal to amend Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent.

- The Committee provided input on two cross-committee projects dealing with pro se access to electronic filing and bar admission in the federal courts.

- The Committee removed from its agenda a proposal to revise the procedures for contempt proceedings under Rule 42.

II. Rule 53 and broadcasting criminal proceedings

Rule 53 currently provides "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." Because no current statute or rule permits the broadcasting of criminal proceedings, Rule 53 prohibits the broadcasting of the proceedings in all federal criminal proceedings. A coalition of media organizations[1] proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting.[2]

[1] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

[2] To the extent the media coalition's proposal also sought broadcasting of the "fast-approaching trial in United States v. Donald J. Trump, 23-cr-257-TSC (D.D.C.)," consideration of such a case-specific exemption from the Rule is foreclosed for the same reasons that the Committee, at its November 2023 meeting, declined to pursue a request in a letter from 38 members of Congress that the Judicial Conference "explicitly authorize broadcasting in the court proceedings in the cases of United States of America v. Donald J. Trump." The Committee recognized that under the Rules Enabling Act it has no authority to exempt or waive in a particular case the application of Federal Rule of Criminal Procedure 53.

Judge Mosman, the chair,[3] presented the Rule 53 Subcommittee's unanimous recommendation that the Committee decline to amend the Rule. He began by describing the goals of the proposal as furthering transparency and trust in the legal system and improving public understanding of the judicial system. But the proposal also raised heightened concerns about security, privacy, and due process in criminal cases.

Judge Mosman described the information considered by the Subcommittee and how the Subcommittee had reached its conclusions.

First, the Subcommittee sought information about the basis for the adoption of Judicial Conference Policy § 420(b) (available here), which now permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The chair and the reporters spoke at length with the chair of the Committee on Court Administration and Case Management, Judge Gregory F. Van Tatenhove, about the research and the process that led to the expansion of broadcasting under § 420(b). In light of the absolute prohibition of all broadcasting in Rule 53, CACM did not consider or discuss the advisability of making any change in criminal proceedings. In the context of civil and bankruptcy proceedings, Judge Van Tatenhove explained that CACM had made a policy decision to make a small incremental expansion of public access—giving the courts discretion to permit audio only, and only in civil and bankruptcy non-trial proceedings not involving testimony. He said that CACM currently has no plans for further expansion, and it was too early to determine how much the new authority was being used in civil and bankruptcy proceedings, or to evaluate any problems. This discussion revealed that the adoption of § 420(b) had no direct implications for Rule 53 at the present time.

Second, the Subcommittee sought to learn about the experience in state courts permitting broadcasting and particularly in empirical studies of the impact of the authorized broadcasting. Most states permit some form of broadcasting in some judicial proceedings, though the details vary greatly from state to state.

The Federal Judicial Center provided the Subcommittee with a comprehensive review of state law and a summary of the academic commentary on the issues raised by providing remote public access to criminal proceedings.[4] The reporters also consulted William Raftery at the National Center for State Courts, who has worked on numerous reports and publications on the topic over the past several years. He was especially helpful in tracking down information on the experience of state courts. Mr. Raftery advised the reporters that there is very little research into the actual performance of the widely varying state policies on remote public access in criminal proceedings. The Subcommittee found particularly helpful the material gathered by the Minnesota

[3] The Subcommittee initially appointed in November of 2023 included Judge Robert Conrad as chair, and members Judge Burgess, Judge Harvey, Ms. Mariano, and Mr. Wroblewski. Judge Conrad's appointment as director of the Administrative Office of U.S. Courts required changes in the membership of the Subcommittee. Judge Michael Mosman joined the Rules Committee and succeeded Judge Conrad as the Subcommittee chair. After Mr. Wroblewski's retirement, Ms. Tessier succeeded him as the Department of Justice representative on the subcommittee.
[4] The FJC research was added to the Advisory Committee's November meeting agenda book after the meeting when the research became available. The research memorandum begins on page 490 and can be accessed with the following link: https://www.uscourts.gov/sites/default/files/2024-12/2024-11-criminal-rules-meeting-agenda-book-final-revised-12-6_0.pdf.

Advisory Committee, which also reviewed the empirical studies and received reports and recommendations from a wide variety of participants in the Minnesota state courts.

The Subcommittee learned that there has been very little empirical research on the effects and impact of broadcasting. As a research memorandum provided to the Minnesota Advisory Committee stated:

> The methodology of most data on how cameras in the courtroom impact judicial outcomes is flawed. First, the short length of the studies (which generally range from one to three years), and diversity of cases makes it difficult to obtain a representative sample, collect accurate data, and generalize and apply the results. Furthermore, the evaluation design of most studies, self reporting questionnaires, is defective. As frequently opined by social scientists, self-reporting question[n]aires are highly unreliable. Most of the "research" has not been reproduced and is limited in application to that specific trial. There is much room for improvement in the scientific data surrounding cameras in the courtroom.
>
> * * * * *
>
> Current data on the impact of cameras in the courtroom is limited. The studies that exist suffer from low sample sizes, self-reporting bias, and the inability to be replicated. Therefore, the data is generally not applicable to populations other than the exact population that was studied. However, the data is still useful at offering a limited perspective in how cameras in the courtroom impact trials. Most of the data shows that very few negative impacts are realized when cameras are in the courtroom. While further research is necessary, the limited data supports the move towards allowing cameras in the courtroom. However, anecdotal evidence from other jurisdictions may also support a cautionary approach to implementing cameras in the courtroom.

Memorandum to Justice Thissen from Kaitlin Yira, Cameras in the Courtroom Studies (Nov. 11, 2021) (footnote omitted). Judge Mosman later remarked at the Committee's November meeting that in his view the memo's concluding comment that "limited data supports the move towards allowing cameras" was unpersuasive given its strong critique of the existing studies and data.

After collecting and reviewing this information, Subcommittee members discussed the question whether to move forward with an amendment to Rule 53. In general, members expressed concern that cameras would have a negative effect on witnesses and victims in criminal cases. One member described his experience in cases in Indian Country, where he found that witnesses and victims in cases involving sexual abuse or murders were terrified. They would certainly not want to testify if the case would be broadcast. The member noted this was not unique to these kinds of prosecutions. A bank teller in a robbery case might feel the same way. Indeed, in a recent RICO prosecution it had been necessary to use contempt to compel a FedEx driver to testify about making a delivery. Jurors are afraid of gangs and have heightened fear in certain kinds of cases. And criminal cases often involve confidential informants, whose identity and the assistance provided

should not be broadcast. Moreover, even witnesses who do testify may restrict what they are willing to say if they know their testimony will be broadcast.

Subcommittee members also expressed concern that broadcasting might lead to more threats to defense counsel and defense experts, as occurred in the Derek Chauvin prosecution. There might also be subtle and harder to measure impacts. Jurors and potential witnesses might withhold certain personal or sensitive information. There might also be greater impacts in certain kinds of cases, including increases or decreases in conviction rates.

The Subcommittee concluded that given the paucity of empirical research on the effects of broadcasting in state proceedings, the state experience with broadcasting did not assuage these serious concerns. Members favored a conservative approach to broadcasting in criminal cases, and the Subcommittee voted unanimously not to move forward with an amendment to Rule 53.

At the November meeting, Committee members generally found the Subcommittee's reasoning persuasive, and they voted to remove the proposal from the Committee's agenda.[5] Members emphasized the critical distinctions between civil and bankruptcy practice—in which Judicial Conference Policy § 420(b) allows the court to permit audio broadcasting of non-trial proceedings in which no testimony will be taken—and criminal proceedings. In criminal cases, even proceedings that do not involve taking testimony present many of the same concerns as those in which testimony is taken. These include, for example, proffers of the testimony a witness may give, and sentencing proceedings, which frequently include discussions of a defendant's cooperation.

Some members had suggested this might be an appropriate subject for a pilot study. But because Rule 53 now has an absolute ban on all broadcasting in criminal cases, no study could authorize any form of broadcasting absent an amendment of the Rule.

III. Rule 17 subpoena authority (22-CR-A)

The Rule 17 Subcommittee, with Judge Nguyen serving as chair, is considering potential responses to perceived problems for defendants who seek documents or other items by subpoena from third parties under Rule 17. As previously reported, the Subcommittee has been conducting an extensive investigation to learn more about gaps and ambiguities in the rule and difficulties created by the application of the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 700 (1974),[6] which interpreted the rule's current text. The Subcommittee gathered information about subpoena practice in various districts from eleven experienced practitioners who

[5] The Department of Justice abstained from the vote, and one member dissented on the grounds that additional study of state practices should be pursued.

[6] *United States v. Nixon*, 418 U.S. 683, 700 (1974), requires a party seeking documents through existing Rule 17(c) to "clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." The Court also stated that when a party seeks pre-hearing production of documents, it must establish: (4) "that [the documents] are not otherwise procurable reasonably in advance of [the proceeding] by exercise of due diligence"; and (5) "that the party cannot properly prepare for [the proceeding] without such production and inspection in advance of [the proceeding], and that the failure to obtain such inspection may tend unreasonably to delay the [proceedings]." *Id.* at 699-700.

attended the Committee Meeting in October, 2022; met with experts whose practices included responding to subpoenas (tech companies, banks, and financial service companies); heard summaries of the Reporters' discussions with individuals representing medical providers, hospitals, and schools, as well as attorneys from the Department of Justice who work on victim and witness issues in the Executive Office of U.S. Attorneys; and reviewed research from the Rules Law Clerks and the Reporters on the history and present application of Rule 17 and *Nixon* in federal courts, as well as subpoena regulation in the states.

By this past October, the Subcommittee had developed a discussion draft that contained language addressing a number of currently contested issues. The draft included, for example: two potential issuance standards to replace the *Nixon* standard (one for subpoenas seeking legally protected or personal or confidential information, and another for information that is not); clarification that parties may seek subpoenas for evidentiary hearings and sentencings as well as trial; a provision authorizing and regulating ex parte subpoenas; provisions regulating the return and disclosure of information sought by subpoena; in camera review before disclosure of protected information and information sought by unrepresented defendants; and a provision on protective orders.

At its fall meeting this past November, the Committee devoted an entire day to Rule 17. At the meeting, twelve invited speakers shared their views about the issues addressed in the discussion draft. The speakers represented varied districts and professional backgrounds, and included a mix of prosecutors and defense attorneys, a privacy expert, and an expert from a victim's advocacy organization. In the morning, the speakers offered prepared remarks then answered questions from Committee members. The afternoon began with a discussion among the speakers and Committee members about recurring areas of concern and consensus. The last session was a conversation among Committee members.

There was widespread agreement—among both the speakers and Committee members—on a significant number of points, including the following:

- Courts are now applying the *Nixon* standards and various procedural aspects of Rule 17 inconsistently.
- It may be possible to get agreement on a standard that would relax somewhat *Nixon*'s admissibility requirement.
- Although some subpoenas should require court approval, others should be available to the parties without a motion.
- Access to ex parte subpoenas to third parties is needed, and when material is produced, automatic disclosure to the opposing party should not be required.
- In camera review by judges before disclosure is burdensome. It is not needed in all cases.
- Some subpoenas can be returned directly to the requesting party and need not be returned to the court.
- Negotiation rather than litigation between the requesting party and subpoena recipient is the norm for many cases and should be encouraged.
- Subpoenas should be available to both parties for sentencing and at least some evidentiary hearings in addition to trial, including hearings on suppression motions.

On other points, differing views were more pronounced, including a difference of opinion about the efficacy of protective orders; the degree to which various changes would increase risks to and chill cooperation by victims and witnesses; the magnitude of the difficulties posed by the current rule for defendants; whether certain changes would prompt abuse by defendants; and the need for different standards for protected and unprotected information and how to define that distinction.

The Subcommittee will be working on formulating a somewhat narrower, more incremental draft proposal for the Committee's spring meeting, taking this helpful guidance into account.

IV. Reference to minors by pseudonyms (24-CR-A and 24-CR-C); full redaction of Social-Security numbers (22-CR-B)

The Committee heard and discussed a report from Judge Harvey, the chair of the Privacy Subcommittee, which is considering two proposals to amend Rule 49.1's redaction provisions.

A. Reference to minors by pseudonyms

The Department of Justice has proposed amending Rule 49.1 to require that minors by be referred to only by pseudonyms, rather than by their initials. As explained in the Department's suggestion, referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety. Child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and child-exploitation offenders sometimes track federal criminal filings and take other measures to identify child victims and contact and harass them.

The American Association for Justice and National Crime Victim's Bar Association (24-CR-C) support the Department's proposal, but they add the suggestion that the Advisory Committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state, "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Subcommittee learned that the practice of using pseudonyms rather than initials is already well established. It is the Department of Justice's current practice, and neither public defenders nor clerks of court identified any concerns with the proposed modification of the rule. There were concerns, however, about requiring gender-neutral pseudonyms in the text of the rule. Although this is already done in many cases, using phrases like Minor Victim number 1, there are cases in which the evidence and the nature of the charges are gender specific. Accordingly, the Subcommittee will attempt to develop language for a draft committee note encouraging the use of gender-neutral pseudonyms when that is feasible.

B. Full redaction of Social-Security numbers

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

Although full social security numbers are often relevant in certain kinds of prosecutions (such as those for various forms of fraud), the Subcommittee was unable to identify any reason that the last four digits were needed in public filings. Indeed, some members thought that full redaction was likely easier than partial redaction in cases in which social security numbers were included in sealed filings or covered by protective orders. The fraud division attorneys consulted raised no concerns about full redaction from public filings.

C. Next steps

Both of these proposals were also referred to the other advisory committees, and before making a decision to move forward with any proposed amendments to Rule 49.1, the Committee will consult those committees. The Committee recognizes that uniformity across the privacy rules was a cardinal value in drafting the existing rules, and that the Bankruptcy Committee has determined that the last four digits of Social-Security numbers remain useful in certain bankruptcy filings. On the other hand, members thought that there was relatively little overlap in bankruptcy and criminal practice, and they were not sure that different requirements on these issues would cause any practical difficulties. It would be helpful to hear the views of the Standing Committee on the need for uniformity on these particular issues.

Additionally, all of the Committees would benefit from additional research on the potential for harm as a result of allowing public filings to include the last four digits of Social-Security numbers.

V. Ambiguities and gaps in Rule 40 (23-CR-H and 24-CR-D)

The Committee received two proposals advocating revisions to clarify Rule 40, which governs arrests for failure to appear and violations of conditions of release set in another district.

Magistrate Judge Bolitho proposed clarifying two questions that arise under Rule 40 when a defendant from outside the district is arrested for violating her pre-sentencing release: Is the defendant is entitled to a detention hearing in the district of arrest? And, if so, what is the standard?

The Magistrate Judges' Advisory Group submitted a comprehensive proposal that identifies seven points of confusion under Rule 40 involving procedures and substantive rights, informing the defendant of an alleged violation, providing a defendant with notice the right to counsel, applicable detention standards, and modification of detention orders.

Judge Harvey, who had discussed these proposals with their drafters and reviewed them carefully, expressed the view that the rule is indeed very unclear, and clarification would be beneficial. After a brief discussion, Judge Dever announced the appointment of a subcommittee, chaired by Judge Harvey, to consider these proposals.

VI. Rule 43 and extending the authority to use videoconferencing (24-CR-B)

Judge Brett Ludwig wrote requesting that the Committee consider amending Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent. He urged that experience under the CARES Act demonstrated that there is no good reason to limit the use of technology to only initial appearances and arraignments. He stated that under the CARES Act "courts around the country embraced the use of technology without any noticeable deficit in the administration of justice," and his own court and others were "able to fairly and efficiently conduct all manner pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32."

The Committee discussed the question whether to appoint a subcommittee to return to the question whether to expand the availability of videoconferencing as a substitute for the defendant's physical presence. It has considered similar issues on multiple occasions. The Committee considered a variety of proposals to expand videoconferencing in 2002, 2008-10, 2017, 2019, and 2020, and has consistently rejected authorizing videoconferencing for pleas or sentencings except in the truly extraordinary circumstances detailed in provisions of the emergency rule, Rule 62.

Although members expressed no interest in returning to the question whether to permit videoconferencing for plea and sentencing proceedings, there was some support for seeking to identify any other proceedings for which videoconferencing should be permitted with the defendant's consent. The rules currently permit the use of videoconferencing for initial appearances and arraignments, in misdemeanor cases, and for conferences about exclusively legal issues (though it appears not all judges are aware of that authority).

Judge Dever concluded that enough issues had been raised to warrant the appointment of a subcommittee. Its first question would be what (if any) proceedings should be covered by a rules change.

VII. Cross-committee projects

A. Self-represented litigant access to electronic filing

Professor Struve reported on developments in the working group as well as discussions of potential rules in the other advisory committee meetings. She explained the Bankruptcy Committee appeared to be least likely to allow self-represented litigants to access the court's electronic filing systems because of concerns about multiple pro se defendants in a single case. The Civil and Appellate Committees were less concerned than the Bankruptcy Committee about this issue. Judge

Dever observed that the Criminal Rules Committee probably not have concerns about the Bankruptcy Committee taking a different approach.

When asked for feedback, Committee members reiterated the need to consider that incarcerated individuals would have trouble accessing electronic filing systems. In response, Professor Struve emphasized that the draft rule change would only permit—but not require—a self-represented litigant to file electronically.

B. Unified Bar Admissions

Professor Struve highlighted various aspects of the Joint Subcommittee's written report. The Joint Subcommittee was considering a national rule that would foreclose federal districts from requiring attorneys practicing before a court in that district to be a member of that state's bar. But the Joint Subcommittee will need to consider whether there is rulemaking authority to address this topic. Professor Coquillette agreed that the judiciary's authority to address attorney admissions remains an important question.

VIII. Contempt proceedings (23-CR-C)

The Committee removed from its agenda a proposal to make a wide variety of statutory and rules changes, including amending Rule 42. Many of the elements appeared to be substantive, rather than procedural, and the proposed amendments to Rule 42 depended upon, and were interwoven with, proposals to amend 18 U.S.C. § 401 and a host of other statutes.

TAB 7B

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6-7, 2024
New York, New York

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on November 6-7, 2024, in New York, New York. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr. (via Microsoft Teams on Nov. 7)
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative
Catherine M. Recker, Esq.
Justice Carlos Samour
Finnuala Tessier, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Rakita Johnson, Administrative Analyst, Rules Committee Staff
S. Scott Myers, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)

[1] Ms. Tessier represented the Department of Justice.

Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on pages 17, 25, and 31 of these minutes.

Opening Business

Judge James Dever, Chair of the Criminal Rules Committee, began the meeting by welcoming meeting participants and thanking the staff from the Administrative Office of the United States Courts for arranging the meeting. Judge Dever specifically welcomed Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts; Ms. Finnuala Tessier, who represented the Department of Justice in place of Principal Deputy Assistant Attorney General Nicole Argentieri; Professor Daniel Coquillette, Consultant to the Standing Committee; and Dr. Tim Reagan, from the Federal Judicial Center. Judge Dever noted three members had been reappointed to the Committee: Judge André Birotte, Judge Jane Boyle, and Catherine Recker.

Judge Dever then welcomed three new members to the Committee: Justice Carlos Samour, Shazzie Naseem, and clerk of court representative Brandy Lonchena. Judge Dever noted that Kyle Brinker began as rules law clerk for the Committee on Rules of Practice and Procedure and that Allison Bruff, former staff attorney for the Committee, had departed for a new career opportunity. Judge Dever welcomed members of the public attending the meeting in person or by video and thanked them for their presence. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on pending rules and legislation. Thomas Byron, Secretary to the Standing Committee, said that no proposed criminal rule amendments were expected to come into effect this year or next year. Other proposed rule amendments appeared in the meeting agenda book at page 90.

Mr. Brinker noted that pending legislation of interest was collected in the agenda book beginning on page 97. He mentioned the Trafficking Survivors Relief Act of 2024, which provided that a person who has been convicted of a nonviolent federal offense as a result of having been a victim of trafficking may move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references to the arrest and criminal proceedings be expunged from all official records. Mr. Brinker said he brought the bill to the Committee's attention because the provisions would not fit within Rule 29(c)'s requirement that a motion for judgment of acquittal be filed within 14 days after a jury verdict or the discharge of a jury. He also noted that bill's provisions did not appear to fall within the rules governing Section 2255 proceedings.

Rule 53

Judge Dever recognized Judge Mosman to provide an update on the work of the Rule 53 Subcommittee. Judge Mosman thanked Professors Beale and King for their assistance providing written materials to the Subcommittee both before and after the Subcommittee's last meeting. He also thanked Laurel Hooper and others at the FJC for a comprehensive memorandum surveying a

wide variety of articles on this subject as well as relevant state and federal court procedures and experiences. Lastly, he thanked Zachary Hawari, the former rules law clerk, for a memorandum on the history of Rule 53.

Judge Mosman noted that the Subcommittee was formed to consider requests from various organizations to amend Rule 53 to allow broadcasting of some criminal proceedings and that the Committee continued to receive supporting materials from interested parties. Judge Mosman said that the request was to end, in whole or in part, Rule 53's general ban on broadcasting in federal criminal cases. He said it required an understanding of the policies underlying Rule 53.

Judge Mosman explained that there is a right to a public trial under the First and Sixth Amendments of the Constitution, but no interested party had suggested that current practice falls below any constitutional standard. Rather, the request sought to further greater transparency, increase trust in the judicial system, and improve civic education and understanding of how courts work. Judge Mosman recognized that the Committee on Court Administration and Case Management had recommended, and the Judicial Conference then approved, a policy permitting audio broadcasting of non-trial proceedings in civil and bankruptcy cases when no testimony is being taken.

Judge Mosman expressed Subcommittee members' concerns about fundamental differences between civil and criminal cases, including heightened due process, privacy, and security concerns in criminal cases. With the help of the Federal Judicial Center, the Subcommittee reviewed state-court experiences with broadcasting proceedings. Judge Mosman noted that the Minnesota Supreme Court undertook a similar review before amending its rules to allow expanded broadcasting.

Judge Mosman stated that the Subcommittee's review found little empirical research on court systems that allow broadcasting. He noted that the agenda book materials included a memorandum to the Minnesota Advisory Committee, which concluded that the methodology on most data regarding how cameras in the courtroom impact judicial outcomes is flawed. The memorandum explained that existing data is generally not applicable to populations other than the exact population studied because existing studies suffered from low sample size, self-reporting bias, and the inability to be replicated. The memorandum also stated that the data did offer a limited perspective on how cameras impact courts, but Judge Mosman questioned the reliability of that comment based on the memorandum's critiques of the existing data.

The research identified by the Subcommittee was fundamentally anecdotal. The Subcommittee found no reliable, empirical study from a state court that looks at whether potential jurors withhold sensitive information from broadcasted trials more than unbroadcasted trials. The Subcommittee also found no empirical study looking at whether jurors convict more often in broadcasted trials than unbroadcasted trials. The Subcommittee found no study that alleviates concerns that broadcasting criminal trials would have a negative impact on communities of color, both in conviction rates and in community perception of crime rates.

Judge Mosman reviewed social science studies not grounded in state-court experience. As an example, Judge Mosman explained that one study, entitled *Cameras in the Courtroom: The*

Effects of Media Coverage on Witness Testimony and Juror Perceptions, provided unreliable conclusions because it involved undergraduate college student serving as witnesses or jurors in fake trials that had (or did not have) cameras. The study showed the witness students a video of a fake robbery and compared the students' factual recall. Judge Mosman next noted one empirical study that found that expanded media coverage leads to an increase in sentencing lengths, although the study was limited to proceedings before elected judges.

Judge Mosman said that the materials also contained testimonials, including from individuals once opposed to cameras but who had changed positions. Judge Mosman pointed out that the Derek Chauvin trial was cited as a success of broadcasting in the courtroom, including by the trial judge. But a public defender in that trial noted that a defense expert witness had a severed pig's head placed on his doorstep in California and a defense counsel met a mob outside the courthouse that damaged his car. She attributed both incidents to increased media exposure. Judge Mosman concluded that state-court experiences provide few lessons for the Subcommittee. He invited interested parties to provide the Subcommittee with additional research.

Judge Mosman said that the identified research did not rebut the Subcommittee's concerns, including privacy and security concerns for those compelled to participate in criminal proceedings. These concerns were described by a memorandum by Professors Beale and King, which was included in the agenda book starting on page 105. Judge Mosman asserted that trial participants retain a degree of privacy and security interests even though they may be compelled to provide testimony. He thought the appropriate question was one of degree: to what degree do we require people who show up in court to sacrifice their privacy and security concerns?

Judge Mosman stated that these concerns are very real for jurors. He estimated that every trial judge in the Committee meeting has regularly had people in court tell them something that the person had never told anybody in their lives. But because they were obligated by oath to do so, the participants reveal sensitive information, such as their sexual and criminal histories. Judge Mosman commented that it is difficult to measure the amount of information that court participants might forego providing, but this should be a critical consideration. He said that this was similarly true for witnesses. Judge Mosman said there is already enormous reluctance to testify in federal court, particularly in cases involving sex crimes, Indian country, minors, and violence. Judge Mosman recalled a recent RICO case involving a motorcycle gang where the government had to compel a delivery driver to testify that he had delivered a package.

Judge Mosman noted that exceptions can be made, but he said that the result would be a patchwork system for who has to be subjected to enhanced media coverage. "What does that mean that not everybody is subjected to the same rules?" He also observed that it is difficult to know who has heightened privacy concerns. Judge Mosman said that he has had older victims who were as ashamed to admit that they had been defrauded and lost their money as they were to admit any other fact in their lives. Judge Mosman suggested that making an exception for this concern would be placing a broad exception into the rule.

Judge Mosman then surveyed other arguments in favor of broadcasting. He stated that one argument was that live broadcasting impairs the opportunity for artificial intelligence to misrepresent federal court proceedings. Judge Mosman questioned whether live broadcasting

would be the most appropriate way to counter AI misrepresentations. A second argument contended that broadcasting is needed for civic education. Judge Mosman agreed that civic education is important, but he questioned whether state courts had shown that broadcasting is an effective vehicle for civic education and whether civic education should trump privacy and security concerns for court participants. Citing *United States v. Donald Trump*, a final argument contended that some cases are of such particular importance that barring cameras "threatens to undermine democracy itself." Judge Mosman replied that conducting business as usual, where the same rules apply no matter who shows up in court on a particular day, is a critical element of democracy.

Accordingly, Judge Mosman stated that the Subcommittee recommended no action on the suggestion to amend Rule 53 but expressed an interest in observing future developments in court broadcasting and receiving additional studies.

Judge Dever invited Professor Beale to make additional comments. Professor Beale noted that the agenda book listed relevant state provisions and that the FJC study that Judge Dever referenced was expected to become available later in the month. Professor Beale also observed that one study cited to support broadcasting involved Chinese students viewing video materials but that the study's context likely differed substantially from American criminal proceedings. Professor Beale said that it would take several years to study the effects of the recent Judicial Conference broadcasting policy.

Judge Dever invited Committee members and liaisons to comment on the proposal to change Rule 53 and repeated that the Subcommittee unanimously recommended no change. A practitioner member agreed with the Subcommittee's recommendation and suggested that as the number of participants in a proceeding increases, the potential for harm increases. The member recalled a civil case in which the court regularly conducted virtual hearings with hundreds of participants. In the virtual hearings, one could see the attorneys and the background of their offices. At the close of one hearing, a participant in the virtual proceeding notified someone who was waiting outside the office of counsel for the receiver that the hearing ended. The individual then attacked the receiver's counsel, putting him in the hospital.

A judge member thought that there are ways to reduce the Subcommittee's concerns. He provided an example of a state rule that gives state trial judges discretion to permit expanded media coverage in a particular case, which the judge could decline to exercise when the case involves heightened concerns. He said that the rule works well and he had not confronted issues with it. The judge member suggested that broadcasting would not be appropriate in trials involving certain subject matters, types of victims, or other particular concerns. He observed that some cases garner increased community attention and allowing expanded access would permit the community to understand the proceedings better.

As an example, the member said that he had presided over a high-profile state case related to a shooting in the Aurora Theater. He observed that the case affected the community at large, and the community was very interested in it. The member recalled that he permitted media organizations to broadcast the feed from the court camera. Several victims had written the judge member letters protesting his decision, but later thanked him for allowing expanded access so that they could follow proceedings without being in the courtroom. He said that it also allowed the

community to learn about the proceedings without relying on the media to describe the proceedings. The member recognized that certain limitations to broadcasting he implemented, including restricting broadcasting during voir dire and having the court control the camera, reduced the risk of harm. The judge member said that he would not favor requiring broadcasting, but expanded media access can work when the rule gives the trial judge discretion. He recognized that getting relevant empirical evidence will be difficult, but he supported continuing to study state court experiences.

Judge John Bates, Chair of the Standing Committee, inquired whether the Subcommittee discussed the option of giving trial judges discretion to make decisions about whether to broadcast a particular proceeding. Judge Mosman responded that the Subcommittee had discussed this discretionary option. Judge Mosman observed that most states with expanded media access provide judges with discretion, but their limited experiences did not rebut the Subcommittee's concerns about the possible broad impact on justice. He said that individual cases do not answer how broadcasting impacts justice in quantifiable ways. For example, does it result in more convictions or fewer in some kinds of cases? Do people withhold information? Judge Mosman also asserted that expanded access in a few specific cases would not give the public a representative picture of how the justice system works.

Ms. Tessier identified two considerations for the Committee. First, Rule 53 prohibits broadcasting to the public, but it does not necessarily prohibit remote participation, such as a closed-circuit television at a remote courthouse to allow victims to watch proceedings. Second, she pointed out that a pilot project studying broadcasting would likely conflict with Rule 53.

Judge Dever invited Professor Beale to comment on the Subcommittee's pilot project discussion. Professor Beale agreed that a pilot project could not be authorized because it would conflict with the existing rule. She noted that there had been pilot projects under the civil rules, which do not include a total ban on broadcasting. But because it contains a total ban, Rule 53 would need to be changed to allow a broadcasting pilot project in criminal proceedings.

Professor Beale noted that the Subcommittee did not recommend changing Rule 53 to allow a pilot project. She explained that, even if authorized, a pilot project would require recruiting districts that want to participate. This itself could be problematic because districts that would want to participate could be different than districts that would not want to participate. Professor Beale said that the courts that participated in the civil broadcasting pilot program were pleased with the results, yet the Standing Committee and Judicial Conference determined that the pilot project was not positive enough and broadly applicable enough to justify amending the civil broadcasting rules.

Professor Struve, Reporter to the Standing Committee, recalled that two districts participated in the civil pilot project. Judge Bates noted that the pilot project also required the parties in each case to consent.

Judge Dever emphasized the importance of cooperating witnesses in criminal cases and the need to protect their physical safety. He noted that the Committee participated in a larger working group related to the topic of protecting cooperators because of the serious physical threats to cooperators in criminal cases. Judge Dever said that the recent broadcasting policy provided judges

with discretion in civil and bankruptcy cases when the proceeding does not involve witness testimony, but participants in criminal proceedings often reference cooperating witnesses even when no testimony is being taken. Judge Dever stated that the risk of additional exposure to cooperating witnesses influenced the Subcommittee's decision to recommend no change to Rule 53.

Judge Conrad commented on broadcasting's possible effect on the prevalence of jury trials. He stated that criminal trials are already a rare occurrence, and he expressed concern that broadcasting would increase security risks for participants and further discourage trials. Judge Conrad also agreed that broadcasting exacerbates safety concerns for trial participants. He recalled cases involving interstate criminal activity where people came to the courtroom and threatened prosecutors and jurors, and Judge Conrad asserted that broadcasting would increase this concern.

A judge member agreed with the Subcommittee's recommendation. She noted that courts of appeals often broadcast arguments, but how broadcasting could impact trial courts was less clear. She recalled the broadcasted trial of O.J. Simpson and expressed concern that broadcasting may have impacted how the lawyers in that case presented evidence. The member suggested that the more high-profile the case, the more access the media may want and the more broadcasting may impact the presentation of evidence. She cited the recent trial involving Johnny Depp as the latest example. She said that many state court judges had received requests for expanded media access in certain cases and predicted that the Committee would need to confront the broadcasting issue again in the future.

Another judge member recognized that an interested party indicated it intended to present additional information, and he asked how the Committee would proceed with new materials coming in.

Professor Beale explained that the Committee had several options. It could retain the subcommittee and put the matter on its study agenda, take no action and defer consideration, or take a final vote.

Judge Dever invited further comment on how the Committee should proceed. He thanked the FJC for its extensive study on state-court approaches to broadcasting.

Professor King explained that a final vote would remove the matter from the agenda, but the matter could be reproposed at any time.

Judge Dever observed that the Committee often receives suggestions related to matters that it had previously studied and resolved. Judge Dever affirmed that the Committee would continue to review suggestions that are submitted.

Judge Mosman suggested that the Committee vote on the Subcommittee's recommendation to take no action. He said that the matter could be appropriate for study if the Committee expects to receive a study soon but questioned whether a relevant, reliable study could be produced in the near future.

Judge Dever noted that the Subcommittee's recommendation was unanimous, and he proposed voting on the recommendation, acknowledging that the Committee may reexamine the matter in the future.

A vote to take no action passed, with one member voting nay and the DOJ representative abstaining. Judge Dever thanked Judge Mosman and Judge Conrad for leading the Subcommittee. Judge Dever repeated that the Committee will continue to review additional studies or other information brought to the Committee's attention. He thanked Judge Mosman and Judge Conrad for their work with the Subcommittee.

Rule 49.1

Judge Dever recognized Judge Harvey to discuss the Subcommittee's work related to Rule 49.1, noting that the agenda book materials on this topic began on page 237. Judge Harvey thanked Professor Beale, Professor King, and staff for compiling materials for the Subcommittee.

Judge Harvey said that he would speak about three topics related to Rule 49.1.

First, the DOJ suggested the use of pseudonyms to identify minors in public criminal filings instead of the minor's initials. Two bar associations that represent victims made a similar suggestion for the use of gender-neutral pseudonyms. The bar associations suggested that gender-neutral terms would serve as an additional safety precaution. Judge Harvey stated that the Subcommittee unanimously supported the DOJ proposal. He noted that the public defender representative had no objection to the proposal and that many federal public defender offices said they already use aliases or pseudonyms for minors. Judge Harvey also noted that this had been DOJ policy. Judge Harvey said that the Subcommittee discussed the option of using a consistent pseudonym for each minor across jurisdictions, but such a change would require a more complicated rule amendment. Tracing restitution across jurisdictions would be better addressed through collaborative discussion. Judge Harvey said that a concern arose that using a gender-neutral pseudonym would be difficult in cases where a minor's gender is relevant to the government's evidence. Accordingly, the Subcommittee agreed that it would not want a rule that requires the use of gender-neutral identifiers where the evidence is not gender neutral. Judge Harvey commented that the DOJ was open to the possibility of including a committee note that would encourage the use of gender-neutral identifiers where possible and necessary to protect the identity of the minor. Judge Harvey concluded that the Subcommittee would likely propose an amendment to Rule 49.1 consistent with the DOJ proposal and perhaps with a committee note encouraging the use of gender-neutral terms.

Second, Senator Wyden had proposed a change to fully redact social security numbers in public filings. Judge Harvey said that the Privacy Rules Working Group had been considering the issue for a number of years and that a Bankruptcy Rules Subcommittee decided that including the last four digits of social security numbers was still important in public bankruptcy filings. That subcommittee recommended, and the Bankruptcy Rules Committee agreed, to continue permitting the last four social security number digits in filings.

Judge Harvey said that the Subcommittee discussed the benefits and consequences of including the last four digits of social security numbers in criminal filings. He commented that the Subcommittee sensed no need for the last four digits, and an informal survey of federal public defender offices showed no objection to excluding the last four digits. He noted that the DOJ did not raise concerns about the full redaction of social security numbers, and the court clerk liaison did not see a need for their inclusion. Judge Harvey indicated that the Subcommittee would continue to research the possible consequences of including the last four digits in criminal filings.

Judge Harvey asked the Committee what the consequence to uniformity would be if the Subcommittee recommended a change to redact individuals' full social security numbers and other Committees declined to make a similar change.

Third, the Privacy Working Group recommended no further consideration on issues identified in pages 252 through 254 of the meeting agenda book. These issues were not the subject of any specific suggestion. Judge Harvey explained that these were areas where Rule 49.1 and other related rules could be clarified. He asserted that the Privacy Working Group made its recommendation because the Committee has limited resources and the Working Group found no evidence that the rules caused real-world problems.

Judge Harvey said that the Subcommittee unanimously agreed with the Working Group's recommendation, and he recommended that no further action be taken with respect to those issues. Judge Harvey then invited comment by the Committee.

Professor Beale observed that a change requiring pseudonyms may cause uniformity concerns. She said that the Committee should monitor related discussions in other rules committees so that the rules committees could collaborate on any proposed change.

Mr. Byron noted that the pseudonym suggestion was docketed as an agenda item for other committees, but the other rules committees had not yet discussed the issue. He said that the other rules committees hoped to first hear the views of the Criminal Rules Committee on the issue because the suggestion was first addressed to the Criminal Rules Committee. Mr. Byron agreed that rules uniformity is important and encouraged the Committee to make any change in alignment with the other rules committees.

Professor Beale observed that including the last four digits of individuals' social security numbers in public criminal filings presents a risk because a person's full number could be gleaned from the last four digits in conjunction with other personal information. She encouraged the Rules Office staff to research the risk of including the last four digits in public filings and to monitor how the issue progresses before the other rules committees.

Dr. Reagan noted that the Federal Judicial Center was conducting a project looking at civil and criminal public filings to find out why and how often social security numbers are not redacted. He said that the information could help the Committee understand the need, if any, for social security numbers in public filings. Already, he observed many cases where a person's social security number was included in an exhibit but was irrelevant to the litigation. Mr. Reagan said that the FJC would share the results when the study is completed if asked by the Committee.

Ms. Tessier said that the use of pseudonyms for minors is particularly important in criminal cases. She explained that 18 U.S.C. § 3509 reflects Congress's view that it is particularly important to protect the identity of minors in criminal cases and said that the DOJ would support a change to the criminal rules even if other rules committees decided not to make similar changes.

Judge Dever invited further comments. Hearing none, Judge Dever thanked Judge Harvey for chairing the Subcommittee. He said that the Subcommittee's goal is to make a recommendation regarding these issues at the spring meeting.

Rule 40

Judge Dever turned the Committee's attention to the suggestion, materials for which started at page 261 of the agenda book, regarding procedures for revoking or modifying pretrial release under Rule 40. He noted that the Magistrate Judge's Advisory Group (MJAG) submitted a comprehensive suggestion, which was included in the agenda book at page 266. Judge Dever said that he was inclined to appoint a subcommittee to study the matter. He invited Professor Beale to comment.

Professor Beale observed that the Committee previously encountered this issue but did not have enough information at that time to warrant exploring a rule revision. She thought that the MJAG suggestion provided the additional information to show that there is a need for a subcommittee to research the issue.

Judge Dever indicated that he would appoint Judge Harvey to chair the subcommittee and invited him to comment. Judge Harvey agreed that a subcommittee should study the issue, noting his personal experiences with Rule 40 demonstrated that the rule was confusing, and he observed that the Federal Magistrate Judges Association supported researching changes to Rule 40.

Rule 43

Judge Dever turned to the suggestion at page 284 in the agenda book regarding Rule 43 and the expanded use of videoconferencing in federal court. Judge Dever noted that Rule 43 had previously been the subject of proposals from judges advocating for the use of videoconferencing for Rule 11, sentencing, and revocation proceedings. Judge Dever commented that the proposals had always been from judges, never from the National Association of Criminal Defense Lawyers or from the Association of Assistant U.S. Attorneys. He said that the issue for the Committee was whether to appoint a subcommittee to study Rule 43, and he invited Professor King to comment.

Professor King said that the proposal argued changes to Rule 43 would promote efficiency and appease parties and counsel who would prefer videoconferencing for some proceedings. She explained that the proposal would change Rule 43 so that all kinds of pretrial proceedings could be held by videoconference, including Rule 11 and sentencing hearings. Professor King noted an FJC survey showing that most judges polled were amenable to some additional videoconferencing, but the survey did not specify which proceedings the judges would be amenable to. Professor King said that she did not see anything in the proposal that changed or supplemented the concerns that

were raised in prior Committee deliberations and asked whether the Committee believed reconvening a subcommittee would be proper.

A practitioner member observed that the Committee had previously determined that in person proceedings are best when a person is pleading guilty to a criminal offense, and he agreed that convenience and efficiency should not trump the importance of being in person for these types of proceedings. Accordingly, he recommended against continued consideration of the issue.

A judge member agreed that convenience benefits alone did not justify changing the rule. However, he said that a change could be valuable in circumstances where a party in a sparsely populated district must make substantial efforts to get to the federal courthouse.

Judge Dever noted that parties already may appear via videoconference with consent for initial appearances, arraignments, and in misdemeanor cases. He asked the Committee for its views on allowing videoconferences for proceedings in addition to what the rules already allow but excluding critical proceedings, for example, a proceeding where a defendant pleads guilty to a serious offense.

A judge member thought that parties should have some flexibility because litigants in large districts sometimes must travel many hours for a short proceeding. But he thought that some proceedings, such as sentencings, generally should not be conducted by videoconference. He indicated that he was undecided about whether the rules should allow a change of plea to be conducted remotely.

Ms. Tessier commented that the proposal would require the defendant's consent, which the DOJ considered important for the issue, and that a subcommittee had not considered an issue with the defendant's consent since the CARES Act. She suggested that a subcommittee could research whether there were issues with videoconferencing during proceedings under the CARES Act.

A practitioner member observed that this issue had been studied before, and though the CARES Act allowed for expanded videoconferencing for a period, she thought that the experience did not change the considerations that led the Committee to decide against changing the rule. She said that when the Committee previously considered similar changes, defense participants had suggested that any change should include a requirement of the defendant's consent. The member agreed with Judge Conrad that criminal trials are becoming more uncommon. Thus, she commented, many defendants appear in court only for their initial appearance, plea, and sentencing. She said that in-person appearances for such proceedings promote respect for the judicial system and keep proceedings focused on defendants.

Another practitioner member expressed a concern that defendants would feel pressured to consent to videoconferencing and observed that a similar concern was raised during discussions related to proposed changes to Rule 62.

A practitioner member commented that a distinguishing feature of the CARES Act period was that defendants were similarly situated during the pandemic, since proceedings were conducted regularly by videoconference. The member suggested that defendants were more

accepting of videoconference because "we were all doing it remotely." He agreed that defendants could feel coerced to consent now that defendants are not similarly situated and proceedings are not conducted regularly by videoconference. He thought that proceedings where defendants could be deprived of their freedom demand in-person appearances.

A practitioner member recalled a case near the end of the CARES Act period when courts also conducted proceedings in person. In the case, the court was scheduling a proceeding that would determine whether the defendant remained detained. The member said that conducting the proceeding in person, rather than by videoconference, would have delayed the proceeding and possibly caused unnecessary detention. She offered this as evidence that the process itself could be coercive by adding delay if a defendant wishes to appear in person.

A judge member observed that in his experience requests to appear remotely usually came from the defense. He asked whether the Committee thought that most defense attorneys would prefer in-person appearances at all proceedings.

A practitioner member responded that defendants often appreciate the option to waive appearance or appear remotely for routine matters, such as status conferences. He said that for proceedings that may deprive them of their liberty, defendants want to be present with their attorney so that they can better communicate with counsel. He noted that poor video quality could impair communication and cause the defendant distress. The practitioner member emphasized that communication between defendants and their attorneys is important, and appearing in person helps improve the lawyer-client relationship because it creates an opportunity for discussion outside of the proceeding.

A judge member thought that a rule change, if any, should be driven by the defense and not only for the convenience of the court.

Judge Dever observed that Rule 43 already allows a defendant to be absent from conferences about legal questions. He asked if the Committee could identify proceedings for which the rule should be changed to allow videoconferencing.

Judge Bates recalled fielding questions from judges about whether the rules permit videoconferencing for status conferences and said that these experiences demonstrated that the rules are not clear regarding when judges can use videoconferencing. He also said that he had held many proceedings by videoconference in misdemeanor cases since the end of the CARES Act period and had not experienced problems. He suggested that many in the federal judiciary supported expanding the use of virtual proceedings, though he acknowledged the support may have been because judges did not know they may already use videoconference for many proceedings. Judge Bates wondered whether judicial support alone warranted a subcommittee to study the issue. He said that he did not believe that felony pleas and sentencings should be remote, but he signaled that he was open to arguments that a rule change could alleviate the concerns previously raised.

Judge Dever indicated an intent to appoint a subcommittee and said that the first question to discuss would be what universe of proceedings should be covered by a rule change. He said that

the Committee appeared to agree that a change should not cover pleas and sentencings, and the rules already allow with the defendant's consent videoconferencing for initial appearances and arraignments.

A judge member asked whether the Committee should vote on the decision to form a subcommittee and questioned whether the Committee agreed in the way outlined by Judge Dever.

Judge Dever asked the judge member if it was the member's opinion that the issue had been studied enough by the Committee, and the member answered affirmatively.

Judge Dever asked the Committee to identify a proceeding that should be covered by a rule change. Judge Conrad offered competency hearings as an example. A judge member responded that he thought competency hearings would be excluded. Judge Dever said that he preferred to conduct competency hearings in person. Another judge member said that the Committee should consider permitting videoconferencing for competency hearings because transporting some defendants to court for such hearings can be difficult.

A judge liaison said that courts should conduct status of counsel hearings and similar critical proceedings in person.

Judge Dever invited further comment. Hearing none, Judge Dever thought that the Committee raised enough issues worth studying to appoint a subcommittee. He stated that he would appoint a subcommittee to report at the next meeting.

Rule 42

Judge Dever recognized Professor Beale to discuss contempt proceedings under Rule 42. Professor Beale stated that the proposal was based on a long and detailed law review article exploring contempt proceedings and finding possible improvements. She said that the article suggested changes to statutes and other changes that would be substantive or that at least sit on the border between procedure and substance. Accordingly, Professor Beale recommended that the Committee remove the suggestion from the agenda.

Judge Dever agreed with Professor Beale and invited comments. Hearing none, the Committee unanimously voted to remove the suggestion from the agenda.

Attorney Admission

Judge Dever recognized Professor Struve to report on attorney admissions. Professor Struve said that a Subcommittee had been formed to study a proposal to change the current attorney admissions practice, which results in some attorneys seeking to practice in multiple federal districts being required to take the bar exam in multiple states. She stated that the Committee previously dropped from consideration a proposal for a national bar of the United States District Courts, but it was continuing to consider other possibilities. Professor Struve thanked Judge Birotte, Ms. Recker, and Dr. Reagan for their support with the Subcommittee.

Professor Struve said that one proposal under consideration was to adopt a national rule that would foreclose federal districts from requiring attorneys practicing before a court in the district to be a member of the bar of the encompassing state. Professor Struve said that another possibility was to adopt a rule providing for admission to any federal district court for an attorney who is a member of any state bar or any federal court and is of good moral and professional character, similar to Appellate Rule 46. She noted that some contend that practice before trial courts is different than practice before courts of appeals. Professor Struve said that the Committee remains mindful of the need to consider whether there is rulemaking authority to address the topic consistent with statutory requirements. She said that the Subcommittee would continue to receive information on the topic.

Professor Struve said the Subcommittee also discussed requirements that out-of-district attorneys associate with local counsel. She recalled that the Subcommittee raised potential concerns about mandating that some districts have more permissive admissions procedures and concerns with how a change could affect local legal culture or impact client protection. She said the Subcommittee also discussed whether a change could implicate the regulation of unauthorized practice of law. Professor Struve stated that the Subcommittee was gathering information about views from state authorities on that topic.

Judge Dever invited comments. Professor Coquillette agreed that the judiciary's rulemaking authority to address attorney admissions was an important question. He observed that most federal districts have promulgated rules regulating attorney admissions.

Judge Dever invited further comment. Hearing none, he turned to the next topic.

Electronic Filing and Service by Self-Represented Litigants

Judge Dever noted that Judge Burgess chaired the Subcommittee and that Professor Struve had prepared a report on developments considered by a working group including participants from other rules committees as well.

Judge Burgess said that the working group focused on increasing electronic access and service by self-represented litigants. Judge Burgess explained that the draft rule would presumptively permit self-represented litigants to file electronically and require alternatives if a court order or rule bars such filings. Judge Burgess said that the working group was using Civil Rule 5 as a template.

Professor Struve explained that the project raised two policy ideas, one concerning service and one concerning filing. She said that the first idea would eliminate the requirement that a self-represented litigant separately effect paper service on litigants who are already receiving electronic notice. Professor Struve said that the second idea would presumptively allow self-represented litigants to access a court's electronic filing system. Professor Struve noted that courts would likely approach incarcerated self-represented litigants differently, recognizing that these litigants may lack consistent internet access. She concluded that many incarcerated litigants therefore would not be affected by the electronic filing change.

Professor Struve commented that the Committee would now have the benefit of other rules committees' discussions on the issue. She said that the Bankruptcy Rules Committee raised concerns about cases with multiple pro se litigants, a concern particularly salient to bankruptcy practice because a bankruptcy case can involve many creditors whose amount at issue does not justify hiring an attorney. In these cases, self-represented litigants may not understand their service responsibilities. Professor Struve said that the Bankruptcy Rules Committee appeared least likely to allow self-represented litigants to use bankruptcy courts' electronic filing systems. She also said that several Bankruptcy Rules Committee members were highly skeptical of a rule that would go further than presumptively allowing access to a court's electronic system.

Professor Struve said that the Appellate and Civil Rules Committees tended to think those concerns are distinct to bankruptcy because the committees thought having multiple pro se litigants in a single appellate or civil matter is unlikely. Professor Struve said that these two committees thus seemed open to considering this proposal. Professor Struve and Judge Dever invited the Committee's thoughts.

A judge member asked if the Committee wanted to continue studying the issue if the outcome might differ from the Bankruptcy Rules Committee.

Professor Struve said that the Committee did not need to vote on the issue, but a discussion would be helpful. Judge Dever thought the Committee would not be deterred by the Bankruptcy Rules Committee acting differently.

Judge Dever questioned whether the current rule—which allows pro se litigants access to electronic filing only when permitted by a court order or local rule—is adequate. He asked Committee members if they would object to the Criminal Rules treating the issue differently than the Bankruptcy Rules.

Professor Struve noted that the draft rule took into consideration court clerk concerns by allowing for alternatives. She predicted that if the draft rule was published for comment, the Committee would learn much from the public feedback. Professor Struve noted that the FJC was also discussing ways to provide additional helpful information.

A practitioner member noted that incarcerated individuals could have trouble accessing electronic filing systems. He also asked how courts would respond if an individual failed to file in a timely fashion due to difficulty accessing technology.

Professor Struve thanked the practitioner member for raising the questions and emphasized that the draft rule change would, at most, permit but not require electronic access. Professor Struve also noted that the federal rules do not account for the prison mailbox rule in the era of electronic filing.

Federal Judicial Center Research and Education Report

Judge Dever recognized Dr. Reagan to provide a report from the FJC. Dr. Reagan explained that the FJC had resumed reporting to rules committees and added to its report information on the

FJC's education division and history office because education had sometimes been suggested as an alternative to rulemaking.

Judge Dever thanked Dr. Reagan and noted that the full report appeared on page 428 of the agenda book.

Rule 17

Judge Dever turned the Committee's attention to Rule 17. He said that the Committee had been studying the issue for two years and began by discussing problems with the current rule. Judge Dever explained the timeline of the next day's panel discussion. He said that the panel discussion would help the Committee gather information, but it was not intended to be a drafting session for the Committee. Judge Dever recognized Judge Nguyen to further introduce the next day's discussion.

Judge Nguyen commented that the Subcommittee met 13 times over the preceding two and a half years and thanked all participants for their support. She said that the Subcommittee began by asking whether there was a problem with the existing rule and how the rule could be improved. The Subcommittee heard from many interested parties and learned that subpoena practice differs across the country. Some districts strictly apply the *Nixon* standard, a practice that discourages parties from using third-party subpoenas. In addition, districts have different procedures on how a party requests a third-party subpoena.

Judge Nguyen said that the Subcommittee studied several different issues. The Subcommittee studied procedural issues, such as ex parte and protective order procedures. The Subcommittee also discussed whether and how the *Nixon* standard should be changed. Judge Nguyen explained that in doing so the Subcommittee thought about two types of information: unprotected information and protected personal or confidential information. She said that the Subcommittee drafted frameworks for each type of information, but the draft language was merely a starting point to facilitate discussion.

Professor Beale noted that pages 442 and 443 of the agenda book had the list of questions for the speakers. She said that the speakers were encouraged to share personal experiences with the rule and to react to the draft rule language. Professor Beale explained that the Subcommittee invited speakers from varying districts and professional backgrounds, including a mix of prosecutors and defense attorneys, a privacy expert, and an individual speaking from the perspective of victims. Professor Beale detailed the timeline of the panel presentations and opportunities for Committee questions.

Judge Dever said that the Subcommittee studied the varying subpoena practices under Rule 17 and acknowledged that some districts have a limited third-party subpoena practice. He agreed that the draft language was not a recommendation but a way of thinking through issues. Judge Dever identified two questions for the Committee: is the draft rule an improvement and how would it affect court and lawyer workloads. A judge member observed that the proposal would permit parties to obtain more information than they could under the current Rule 17 as interpreted by *Nixon*.

Judge Dever noted that speaker biographies appeared in the agenda book. A judge member asked if the speakers had access to the draft language. Judge Dever answered that the panel members did.

Judge Nguyen commented that the agenda book included the draft rule language as well as a redlined version. Judge Dever asked for further comment. Hearing none, Judge Dever said that the meeting would resume at 8:30 a.m. the following day. Judge Dever adjourned the Committee until the next day.

The next day, Judge Dever welcomed meeting participants and noted that the meeting was intended for discussion of the proposal to amend Rule 17 of the Federal Rules of Criminal Procedure. He explained that the White Collar Crime Committee of the New York City Bar submitted the proposal and that Judge Nguyen was serving as chair of the Subcommittee. Judge Dever explained that the Subcommittee was studying potential problems with the current rule and potential solutions.

Judge Dever noted that the material for this issue began at page 438 of the agenda book. He repeated that the meeting was not meant to be a drafting session, but instead the Committee is interested in finding out how Rule 17 is being applied and if there are ways to improve it. Judge Dever thanked the panel for their time and asked meeting participants to introduce themselves.

Judge Nguyen again thanked the panel participants and explained the structure of the panel discussion. The first panel included:

Eóin Beirne, partner, Mintz Levin, Boston, Massachusetts;

Geremy Kamens, Federal Public Defender, Eastern District of Virginia, Alexandria, Virginia;

Professor Stephen Henderson, Judge Haskell A. Holloman Professor of Law, University of Oklahoma School of Law, Norman, Oklahoma; and

Alixandra Smith, Criminal Chief, United States Attorney's Office, Eastern District of New York, Brooklyn, New York.

Judge Nguyen recognized Mr. Beirne to begin the panel discussion. Mr. Beirne said that the *Nixon* standard is outdated and does not afford defendants their constitutional rights. He offered to illustrate this with his experience in the Varsity Blues cases from the District of Massachusetts, where more than 50 defendants—including parents of college applicants, school coaches, administrators, and testing proctors—were charged with conspiracy to commit fraud, bribery, and money laundering by bribing university officials to admit their children as athletes in sports they did not play or would never play at college level. The government took the position that the schools were victims of the fraud, that the students would not have been admitted if they had known they were not going to play the sports, and that donations have no role in admissions. Mr. Beirne explained that for the parents who did not plead guilty, the millions of documents and recordings subject to discovery contained a lot of highly sensitive information about people who had not been charged that the government had obtained through grand jury subpoenas, including academic

records, medical and mental health records of minors, and communications between spouses and between other family members. The Magistrate Judge entered a "very, very strict protective order" agreed to by all that covered who could access the material, for what purpose, to whom could it be shown as part of trial preparation, and how it must be redacted, stored, and destroyed. Mr. Beirne said that through snippets received from the government it became apparent to defense counsel that the schools' claims that donations didn't matter to admissions were false. As a trial date had not yet been set, the defense moved for Rule 17(c) subpoenas to two schools, which resulted in a large production of documents that refuted the schools' claims that donations played no part in admission. Later, in the trial of the first two parents, the court ruled that documents relating to school donations were inadmissible and could not be used to impeach witnesses from the school who testified that donations didn't matter to admissions. Those defendants were convicted. (The defendants included the exclusion of the documents in an appeal, and the Court of Appeals vacated the convictions on other grounds, Mr. Beirne explained.) In another case in front of a different judge, the court permitted the defense to use the documents to "thoroughly" impeach the testimony of the school witnesses that donations played no role, and that defendant was acquitted.

Mr. Beirne provided several takeaways. First, he said the government had no incentive to search for this "highly exculpatory" information because it did not fit within the government's theory of wrongdoing, and the defense met the *Nixon* standard only because it had received a snippet of the information by chance. Mr. Beirne asserted that a less onerous standard would afford defendants the constitutional right to compulsory process to properly prepare a defense, after which the judge would decide whether the information is admissible, a decision that may be appealed in the event of a conviction. Access to the material and use or disclosure of that material are very different things, he said.

Second, Mr. Beirne stressed the right solution for protecting sensitive material is a protective order, not in camera review. He stated that in the Varsity Blues case, it would have been practically impossible for the court to review the tens of thousands of documents received under the negotiated protective order; almost all would have been considered protected material under the draft. The protective order, he said, also required filing under seal, redactions, and anonymizations to protect privacy.

Third, Mr. Beirne said that the court correctly agreed that the government had no right to learn defense strategy when the defense was requesting documents, or to learn what the defense received. The process involved ex parte filings and an ex parte motion, and the court in his case correctly granted the motion to quash the government's subpoena to the school asking for everything it had produced to the defense. He noted that as with a grand jury subpoena, a recipient of a Rule 17 subpoena cannot be prevented from disclosing the subpoena, especially if they have a notification obligation under statute, such as FERPA.

Fourth, he said virtually all of the materials the defense received that were to be used at trial were turned over to the government per Rule 16. Everything else stayed hidden and governed by the strict protective order.

Fifth, Mr. Beirne commented that an interesting situation occurred where, due to ex parte filings, the court learned that the government may have possessed information that it did not know

was exculpatory. The judge gave the defense a choice: disclose documents in order to broaden the scope of *Brady* or hold the documents until required to be turned over, but not insist that the government violated its *Brady* obligations.

Sixth, regarding how to incorporate laws and other regulations into the decision about whether a defendant can access documents, in his case, Mr. Beirne said, the school cited FERPA as a basis for it not to turn over the relevant records, and the school provided notice to students, who got lawyers and intervened in the case. All that resulted was a reaffirmation of the protective order that was already in place, with the judge finding that the defendant's right to compulsory process outweighed any restrictions FERPA placed on the school's ability to disclose the relevant information.

Mr. Beirne recommended that to protect privacy, the Committee should leave it to the courts to impose strict protective orders which the parties and the recipient of the subpoena can negotiate, rather than distinguish between protected and unprotected information at the front end, which would lead to unnecessary delay and complication. Mr. Beirne further recommended that the rule not require the return of materials to the court for in camera review in white collar or large conspiracy or RICO cases, as it would be too unwieldy and impractical. He added that he agreed with the local rules in the District of Massachusetts that permit service of subpoenas without court permission once a trial has been set.

Judge Nguyen recognized Mr. Kamens. Mr. Kamens said that he was no fan of the *Nixon* standard but that the subpoena practice in his district works fairly well. Motions to quash do not require a substantial amount of the court's attention, parties serve trial subpoenas for witnesses and documents without first obtaining court permission, and subpoenas for documents before trial also work reasonably well, although he took issue with the *Nixon* standard.

Mr. Kamens provided as an example a case (being appealed by the Department of Justice) where the defendant was charged as a felon in possession of a firearm after a traffic stop. The defense argued that the court should dismiss the indictment due to selective enforcement by law enforcement in violation of the Equal Protection Clause, citing data showing a racial disparity in traffic stops. The court had granted the defense request for an ex parte subpoena for data on five months of traffic stops by the police department, data that a state law required it collect. After receiving the subpoena, instead of moving to quash, the police department representative negotiated with defense counsel and agreed that the department would produce a narrower set of information. The defense expert was able to conduct a regression analysis using the data and show the stops of black drivers far exceeded what would be expected based on the racial composition of the locations in which the stops occurred.

Mr. Kamens offered this example as a demonstration of the importance of negotiation in subpoena practice. He expressed concern that the language in the discussion draft would upend the practice of obtaining subpoenas that works reasonably well in most cases in his district. It would, he warned, increase litigation over terms such as "substantial doubt," "personal," and "confidential"; require more judicial involvement; and largely eliminate negotiations between the recipient and the parties about confidentiality issues and an appropriate protective order before the matter comes to the court.

Judge Nguyen thanked Mr. Kamens and recognized Professor Henderson. Professor Henderson supported expanding Rule 17 and emphasized the critical value of information privacy. He noted that a criminal defendant has constitutional rights not afforded to the prosecution. Professor Henderson suggested that Rule 17 should acknowledge this asymmetry by ensuring that if a defendant is denied access by statute, a court must consider the defendant's Sixth Amendment rights. Perhaps this could be phrased as whether the interests of justice and fair trial require access. Professor Henderson recommended requiring federal prosecutors—but not federal criminal defendants—to comply with state privacy laws. He noted that it was criminal defense attorneys who are seeking a revision of the rule, not prosecutors, who are very well able to operate under the current rule with the grand jury, special agents, cooperation agreements, and more at their disposal. He thought that the draft rule would substantially improve subpoena practice for defendants in districts that operate under the extremely narrow *Nixon* framework, and supported the disclosure restrictions in the draft.

Professor Henderson said that the draft rule should distinguish between protected and unprotected information by looking only to existing positive law, stating it would not be realistic to require judges to determine what is private or personal in every instance, and added that protected information should include trade secrets. He advised against using language that would encourage litigation about the scope of existing privacy protections and inquired whether the rule could allow a party to certify in good faith that information is unprotected. Professor Henderson recommended using a single exception for grand jury subpoenas rather than repeatedly referring to subpoenas other than grand jury subpoenas. He supported the draft's provisions regarding subpoenas sought by pro se defendants, and its ex parte procedures, but suggested that the rule give more guidance on what circumstances constitute good cause. Lastly, Professor Henderson recommended using a showing of "reasonably likely" in place of "likely" in subdivisions (c)(4)(B)(i) and (c)(4)(B)(iv).

Judge Nguyen turned to Ms. Smith. Ms. Smith began by expressing her general concerns with the draft rule. She said that she had seen no evidence that Rule 17 as interpreted by *Nixon* was causing problems. She thought the *Nixon* standard provides a transparent, flexible, and reasonable framework for the implementation of Rule 17, and judicial oversight of that standard is critical, because it allows each judge to tailor the standard to the needs of the particular case. Ms. Smith commented that she had not heard of a single case where the existing standard prevented defense counsel from obtaining materials necessary to defend their client. From the earlier description of the Varsity Blues case, she thought the standard did not prevent counsel from obtaining materials necessary to defend their client; the issue was a second line question about the court's decision to allow the defense to use those materials at trial. She said the government has the burden of proof; has a responsibility to protect the rights of parties, victims, witnesses, and third parties; and is constrained by laws, regulations, and policies not applicable to criminal defendants including Rule 6(e), the Privacy Act, the Crime Victims Rights Act, and Department of Justice Policy, which restrict what the government can or cannot use when it receives information pursuant to subpoena. Defense counsel are responsible to their client alone and are not subject to the restrictions on obtaining and disseminating information that regulate the government. Ms. Smith said that there is nothing unfair about the government having greater investigative tools.

Ms. Smith thought that the draft was vastly disproportionate to concerns that the *Nixon* standard is too narrow, that the draft would negatively affect the safety and privacy rights of third parties and cause extensive litigation. She anticipated increased litigation over the interaction with rules governing Jencks material, Rule 16, and the Fourth Amendment.

Ms. Smith observed that the draft rule did not sufficiently protect victim and witness privacy interests. She said that under the draft showing for protected information it would be significantly easier to obtain a subpoena than under the *Nixon* standard—allowing a subpoena for information that is not in fact admissible at trial without restrictions prohibiting the party from using the information for nefarious purposes, such as to embarrass or harass witnesses, making victims and witnesses less likely to cooperate in certain criminal cases. She criticized the draft as asymmetric, allowing the defense to subpoena information to disprove the offense, but not information to prove the offense, even though the government bears the burden of proof, and allowing defendants to obtain materials ex parte from victims and witnesses without the guardrails applicable to the government and without sufficient judicial oversight.

Ms. Smith asserted that protective orders are important but not sufficient to protect information in cases involving violence and the draft rule would particularly hurt the most vulnerable victims and witnesses who are less likely to have counsel that can advocate for their interests. These third parties may not understand terms in the subpoena or what information would be protected from disclosure. For example, a person receiving the subpoena might not know what "non content" information is and end up providing materials that should not be obtained by subpoena, or could reveal privileged information when they don't know what information is privileged. They may not know that the date on the subpoena must be the hearing date and not an earlier arbitrary date, she said, noting that there have been problems in her circuit with defense counsel putting dates on subpoenas that were not the hearing or trial date.

Ms. Smith said that though the rule would permit a third party to move to quash an inappropriate subpoena, many victims and witnesses may not be able to afford an attorney. Lastly, Ms. Smith suggested that the protection for personal and confidential information should be expanded to cover additional non-victim witnesses, such as eyewitnesses, cooperating witnesses, or other individuals whose personal and confidential information, like a home address, might be just as dangerous to obtain as for a victim. The draft also moves to a much earlier stage litigation about who is a victim; the facts that determine victims are often not litigated until sentencing.

Judge Nguyen invited questions from the Committee. A practitioner member asked Ms. Smith if she was referring to the Eastern District of New York or a broader area when she said that there was no evidence that Rule 17(c) prevents defendants from accessing needed information. Ms. Smith said that her assertion that she has seen no cases where defendants were unable to access information they needed for trial or that was exculpatory was based on her past experiences and review of the meeting materials. Ms. Recker said she didn't understand how it is possible to say there is no evidence when in some districts the judges are not open to Rule 17(c) subpoenas and the court of appeals so closely adheres to *Nixon*; it is not an active area for the defense.

A judge member asked Ms. Smith if she was wholly opposed to the draft proposal. Ms. Smith responded that she had significant concerns with the draft. The judge member asked Ms.

Smith if she agreed that the defense does not receive information prior to trial under Rule 17 that is not trial related. Ms. Smith responded that it is supposed to be for trial, so that if the information is trial related the defense should get that and she did not know of information that is not trial related that the defense should obtain.

Another judge member asked if the issue stemmed from a disagreement over the purpose of the rule—for obtaining evidence for trial, or as an investigative tool. Ms. Smith agreed that the White Collar Committee would like the rule to be more of an investigative tool, but the purpose of Rule 17 is to gather evidence for trial, not to be used as a general investigatory tool, that the rule should be tailored to relevant and admissible evidence for trial and not open civil discovery.

Professor Henderson disagreed and said that the rule is meant for criminal defendants to prepare a defense, not simply to gather evidence for trial. There are no criminal trials in many jurisdictions anymore; it is a system of pleas, and this is the opportunity for the defense to make its case, and it would be too narrow-minded to think of this for trial only.

Mr. Kamens noted a conversation he'd had with an experienced judge who said he'd not experienced defense attorneys sending out subpoenas to harass people, because most cases don't go to trial. Mr. Kamens said that the risk that defense counsel would use a subpoena to harass a witness or for another improper purpose is low and any such case would be an outlier, that most cases are handled by public defenders and CJA lawyers who have an interest in not harassing but simply doing their job. If it was a risk, you should see it in his district where subpoenas are issued relatively freely, but the problem did not exist in his district. He said the rule should focus on the vast majority of cases, not outliers. The rule already provides specific protection for a victim's personal or confidential information. The comment that lawyers are providing dates that are not hearing or trial dates is not at all true in his district, the clerk's office always look to see if that date is correct. He agreed with Professor Henderson that compulsory process requires the defense get the evidence (*Washington v. Te*xas). He also objected to the draft provision that required a defendant to show "substantial" doubt about an element, barring access to material that cast some doubt. All are issues better addressed on the back end, not the front.

A judge member asked Mr. Kamens if he recommended keeping the current rule. Mr. Kamens thought that the *Nixon* standard is too restrictive, and a targeted proposal that would address that would be beneficial, but he did not support the broader, wholesale revision, which he thought would upend the practice in a number of districts around the country.

Ms. Tessier asked Professor Henderson how the rule could ensure the protection of the Fourth Amendment rights of the individual whose information is sought from a third party, and gave an example of a subpoena for a person's email from Google. Professor Henderson responded that it is unclear what Fourth Amendment interests would be implicated by that example, noting that a subpoena has long been treated differently than a search warrant, and the party of true interest is not the party being subpoenaed. But a recipient could protect the rights of the person through a motion to quash. Since Apple made it a market issue, he thought that similar companies would file those motions in the appropriate cases. He also added that in the decades he has been working on privacy, he has never heard someone say that criminal defendants defending themselves are a threat to Fourth Amendment interests. Ms. Tessier asked if the draft sufficiently protects the Fourth

Amendment rights of the person whose information is sought from unrepresented subpoena recipients, such as a subpoena to witnesses' employers asking for emails. Professor Henderson responded that the rule likely did not sufficiently consider the issue, though it is not a problem unique to Rule 17. It arises when a grand jury asks for the information and has not been well addressed.

Judge Bates asked the panel members whether the district in which they practice requires court approval before a trial subpoena can issue. Mr. Kamens, Ms. Smith, and Mr. Beirne responded that court approval is not required for a subpoena tied to a specific hearing or trial date, but court approval is required for production of documents in advance of trial. Judge Bates asked if they all believe that is the way Rule 17 should stay, and they responded yes. Mr. Kamens said that he would be concerned about a rule requiring judicial approval for trial subpoenas in all circumstances. Ms. Smith said the practice in the Eastern District and Southern District of New York, for trial subpoenas, is that unless you get a court order the documents are returnable to the court. So they go to both parties, and there have been difficulties with defense not providing those documents in a timely manner. There is no court approval before the subpoena is issued, but there is litigation after they come back about whether those documents can be admitted.

A judge member asked if a subpoena duces tecum is issued before trial, say there is a hearing but not a trial, is it returned to the court or to the issuing party. Ms. Smith said they are returnable to the issuing party, and then as a matter of practice they must be provided to the other party, unless the party seeks a court order not to disclose them to the other party. As a technical matter they don't go to the court unless there is a dispute over the subpoena itself or the documents. Mr. Beirne added that defense counsel often adds to a subpoena that orders the recipient to show up with the documents on the first day of the trial or hearing, "In lieu of appearing in court, call me and we'll negotiate," and that's often what happens. The production is a voluntary one and the subpoena recipients don't turn up in court. Rule 16 governs whether or not it is turned over to the government. Mr. Kamens agreed that is what happens in the Eastern District of Virginia as well.

A judge member asked how the current practice prevents disclosure of personal or confidential information to a party who serves a subpoena before trial. Mr. Kamens said that a recipient can move to quash but that typically the bar to disclosure is a privilege. Generalized concerns about confidentiality are not sufficient to outweigh the defendant's interest in a fair trial and compulsory process. He said it is a mistake to pair a privilege, which is a bar to disclosure, generally, with general notions of confidentiality—which are important but typically not sufficient to overcome the weighty interests of a criminal defendant defending himself.

Judge Nguyen asked Mr. Beirne how routine Rule 17 subpoena practice is in his district. Mr. Beirne said that Rule 17 subpoena practice is quite routine, it happens most of the time, and does not typically result in significant litigation because the production is negotiated. He recommended that a good practice of the magistrate judges in his district is to admonish the parties at the outset that if a 17(c) subpoena is served to obtain confidential information, the parties should agree on a mechanism to protect that information. If the parties can't agree, the magistrate judge would order something. A judge member asked in what percentage of cases Rule 17 subpoenas are litigated. Mr. Beirne estimated maybe 5% of cases involve a motion to quash.

Professor King understood that the judge asks the parties to agree on protective steps, but what happens when there is an ex parte request. Mr. Beirne responded that the judge issues a directive to each side: if you serve trial subpoenas, you are charged with making sure private information stays private. There is an understanding that each party may use ex parte subpoenas.

Ms. Smith contested earlier assertions that information obtained by defense counsel or defendants is not used improperly. She provided two recent examples, both in non-white collar cases, where even with protective orders, there was abuse. In one, the defense attorney filed a motion with photographs of the minor victim of sexual abuse that were subject to a protective order, and another in which defendants used discovery materials to obtain personal and confidential information of potential witnesses and threaten legal and retaliatory action against those witnesses. She expressed concern that a rule change expanding the information defendants can obtain would create an environment more conducive to abuse. A practitioner member asked Ms. Smith how the information in her examples was obtained and whether a protective order was violated. Ms. Smith responded that the information in both cases was obtained under Rule 16, which she said has more protections than Rule 17, and that the actions did violate the protective orders.

The practitioner member asked Ms. Smith if she had ever moved for a Rule 17 subpoena and if she had to make a motion to do that. Ms. Smith responded that she had not had to make a motion and said that the practice in her district is that the materials she receives are immediately made available to the other party. There is no judicial involvement on the front end, the party obtains the subpoena from the clerk's office and serves it.

Judge Nguyen turned the Committee's attention to the next panel, which included:

Michael Caruso, Assistant Federal Public Defender, Southern District of Florida, Miami, Florida;

Eric Olshan, United States Attorney, Western District of Pennsylvania, Pittsburgh, Pennsylvania;

Guy Petrillo, partner, Petrillo Klein Boxer, New York, New York; and

Renée Williams, Chief Executive Officer, National Center for Victims of Crime, Hyattsville, Maryland.

Judge Nguyen recognized Mr. Caruso, who began by saying what he liked in the proposal: the explicit ex parte process and the revision to the *Nixon* standard would be beneficial in many districts, and would slightly increase their ability to represent clients in his district. He had several concerns about the draft rule, however, including that the motion requirement for every subpoena would drain their limited time and resources, the category for protected information may be too vague, the standard for the disclosure of protected information was too restrictive, and the provision on unprotected information may provide less information than the subcommittee intended. He described the practice in his district—they do not need to go to the clerk's office to get a subpoena, the clerk of the court supplies subpoenas to them, and he has one on his desktop

that he can fill out and have one of his investigators serve. No motion is required unless the subpoena seeks pretrial production. Mr. Caruso said that a motion requirement for every subpoena would be a significant burden for practice in his district, which involves the second highest number of cases filed and the second highest number of trials, and a median time from appearance to sentencing for a case that pleads of seven months and for a case that proceeds to trial of fourteen and a half months. The motion requirement would delay the disposition of cases while not providing a corresponding benefit. He described a cooperative subpoena practice, where except in fewer than five very complex cases, he has called the owner of the information to ask if that person has the information, to agree on the best language for the subpoena, and whether service by email is acceptable. He offered an example that reflected his typical subpoena practice: his client was the CEO of a company, accused by the government (and by bank officers who were civil defendants) to have stolen money from a bank, causing its insolvency. They called the FDIC, who said they had the information and would respond to a subpoena, and they worked to narrow the scope of the subpoena so it wouldn't waste anyone's time. He said he knows no one in his office or the CJA panel, who together represent 90 – 95% of defendants in his district, who had ever used a subpoena to harass or coerce a witness. If we can't agree, he explained, the dispute goes to the court and the court resolves a motion to quash or modify, which is a rare occurrence.

Mr. Caruso thought that the category of protected information "personal *or* confidential" in the draft was too broad. He agreed with Professor Henderson that a rule change should be tied to existing law and promote certainty and uniform application across the country. There is uneven application of Rule 17 across the country and even within a single district. Mr. Caruso also identified language that he regarded as too restrictive: "cast substantial doubt, on the accuracy of evidence," which sounded to him like outcome altering information, wasn't clear as to whether it referred to only the information sought or combined with other evidence, and didn't clarify if an attorney would have to ask the judge to revisit the decision should a witness provide testimony suggesting a stronger basis for believing it would "cast substantial doubt." Similarly, "accuracy" may not include bias evidence. Combining these two hurdles, he said, is too restrictive and would lead to uneven application. Considering multiple levels of review—motion to quash and back-end review—there is already plenty of protection and deterrence, including protective orders, reputational and financial harm, and defense counsel are too busy and interested in representing clients effectively to use Rule 17 to harass or coerce an information holder.

Mr. Caruso closed with concerns about the standard "information material to preparing the defense" for unprotected information as a standard that could be applied unevenly and more restrictively than intended. He noted that the Court in *Armstrong* recognized the word "defense" could include both sword and shield claims, but that the context of Rule 16 supported a narrow interpretation. Also, the Court was concerned about the defendant's ability to compel government work product, which is not a concern present in the Rule 17 context.

Judge Nguyen recognized Mr. Olshan. Mr. Olshan agreed with Ms. Smith that the *Nixon* standard appropriately balances permitting defendants to obtain admissible evidence with avoiding unnecessary and resource consuming fishing expeditions. He questioned whether a problem existed to justify a complete rewrite of Rule 17. In his view, any lack of uniformity that exists in its application is more likely to benefit the defendant, with a broader interpretation of admissibility that permits defendant to obtain more than *Nixon* allows, rather than a narrower interpretation that

bars a defendant from obtaining what *Nixon* permits. Mr. Olshan said that the draft rule would cause even wider variation than currently exists under *Nixon* and its progeny, and increase the risk of harassment and embarrassment for victims, other witnesses, and non-witnesses, that is significantly minimized under the current *Nixon* regime.

Turning to the draft rule's privacy protections, Mr. Olshan thought that the protections afforded to victims would require litigation to define "personal and confidential" and should be expanded to all whose information is sought. For example, a person testifying about past conduct for which the statute of limitations has run, a child or other person who experienced trauma by witnessing the charged offense, cooperating witnesses, and codefendants are no less deserving of protection for their personal or confidential information than the victim of the charged offense. Mr. Olshan also thought that the draft rule's reliance on external privacy laws was misplaced and unclear about what information it protected. For example, would records subject to HIPAA be protected all the time, only when HIPAA might preclude disclosure, or only when HIPAA does preclude disclosure. Would medical records in the patient's possession or a family member's possession be protected? What if the patient signed a waiver several years earlier or had received notice of the subpoena? What if the issuing district is in a state that has one set of privacy laws, and the subpoena recipient is in a different state that has a different set of privacy laws? He said these ambiguities in the draft rule would cause cumbersome litigation, multiple times in a case, and often close before trial. And these decisions about the scope of privacy laws could affect noncriminal proceedings, without the benefit of expert practitioners in those areas. This would be especially burdensome where ex parte subpoenas are issued for recipients who are unrepresented or cannot afford counsel.

Regarding the issuance of subpoenas for non-trial proceedings, Mr. Olshan said that they do not object to Rule 17 subpoenas for sentencing or other specific hearings, like suppression hearings, a practice that happens in his district and many others. But by only using the word "upcoming," and rejecting the word "scheduled," the draft effectively decoupled subpoenas from any hearing, allowing subpoenas to issue at any time, and thereby would permit the kind of fishing expeditions that *Nixon* prohibits, because upon charge there will be a trial in theory "upcoming."

Mr. Olshan also expressed concern that the draft rule's standard for obtaining a subpoena for protected information was asymmetrical between the defense and prosecution, and provide the defense more access to information by subpoena than the government even though the government had the burden of proof and is subject to more stringent privacy laws than private parties, including Rule 6(e) and the Fourth Amendment. The defense could obtain inadmissible evidence for an affirmative defense, but the government could not obtain inadmissible evidence under the draft to disprove an affirmative defense.

He also was concerned about jettisoning the requirement of admissibility, which ensures that the information is linked to a particular hearing and prevents the type of fishing expedition *Nixon* criticized. Mr. Olshan said the draft standard allows the defense to obtain information, regardless of whether that information is reliable or admissible, such as extrinsic evidence of misconduct that would not be admissible under the Rules of Evidence, from subpoena recipients who may not have the wherewithal to challenge the subpoena.

For unprotected information, Mr. Olshan said that the draft rule would permit broad access to information from third parties including private journals and files stored on their personal computers or their personnel files at work, just on a hunch that they might contain information damaging to a witness's reputation. Unrepresented witnesses without the knowledge, resources, or incentive to move to quash a subpoena may respond with overproduction, and the volume of additional subpoenas would overwhelm the courts. It is not necessary to create a new, broad investigative tool for defendants from scratch in order to respond to the concerns expressed at the 2022 meeting.

Judge Nguyen recognized Mr. Petrillo. Mr. Petrillo welcomed the Committee's effort to amend Rule 17 and said that courts apply the rule with a great deal of variability. He noted that in a recent case in Connecticut, the judge ruled that all Rule 17 subpoenas require a motion, that defense counsel refrain from engaging with counsel for subpoenaed parties, and that any questions be directed to the court on the day of return. Other courts accept ex parte motions for Rule 17 subpoenas on a routine basis. In some districts, subpoenas are permitted for impeachment material, in others they are not. He believed the Rule calls out for textual clarity.

He recommended excluding business entities from the protections that the draft rule provides to victims, and to exclude business entity confidential information, because businesses are routinely represented by counsel, protective orders are routinely ordered and can be made applicable to businesses, and defense counsel routinely negotiates with the counsel for entity receiving the subpoena. It is rare that an accommodation cannot be reached and there is a motion to quash. Parties often agree to limit confidential information to attorney's eyes only or experts, and Rule 17 subpoenas are often used to obtain this information.

Mr. Petrillo also recommended that the standard for privacy protection be changed to "is protected under established state and federal law" to avoid litigation overload. He thought that the rule should not require a different factual showing to obtain personal and confidential information, as the measures that courts apply to protect confidential information, including in camera review, address the concerns. Further, Mr. Petrillo said that requiring a party to show substantial doubt about accuracy (in subdivision (c)(4)(B)(iv)) would be an extremely high burden that may not be possible to meet without viewing the documents. He recommended a reasonableness standard instead. Lastly, Mr. Petrillo commented that the draft rule's requirement (in the same subdivision) that the defense show that the information sought would likely support an affirmative defense would impose too high a burden. He urged abandoning the bifurcation of the standard and adoption of a simpler, more straightforward standard for both.

Judge Nguyen recognized Ms. Williams. Ms. Williams provided background about the National Center for Victims of Crime and said that her comments were from the perspective of individual, rather than institutional, victims. She stated that the premises of the proposed rule change—that *Nixon* prevents access to information that the defendant should be able to obtain and that Rule 17 prevents timely access to such information—were flawed regarding private or confidential information about victims. Ms. Williams explained that the draft rule would cause victims to turn over everything and further chill victims from coming forward. Victims are not represented, and already shoulder a burden when motions come up. She agreed with Ms. Smith that there are important differences between criminal proceedings and civil proceedings, where

they are represented and have put themselves at issue. Ms. Williams said that victims should always receive notice about subpoenas for personal or confidential information, be given reasonable time to be heard on a subpoena, be provided with information about potential legal support, and be entitled to a hearing on a motion for a subpoena. Ms. Williams said that the scope of protected information should include information protected by law and other personal and confidential information. She was concerned that removing *Nixon's* admissibility requirement would lead to untethered fishing expeditions, and that the standard for admissibility at a hearing other than at trial could be much lower and this could be a workaround for some defense attorneys. She added that everyone seems to agree that the lack of a definition of what is personal or confidential is very concerning.

Judge Nguyen invited questions from the Committee. A judge member asked if clarifying Rule 17 to promote uniformity would be more appropriate than implementing a more substantial change. Mr. Petrillo responded that clarification would be helpful for courts who do not deal with Rule 17 as often as others, and urged the Committee to consider extensive commentary.

Judge Nguyen asked if the restrictive interpretation of Rule 17 Mr. Petrillo described by the judge in Connecticut was common in that District. Mr. Petrillo responded that another judge in that district had also required a motion with redactions to protect defense strategy, but had not barred communication with the subpoena recipient.

Professor Beale asked whether small and large business entities are sufficiently similar to treat them the same under a proposed rule change. Mr. Petrillo answered that he did not have experience with subpoenas to small business entities who don't have a legal department and outside counsel.

Professor Beale asked all panelists whether judicial permission or additional information is required to issue a non-trial subpoena. Mr. Caruso said that he had used blank subpoena forms provided by the clerk of the court for hearings, trials, and sentencing proceedings. He said he'd never used that subpoena for plea negotiations or working out terms of a plea; each subpoena has to be tied to a particular hearing. Mr. Olshan said that in his experience subpoenas issue for sentencing and suppression hearings without prior court permission, but there has to be a scheduled date. Otherwise you have to go to court for approval. In his district, they do not have trial dates until much later. It could be a year or two even three years before they have a trial date. Mr. Petrillo said his district's practice is consistent with Mr. Olshan's description. Mr. Caruso said that in their district they get a trial date a week or two after arraignment, and the sentencing is scheduled on the date of the plea or the jury's verdict. He had experienced issues with timing where the judge schedules a suppression hearing for three days later and obtaining information by subpoena within that short period of time was burdensome.

Professor King asked each panelist whether the judges that they practice before permit subpoenas to obtain impeachment evidence and how the panelists negotiate subpoena terms with unrepresented subpoena recipients. Mr. Caruso said that he can obtain impeachment evidence by subpoena and that he also cooperates with unrepresented recipients about the terms of a potential subpoena, that he has never subpoenaed a victim directly, and that he found that the small mom-and-pop employers are often more protective of their employees' information because they often

view them as a family. His process is to ask do you have this information, would you be willing to provide it, and would you accept a subpoena. It had never been acrimonious. Mr. Olshan acknowledged that courts take varying approaches to impeachment evidence under the existing rule and he always comes back to the concept of admissibility, the impeachment information must be admissible. Mr. Olshan raised concern that if there is a set date, the government may not learn how many subpoenas have been issued by the defense or what information was obtained. In his district, there is no reciprocal production to the government if the defense obtained a Rule 17(c) subpoena. They might find out about if an unrepresented person receives a subpoena and the person contacts the government. He described a capital case in which a defense subpoena had issued to a third-party educational institution for a government witness's educational records, and the entity called the former student, which is how the government learned about it and negotiated the production of a set of records. That situation where third parties are producing records in response to a subpoena and no one would ever know about it would be amplified under the draft rule. Say the subpoena is issued to the friend of a victim or witness to a crime that says you are directed to produce all text messages and communications to the other person, the recipient says, "I better do it, this is from a court." Mr. Petrillo said when the defense seeks impeachment material it always comes to the attention of the government, it is generally not thought to be an area where defense strategy is implicated, and that he had seen courts take varied approaches to subpoenas for impeachment evidence. Mr. Petrillo supported a potential rule change that would require courts to address potential subpoenas to unrepresented parties at the outset.

A practitioner member asked how courts in complex cases treat subpoenas that are not necessarily tied to a hearing date, where the investigation has been ongoing, but the defense needs more than the government is providing through discovery and is unable necessarily to describe it with specificity or show it would be admissible. Mr. Caruso said that he had not experienced a case where a subpoena could not be tied to a hearing date. Mr. Olshan said that in his district (where hearing or trial dates are not routinely set), his practice had been to cooperate with defense counsel, but defense counsel retained the ability to file a motion for early production. Mr. Olshan also said that even where the defense had to obtain court permission, the court was often willing to take a permissive approach to admissibility, relevance, and specificity under *Nixon*. Mr. Petrillo said that defense counsel often raises potential Rule 17 subpoenas in the first pretrial conference to receive a ruling or guidance from the court as to how to proceed absent a date.

Professor Beale observed that Rule 17 currently requires notice when seeking personal or confidential information about a victim. She asked whether the panel had experienced problems under the current rule with victims not receiving notice or not understanding the subpoena or their rights as victims, including when a subpoena was issued to another individual seeking information about a victim. Ms. Williams responded that even sophisticated victims do not understand notices and do not know their rights. That's when they call her organization, because they are terrified and don't know what the notice means. Mr. Olshan said that the concern also would apply to nonvictim third parties. Mr. Caruso stated that there are significant guardrails in the draft, including motions to quash to handle these kinds of outlier issues. Defendants are entitled to exculpatory information in the hands of third parties, the question is are there sufficient guardrails, and he thought the judicial oversight at the front end, back end, and through the motion to quash are sufficient. Ms. Williams noted that there is very little litigation under the CVRA and there is no guidance, because victims' rights are not enforced. Mr. Petrillo said that the draft rule addressed what should happen

when a subpoena is issued to an unrepresented party and that the return should go to the court for review.

A judge member asked if the panelists had further comment about the concern over a lack of uniformity. Mr. Olshan said that there was not such variability in practice to justify the proposed changes, and the courts and parties around the country are managing. Mr. Caruso said that the lack of uniformity is caused by the *Nixon* standard and the inability of many defendants to submit ex parte applications under Rule 17. This means defendants must either reveal defense strategy through a public motion or to forego seeking the information. That is a significant unevenness that really rebuts the notion that defendants are all getting what they need, because in districts where you cannot file ex parte they are not filing.

Ms. Tessier asked Ms. Williams if her organization provided services to those negatively affected by crime but who do not meet the statutory definition of victim. Ms. Williams answered that her organization did. Ms. Tessier asked if victims have difficulty dealing with subpoenas under current practice. Ms. Williams said her organization provides different advice to those who meet the statutory definition of victim from those who do not. A practitioner member asked Ms. Williams if her organization worked with victims who had received grand jury subpoenas. Ms. Williams answered that she did not know and could provide the Committee with an answer later.

A practitioner member asked Mr. Olshan if he had ever served a Rule 17(c) subpoena. Mr. Olshan answered that he had. The practitioner member asked Mr. Olshan if he had ever made a motion to meet the *Nixon* standard. Mr. Olshan said that he may have but it would have been rare and a situation where there was no court date so we had to file a motion like the defense would. Mr. Olshan said that more often any such motion would have sought missing material like a certificate of authenticity for business records.

Judge Nguyen thanked the panel and said that the Committee would resume with the next panel after a break. After the break, the Committee turned its attention to the next panel, which included:

Matthew Fishbein, retired partner, Debevoise & Plimpton, New York, New York;

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, Washington, District of Columbia;

David Patton, partner, Hecker Fink LLP, New York, New York; and

Craig Randall, Chief, Criminal Division, Western District of North Carolina, Huntersville, North Carolina.

Mr. Fishbein described the process leading to the New York City Bar subcommittee's proposal, which requires a motion when the subpoena seeks personal or confidential information. He said the current rule is ambiguous and imprecise, and inconsistently applied. The *Nixon* standard does not balance the interests among the government, defense, and subpoena recipient, it involved a government subpoena not a defense, and its narrow requirements can be explained by the Court's discomfort that the government was circumventing the prohibition on using grand jury

subpoenas to obtain evidence against an already indicted defendant. *Nixon* was never meant to apply to defense subpoenas. Lower court applications of *Nixon* have hampered defense counsel's ability to obtain from third parties information that is often critical to preparing a defense. Prosecutors are hampered by *Nixon*, but less so because of their ability to obtain information from third parties by other means. Mr. Fishbein supported expanding the scope of Rule 17 to give the defense an investigative tool.

Turning to the discussion draft, Mr. Fishbein opposed the additional hurdles for obtaining a subpoena for protected information and the motion requirement for seeking a subpoena for nonprotected information. The City Bar's proposal also includes a distinct procedure for obtaining personal or confidential information. But Mr. Fishbein thought that a subpoena for protected information should be the only type where a party must first obtain court permission. In such a case, the court might issue a protective order, redaction, or other limitations. He opposed any requirements for issuance other than a showing that the information is material to preparing the defense. The drafts required showings are substantial burdens that are also problems with the *Nixon* rule. If the defense can't identify a specific item, it can't advocate its admissibility. How is the party supposed to know before obtaining the documents if they will cast substantial doubt on the evidence or establish an affirmative defense? The standard of material to preparing the defense is sufficient to prevent baseless fishing expeditions. The draft puts the concerns of individuals whose protected information that may be in the hands of third parties over the needs of criminal defendants whose liberty is at stake. In the civil context, when a subpoena seeks confidential information, the rule does not impose a higher burden on the party serving the subpoena, the party receiving the subpoena may file a motion to quash.

Mr. Fishbein also opposed requiring a motion for a Rule 17 subpoena. The Rule does not require a motion, and presently many courts do not require a motion, and the sky has not fallen. The comment's explanation for requiring a motion does not explain why a motion is required for a Rule 17 subpoena when it is not required for a grand jury or civil subpoena. Compulsory process with the threat of contempt is the point of a subpoena. The threat of abuse or harassment is present with grand jury and civil subpoenas, but typically there is no need for court involvement, the parties work it out, and no reason to believe it wouldn't work as well with Rule 17 subpoenas. He cautioned against additional court involvement because a party seeking a subpoena would have to reveal its strategy, creating a dilemma for defense counsel—defense would have to make a motion in the hopes of obtaining information material to the defense or abandon the attempt because of the risk of revealing strategy or the risk that information harmful to the defense would be revealed to the government. Requiring court permission would also impose an unnecessary burden on the court for subpoenas seeking unprotected information.

Judge Nguyen recognized Ms. Miller who said that the *Nixon* standard largely works, and even with the *Nixon* standard there are some examples of abuse, like attempts to use Rule 17 as a general discovery device and otherwise. Ms. Miller said she had not experienced this with the defenders in Miami, but more with private counsel. She said precedent post-*Nixon* has not limited the case to government subpoenas because the Rule itself does not distinguish between the government and the defense. A modest revision based on *Nixon* would be far more workable than the draft rule to address concerns about the lack of uniformity and that some defense counsel feel the *Nixon* standard is too stringent.

She discussed current practice under *Nixon*, stating that relevance is a low bar and many courts already apply the admissibility requirements as "likely admissible." As for impeachment, she said it often depends on whether it is admissible, and noted impeachment evidence has been sought improperly under Rule 17 in the context of post-trial Rule 33 proceedings. Ms. Miller thought that the lack of uniformity was not unique to Rule 17. She noted that districts vary greatly in the volume of litigation and crime rates, and such factors help explain the variations in how judges manage their own dockets. She said that the draft rule would increase variation in the courts in unexpected ways, such as variations in state laws governing privacy, and offered case examples where courts reached different conclusions about state laws.

Ms. Miller also argued that expanding defense access to information could lead to harm to witnesses and cooperators, despite protective orders. Under the draft, before a witness list is provided or a trial date is set, defense counsel could issue ex parte subpoenas to obtain jail calls of coconspirators and codefendants on the theory that information in those jail calls is material to the defense, even if not admissible, if the calls are not protected by state law, and the court would not review the returns. The calls could include information about cooperation, and the location of cooperators or witnesses, leading to harm. She provided examples of cases in which information disclosed to the defendant by the government during discovery was used by the defendant to harm and intimidate third parties:

- a case where counsel released material to the defendant in violation of a protective order, allowing the defendant to determine the identity of a cooperator, who subsequently was found murdered with discovery material scattered around his body;
- a case where a defendant posted on Instagram the statement of a codefendant he'd received in discovery, and falsely labeled the codefendant a snitch, leading to threats against the codefendant in detention; and
- a case in which a gang ordered the killing of a witness disclosed in discovery.

Ms. Miller turned to what would happen if the defendant was unrepresented and sought an ex parte subpoena. The motion would go to the court, but she questioned whether the court will be positioned without input from the government to evaluate whether the subpoena was appropriate and who would have standing to litigate that because the government may still be identifying victims at sentencing. She related a case in which the defendant had threatened to murder two victims and served a subpoena in violation of 17(c)(3) through standby counsel for the victim's personnel file with highly sensitive information, which was delivered to standby counsel and into defendant's possession.

Without the *Nixon* standard, Ms. Miller suggested, there may be no limits on the timing for obtaining impeachment evidence from third parties, as there are for obtaining impeachment information from the government. She suggested that the draft rule would improperly expand the scope of Rule 17 to provide criminal defendants with discovery tool beyond the limits of Rule 16. She recommended that the protections afforded to victims should also be afforded to other witnesses. Ms. Miller said that the draft rule would chill cooperation, create delay the disposition of cases when subpoenas are sought close to trial, and burden unrepresented and under-resourced individuals.

Ms. Miller, noting again that she could not speak for the Department of Justice, proposed codifying *Nixon* in part but changing the standard from "admissible" evidence to "likely admissible." She also proposed adding to a modified *Nixon* standard a carve out in the rule that would permit a trial judge to issue a subpoena, upon a party's motion, if it doesn't otherwise satisfy the requirements of the rule but is in the interest of justice and compliance would not be unreasonable or oppressive. She argued it would allow the judge who is best positioned to direct its case, a clear indication they could issue subpoenas more broadly, and allow for incremental change rather than dramatic change.

Judge Nguyen recognized Mr. Patton. He said that there is enormous variation in Rule 17 practice among and within districts. They not only apply the *Nixon* factors differently, but more important is the huge variation on ex parte policy. There are judges who will turn over material meant to be ex parte to the government, others will respect ex parte submissions, and others who will give you the benefit of the doubt, but it is possible they will disagree and disclose the material to the government. He also mentioned for the same reasons defense counsel may not go to the judge when a subpoena recipient refuses to respond.

Mr. Patton said it is quite common for the government to issue grand jury subpoenas post-indictment, beyond search warrants. He said the risk of abuse is greater but there is very little barrier to subpoena practice in the civil side. He also identified problems with the current rule, saying that defendants often do not receive material information and have fewer tools than the government. He thought that the most important changes to Rule 17 would be having a clear ex parte provision and making clear that Rule 17 subpoenas are appropriate for investigative purposes. Mr. Patton questioned why the rule would have a higher standard for obtaining protected information than unprotected information, rather than dealing with that through a protective order. Lastly, he thought that the draft rule would not contribute to violations of protective orders or abuse of information received under Rule 16.

Judge Nguyen recognized Mr. Randall. Mr. Randall agreed with several prior panelists that the proposed change was disproportionate to the harms cited for the change. He said that the *Nixon* standard established a reasonable and clear framework with workable boundaries for protecting privacy rights while permitting parties to obtain needed information for criminal hearings. Mr. Randall said it works well because it relies on well-established rules about what is admissible. The draft rule would create confusion, cause additional litigation, and raise concerns about the potential for abuse by allowing parties to obtain personal information. He termed the draft a complete overhaul that would add to Rule 17 a set of functions that the Rule was never designed to serve. Questions raised include how the rule would interact with the Speedy Trial Act, the Fourth Amendment, HIPAA laws and others.

Mr. Randall suggested the rule would be used primarily to obtain information to shame a witness and discourage the witness from testifying. He agreed with some other panelists that it would burden unrepresented individuals who would be unlikely to resist the subpoena and questioned why the additional protections applied only to victims and not all potential witnesses. For example, a child who witnessed a violent assault would not fit within the CVRA definition of a victim but should have the same protections under the rule.

Next, Mr. Randall recommended that the rule provide more guidance about the circumstances that would constitute good cause to obtain an ex parte subpoena. He raised concern that every defense subpoena would be an ex parte subpoena if the defense cites defense strategy, and without the *Nixon* standard the defense could seek vast amounts of information without input from the opposing party that would help the court determine if it involved victim information, or guide appropriate restrictions. Mr. Randall commented that defense counsel already fail to provide reciprocal discovery and the rule will enhance the disparity in discovery disclosures, and that the draft rule's procedures for in camera review would cause trial delays, raising questions about how the draft rule would interact with the Speedy Trial Act.

Judge Nguyen asked whether the DOJ thought there was a greater risk to victims and witnesses in jurisdictions in districts that interpret *Nixon* more permissively compared to districts that have no subpoena practice or interpret *Nixon* very strictly. Ms. Miller said that she had not noted a trend. Mr. Randall said that he also did not have a sense of current abuses.

A practitioner member responded to the expressions of uncertainty about what the defense needs that it is not getting by noting a case in which the defense asked for a certain group of emails it discovered it needed after reviewing discovery, but the government said it didn't think the emails were necessary. Because the perspective of the government is different than the defense, a rule change that would provide defendants with expanded investigative power is needed. He asked Mr. Randall for his thoughts about Ms. Miller's proposal to change the "admissible" standard to "likely admissible." Mr. Randall responded that he thought Ms. Miller's proposal was a reasonable approach. Mr. Fishbein said that a "likely admissible" standard would not provide defendants with sufficient tools to find admissible evidence because they need information that would lead to admissible evidence. Mr. Fishbein observed that the draft rule would also provide protections for nonvictims and questioned the risk of abuse identified by other panelists.

Another practitioner member asked Mr. Randall if he had ever issued a Rule 17(c) subpoena. Mr. Randall responded that he had. The practitioner member asked if a motion is required in such circumstances. Mr. Randall said that there is not a motion requirement and that there is little Rule 17 litigation in his district. He said that he had typically made Rule 17(c) motions for business records not provided earlier. The member asked if both the defense and government can serve Rule 17(c) subpoenas without court permission in his district. Mr. Randall answered that both parties can.

Judge Nguyen thanked the panelists and said that the Committee would resume after a break. After the break, the Committee asked questions to all panelists. Judge Nguyen started by asking the panelists if they had a reaction to Ms. Miller's proposal to change *Nixon's* admissible standard to likely admissible.

Mr. Fishbein repeated that likely admissible was a better standard than admissible, but he supported an even broader definition because the rule should have a mechanism for the defense to obtain information that could lead to admissible evidence. He said that a better standard would be the New York City Bar's proposed standard of "material to the prosecution or defense" from Rule 16 because it would address the concerns about fishing expeditions and was a phrase already well-known and understood.

Judge Bates asked Ms. Miller if an acceptable standard would be "likely admissible or likely to lead to the discovery of likely admissible evidence." Ms. Miller said that she understood why her defense colleagues would like the standard and preliminarily indicated that she may personally support it, but Ms. Miller repeated that she preferred a catchall interest of justice standard combined with a likely admissible standard. Ms. Miller said that this would better capture a broader set of circumstances because she had confidence that trial judges are best positioned to make these determinations, like Federal Rule of Evidence 403 determinations for a particular case.

Ms. Tessier explained that Ms. Miller's proposal included putting *Nixon* into Rule 17 and allowing for a court in a particular case to determine that the interests of justice or exceptional circumstances warrant a subpoena that does not satisfy even the loosened *Nixon* standard, which would require a court order. Ms. Tessier asked the panelists if this proposal addressed their concerns.

Mr. Fishbein responded that that proposal could be a broad standard, but he was concerned that the proposal was open to interpretation in different ways. He asked if the proposal would mean that a subpoena seeking nonprotected information under a likely admissible standard would not require a motion, but a similar subpoena based on the "interest of justice" would require a motion. Mr. Fishbein said that this would make a difference because he thought the rule should not typically require a party to make a motion before issuing a subpoena.

Ms. Tessier, repeating the caveat that the Department is not able to take a position on language that is not published for comment, explained that she was referring to a narrower, more tailored amendment where the change would leave in place subpoena practice as it had developed in different districts because the practice in different districts is attuned to the needs of those particular districts, but adding a loosened *Nixon* standard to the rule because that standard is not in the rule, so that most subpoenas have to abide by a loosened *Nixon* standard, and requiring court approval before obtaining a subpoena that does not satisfy the loosened *Nixon* standard.

Judge Nguyen assured participants that the draft rule was merely a starting point for discussion, not a recommendation by the Subcommittee. Judge Nguyen also emphasized that any participant's comments would not be construed as a commitment to that position, and that questions such as whether the rule should have more front-end protections or focus on the back end with protective orders are still very open. Judge Nguyen thought that even an incremental change to *Nixon* could have a significant impact on districts that apply *Nixon* strictly.

Professor Henderson expressed concern with a rule change attuned to particular districts because criminal defendants' constitutional rights are the same in every jurisdiction. He said that the variation among jurisdictions in subpoena practice is almost a secret code. Reading the rule gives you no idea what is going on and how varied this is. He said that is deeply problematic. The Federal Rules should be understandable and followed, and he stressed the need to spell out in the rule what is actually happening to promote more uniformity.

Mr. Kamens said that Rule 17 currently is not a viable vehicle for defendants in some districts because of the distance between the defense's good faith belief—based on reasons the defense can put in a motion—that a custodian of information has information that would be

material to the defense, and the complete absence of any knowledge about the content, source, or form of that information, which is critical to admissibility. The variation, aside from the ex parte issue, stems from some courts allowing movants to make reasonable guesses about the information and some not allowing movants to do so. Mr. Kamens said that a "likely admissible" standard would still have this problem if courts continue to demand information about the form, content, and source of the information sought.

A practitioner member asked if a "possibly admissible" standard would be a narrower change that would alleviate concerns about obtaining information without knowing the form and content of it, suggesting it would not be a fishing expedition but indicate good faith as an officer of the court that the custodian has some information but can't yet articulate that it is likely admissible.

Judge Dever also asked the panel if a potential narrower amendment that would (1) loosen the *Nixon* test slightly by allowing a subpoena for information described specifically, is relevant, and is likely to lead to the discovery of admissible evidence; (2) permit subpoenas to issue ex parte and (3) retain all the back end protections including protective orders and the motion to quash, would address the two problems they had heard about. Namely, the problem that in many districts defense counsel acting in good faith, with no interest in a terabyte of data because they will not get their fees and don't have the time, cannot obtain a subpoena. He said the defense should be able to get the camera outside the place where the Hobbs Act robbery happened, because the video was not in the discovery provided and they got the wrong guy. Or in a fraud case where the government didn't produce any of the information from an accounting firm that the defendant says he relied on in good faith, the defense in the Eastern District of Pennsylvania should be able to get that and they cannot. And the other problem is that some districts courts require anytime you issue a subpoena, whatever you get, you have to give it all over, even inculpatory information, which the defense would have no obligation to produce under the rules. The better practice is to recognize that the defense will comply with Rule 16's requirement to turn over whatever it will use at trial.

Mr. Beirne supported Judge Dever's suggestion because untethering the standard from admissibility is what judges are doing in the districts where the rule is working, and is the right thing to do. Mr. Patton agreed and said that a narrow fix to *Nixon* and an ex parte provision would solve 90% of the problems.

Ms. Miller asked how an ex parte provision would interact with the requirement of notification to victims. Judge Dever responded that such a change would not change the notification requirement in (c)(3). Judge Dever also stated that the fundamental problems are that meeting the *Nixon* standard is too difficult in some districts and that courts require all information produced by any subpoena to be disclosed to the other side. Ms. Miller thought the crime scene video should be obtainable, and that Judge Dever's suggested change would raise the floor, similar to her own unofficial proposal.

Mr. Fishbein said that he preferred a likely to lead to admissible evidence standard more than a likely admissible standard, but he thought that defense counsel could live with Judge Dever's suggestion. Mr. Fishbein also thought that the rule should have a mechanism so that parties are not required to share the information, but another way to do that other than an ex parte motion

is not requiring a motion to issue a subpoena so there is no notice to the other side about why the subpoena is necessary. Mr. Fishbein questioned the need to seek an ex parte order in every circumstance with the possible exception of when a subpoena seeks personal or confidential information.

Judge Dever said that he was referring to having no need for a motion before the issuance of a subpoena but having a protective order that the parties agree to, the opportunity for negotiation of the scope and if needed, a motion to quash. A judge member asked if this would apply to both protected and nonprotected information. Judge Dever responded that for purposes of getting others' reaction, yes it would.

Mr. Randall supported a narrower change similar to Ms. Miller's proposal. He thought that the standard should remain tied to admissibility but could be changed to likely admissible. Mr. Randall stated that this change would lessen the concern about ex parte procedures because there would be greater ability to identify and set bounds on what can be obtained through that standard, providing more control on the front end of the process. Mr. Kamens also supported the suggestion.

Professor Henderson said that the suggestion would be an improvement and proposed including a provision that would permit obtaining potentially exculpatory evidence regardless of its admissibility. Mr. Caruso said that an explicit ex parte process was critical, but he thought that districts that read *Nixon* very restrictively would continue to do so under a likely admissible standard. Mr. Caruso preferred a standard where a defendant could obtain information helpful to the defense, which would also incorporate exculpatory evidence.

Judge Bates questioned the feasibility of applying a "possibly" admissible standard. He thought that this standard was nearly limitless but could imagine applying a "likely" admissible standard.

Judge Conrad thought that a fundamental question was whether Rule 17 relates to trial documents or is a discovery tool. Judge Conrad said that when defendants receive information through an open file policy, that is giving the defense more than it's entitled to constitutionally. He acknowledged that defendants may sometimes not receive admissible or exculpatory evidence through an open file policy because the government does not possess the evidence, or because its theory of the case is fundamentally different from the defense perspective. Judge Conrad asked the government representatives if they opposed thinking of Rule 17 as a potential discovery tool for documents not in their possession, or if they still thought of Rule 17 as limited to the production of trial documents.

Mr. Kamens asked Judge Conrad if he meant discovery tool in the Rule 16 sense or as an investigatory tool. Judge Conrad responded that Rule 17 could be reformed, and the government could continue to allege that defendants are trying to use Rule 17 as a discovery tool in a way not intended by the rule. Mr. Kamens answered that Rule 17 is a tool of investigation, when we are seeking information prior to trial. Ms. Miller said that the government may still oppose the use of Rule 17 as a general discovery tool, but she asserted that the Committee did not need to decide the question when deciding whether to amend Rule 17. She explained her position was in part based on the many cases, like *Kaley*, discussing how discovery is limited in criminal matters because of

the important differences in criminal and civil systems and the interests served by those systems. She said that one could conceive of Rule 17 as a quasi-discovery device for something that is admissible or implicates a trial issue, but not a general discovery device for broad discovery purposes.

Professor Henderson encouraged the Committee to think about how a change could implicate the Sixth Amendment's right to a public trial. Judge Conrad responded that the Committee was thinking of tying subpoenas to a hearing or trial date, which would be inconsistent with using Rule 17 as a general investigative tool. Ms. Miller clarified that she was including the use of Rule 17 for trials or other evidentiary proceedings, including a suppression hearing.

A practitioner member said that like a grand jury subpoena, production under Rule 17 is an investigative tool, and the information received may be information that the party must provide in discovery. The member said she was struck by how many districts do not require an up front motion. She noted that if counsel issues a subpoena, currently the information is returned to counsel. She asked how it would impact practice if a change required certain protected information such as victim information to be returned to the court, perhaps not necessarily for in camera review, but for the court to decide how the information would be released to the requesting party. Mr. Caruso said that for his practice the change would be slightly impactful by changing the time it would take to receive information. He thought that at the beginning it would take longer, but as local practice developed it would be shorter.

Professor King observed that there was support for the ability to secure a subpoena without a motion in some circumstances. She asked for confirmation that the current practice was that (1) a motion is not required for a subpoena for a document for trial; (2) it should be required if the requesting party is pro se; and (3) it may be required for an ex parte subpoena, depending on the jurisdiction. She asked whether that description was consistent with the panelists' understanding of the current practice or what the panelists thought would be appropriate.

Mr. Kamens responded that in his district a motion is not required when the subpoena is tied to a trial or hearing, but a motion is required when asking for a return before a trial date and the subpoena is not tied to a specific hearing. That motion would be ex parte if they did not want to share the rationale for seeking the subpoena. Mr. Caruso said that practice in his district is similar, a motion is not required when tied to a hearing, trial, or sentencing date, but a party would need to make a motion to receive information before a hearing when a hearing has no date set but he is fairly confident a date will be set. He also noted that if he served a trial subpoena and the recipient refused to produce the information until the trial date, he would file a motion asking that information be produced immediately. Mr. Patton said that the previous descriptions were consistent with practice in his district where they can freely get a subpoena from the clerk that is stamped and signed and send it out without bothering the judge. He noted that subpoena recipients often produce the information well in advance of the hearing date, because the recipient just sends it or through discussion.

Ms. Miller provided an example case where the defense moved ex parte and under seal for the issuance of subpoenas to the defendant's employer and multiple state agencies, directing compliance on a date before the trial that was not tied to any hearing. The government argued that

it violated Rule 17 because the defendant needed advanced court permission when the subpoena was not tied to a particular hearing or trial date. The court later questioned the relevance of the requested information and specificity of the requests. Ms. Miller said that in her experience parties usually did not need a motion if no victim issues were implicated and the subpoena was tied to a specific hearing or trial. But a motion would be required to receive prehearing production.

Mr. Kamens said that practice in his district is similar, that as long as we put the trial date, the clerk's office will comply. He said he could ask for the documents to be produced earlier so the recipient need not show up at trial and there is often negotiation about that. Mr. Fishbein questioned the need for a motion to seek prehearing production, particularly in districts where trial dates are not set for many months, and did not understand what purpose is served by the motion requirement. Mr. Randall said that in his district parties need not make a motion when the subpoena is tied to a hearing or trial date. Mr. Randall also thought that the more the standard for issuing a subpoena becomes untethered from admissibility, the more concerns arise from subpoenas that are not tied to a specific hearing or trial date. Admissibility is what tethers it to the trial or hearing; if you sever that, it becomes a completely different beast.

Professor King observed that the admissibility standard seems to be not only the lynchpin to a particular proceeding as opposed to wide open investigation, it also prevents parties from obtaining certain information, like privileged information that would not be admissible, or impeachment information when the relevant witness may not testify. She asked if a likely admissible standard would change how courts approach impeachment and privileged information. Ms. Miller said that in practice some courts currently use a likely admissible standard and adopting it would do the same work. But she raised concern that a loosened standard such as possible would pose too much risk that defendants could use subpoenas to advance interests other than defending their criminal case. She noted that often there are parallel civil suits, particularly in white collar cases, for example, where information inadmissible in the criminal case could provide an advantage. Mr. Kamens questioned whether the admissibility standard is what bars disclosure of privileged information and suggested that privilege bars disclosure regardless of the Rule 17 standard and that a recipient is entitled to invoke that privilege in response to the subpoena. Mr. Kamens also emphasized the importance of impeachment information and said many places will not allow a subpoena for impeachment alone, but that impeachment is often critical to the defense and the outcome of the case. Mr. Caruso questioned the risk raised by Ms. Miller that defendants would seek subpoenas to advance improper interests, and that those are outlier cases. The defense attorneys he knows are not interested in that; they are interested in advancing the interests of their clients under the Sixth Amendment.

A judge member said that a core disagreement was the purpose of Rule 17: one side viewed Rule 17 as limited to information needed for a hearing or trial and the other side viewed Rule 17 as an investigatory tool. He didn't know how the Committee can amend the rule without knowing its purpose. He invited Ms. Miller to address this point. The judge member also asked how an interest of justice standard would improve uniformity, because any trial judge can justify a decision one way or the other under that standard. Ms. Miller responded that she thought the disagreement about the rule's purpose did not need to be resolved to achieve a modest, incremental change in a rule and referenced Judge Dever's statement that it can be better even if not perfect. She asked whether Rule 16 should be amended in addition to or instead of Rule 17 if the Committee decided

that the defendant should have a general discovery tool. Rule 17 is a procedural rule, in her view, and if the Committee wants to take on the broader project maybe it should consider the interplay with Rule 16. Mr. Randall agreed with Ms. Miller. Ms. Miller also pointed out that courts vary in how they approach other issues, such as Fourth Amendment protection. Professor Henderson commented that the Rules should be written clearly to apply to everyone. Rule 16 is about discovery rather than investigation, and he questioned whether a defendant has a right to investigation at all if Rule 17 does not provide it. Mr. Patton supported discussing the purpose of Rule 17 and questioned whether the current rule focused only on trials. He said that Rule 17(c) currently contemplates documents being produced well in advance of trial, and no one expects that documents are dumped on someone's desk the morning of opening statements. So he did not view the changes being discussed as radical.

A judge member said that he thought Ms. Miller's position was that one could take a limited view of Rule 17 and still enact within that view the modest changes that Judge Dever proposed and save for another day changes that would transform the purpose of the rule. Ms. Miller said that description was correct and repeated that she preferred adding a provision giving modest discretion to the trial judge through an interest of justice provision. The judge member asked if both proposals kept the rule within a limited purpose. Ms. Miller answered that they did.

Another judge member asked Ms. Miller if her proposal would still allow some investigatory discovery and whether likely to lead to admissible evidence is investigative. Ms. Miller responded that the status quo allows some investigation with the *Nixon* standard, it just has to be tied to the concepts in that standard. The judge member asked if a loosened *Nixon* standard would be permissible for investigative purposes and not merely what is admissible for trial. Ms. Miller answered that it would, but repeated that the status quo permits some investigation.

Judge Nguyen invited more comment. Ms. Tessier asked defense counsel what protective measures beyond protective orders they would recommend for protecting witnesses and cooperators if the *Nixon* standard were loosened, given that that has already occurred under Rule 17. Mr. Patton recommended the measures outlined in the New York City Bar's proposal. Ms. Tessier asked if he was referring to the provision requiring a motion if a subpoena requests personal or confidential information. Mr. Patton said that he was but only as long as the other changes were adopted as well. Mr. Fishbein also identified subsection (i) of their proposal as a protective measure, that provides that the Court may for a good cause and based on specific and articulable facts require a party to obtain court approval before issuing a subpoena, so if the government thought that there were vulnerable witnesses or victims, this would be a way for them to raise that issue and ask for the court's oversight.

Professor Beale asked the prosecution panelists about any concern they had with the draft rule allowing a subpoena for unprotected information material to the prosecution or defense and that is not reasonably available from another source without meeting the higher standard for protected information. Maybe it is the camera pointed toward the robbery, or casino records in a case where the defendant says he won money at a casino and the money is not drug proceeds. Ms. Miller said that such a provision should not be adopted. She said that such material is not constitutionally required to prepare an adequate defense. Ms. Miller inquired whether there could be a pilot project for a proposed rule and suggested a modest change would be most appropriate.

Professor Beale asked if her suggestion represented the modest change she referred to. Ms. Miller responded that the modest change she would propose was closer to the likely admissible standard.

Judge Nguyen thanked the panelists.

After a break, Judge Dever reconvened the Committee to discuss the issue. Judge Nguyen encouraged the Committee to think about unintended consequences. She observed that many panelists agreed that the Rule 17 practice should not be changed or restricted for those districts that have their practice settled. She invited comments from the Committee members.

A judge member asked if there was agreement on a solution that would help and not harm subpoena practice. He said that his district rarely confronted Rule 17 issues.

A practitioner member questioned whether a change to a likely admissible standard would have any practical effect.

Another practitioner member agreed and questioned whether a modest change would solve the problem and said he could imagine reasons why the interest of justice standard will not work. The practitioner member expressed interest in resolving the disagreement about the purpose of Rule 17.

A judge member thought the only critical distinction was Rule 16 versus Rule 17, intraparty or third party, not discovery versus investigation. He said that he did not believe the discovery label was important. The judge member favored a much more limited approach, like what has been discussed today, and noted there was lot of common ground among the members and panelists. He acknowledged the defense would not be as happy as they would be if we did something much more drastic, but it would solve many of the problems.

Another judge member agreed that an incremental change to the *Nixon* standard was probably warranted and wanted to study how the issue develops.

Ms. Lonchena noted the difference in districts on whether blank subpoenas are handed out freely or available only by motion.

A judge liaison thanked the Subcommittee and reporters. He thought that *Nixon* is too restrictive and should be incrementally broadened. The judge liaison agreed with Judge Dever's approach and favored allowing investigation in connection with a proceeding or hearing. He said that he thought judicial review should be limited to what is needed to serve the purposes of that review, but that front end judicial review was needed when there is an unrepresented party, and for the victim provision already in the rule. He questioned the value of additional judicial review before subpoena issuance, noting that when the subpoena sought protected information the rule could require production to the court and protective orders.

A practitioner member asked a judge member how he thought courts would apply a likely admissible standard, which she thought practitioners favored. The judge member responded that he thought it would not change anything and that likely admissible is already the de facto standard

because at the front end there is too little knowledge of the case for him to make a decision about what is admissible and he ends up deciding what is likely admissible.

Ms. Tessier agreed with an incremental approach. She too thought that the distinction between investigation and discovery was less important than the question of what information a party may obtain. Rule 17 is already used for investigative purposes, but it is for investigating information that is admissible or likely admissible. She said her concern was allowing investigation into tangential or collateral issues. She thought the Committee would find more support among prosecutors with a narrow, incremental change and that they agree likely admissible is how *Nixon* is interpreted in most districts and would accept that change. Ms. Tessier repeated her support for an interest of justice exception, noting there is a good example of that in Rule 15 for depositions. There might be particular information that is very important to the defense, but they cannot yet articulate why it would meet the likely admissibility standard, and it would be left to the judge's discretion, so that courts could assure that subpoenas are not misused.

A judge member supported a narrow change by addressing *Nixon* directly along the lines of the proposals by the prosecution panelists and expressed interest in the interest of justice exception. He expressed concern about the burden on the court if the rule were changed to require more judicial involvement before issuance, and that ex parte motions would be difficult for judges to decide on the front end. The judge member also supported acknowledging that the rule is an investigative device.

A judge member said that discussing the purpose of Rule 17 was important and supported acknowledging that Rule 17 is investigatory. He said the thought they were all on the same page in the view that the rule is investigatory because it allows the defense to obtain information that it would not otherwise obtain. It is the only way the defense can get anything from a third party. The judge member supported adopting a standard similar to likely to lead to admissible evidence or material to the defense, which are more consistent with the investigatory purpose. He said that he was not inclined to tie the rule to admissibility. He observed that many were happy with current Rule 17 practice, and he agreed that incremental change would be appropriate, including changing the admissibility standard and ex parte procedures. The judge member supported a procedure for a defendant to obtain information ex parte without revealing defense strategy, and suggested that the rule could incorporate procedures where practitioners are happy with Rule 17 practice.

Judge Conrad supported a minimal modification, baby steps. He agreed that the correct distinction would be that Rule 16 relates to intraparty discovery and Rule 17 relates to third party practice. He thought the important issues were fixing the *Nixon* standard and resolving ex parte procedures so that it is viable but does not overburden judges. He thought the defense shouldn't have to turn over all the information received by a subpoena if they don't want the prosecution to know about it.

Judge Bates thanked everyone for the great job on very difficult and important issues, and recommended looking at a narrower approach because it could solve identified problems and avoid unintended consequences. He said that it may be unnecessary to decide the investigation versus discovery distinction to propose a rule change.

Professor King said that the next effort was likely drafting a narrower draft amendment relating to ex parte procedures based on places where that is working well, loosening the admissibility requirement, and reducing the burden on trial judges particularly regarding motions up front. She asked whether the full *Nixon* standard should be included in the text of the rule amendment—describing the item with reasonable particularity, stating facts that it is likely to be possessed by the recipient and not reasonably available from another source? Professor King observed that there was disagreement about ex parte procedures, whether the rule should require more than good cause for an ex parte subpoena, or whether it should require a motion at all. She also asked what the committee note should include if the proposed amendment includes an interest of justice exception, such as mentioning exculpatory evidence, or the absence of legal protection for the information sought, or that it should be an exceptional circumstance. She also observed that many panelists disfavored distinguishing between protected and unprotected information.

Professor Beale asked if a proposed rule should include more protections from misuse or abuse of Rule 17 and encouraged the Committee to think about the issue.

Judge Dever thanked all participants and invited more comment. He supported incremental change and questioned whether the problem stemmed from some districts reading *Nixon* too narrowly. He said that he observed a consensus on at least raising the floor to correct some districts reading *Nixon* too restrictively, prohibiting ex parte motions, and requiring the defense to produce Rule 17 information to the government. He agreed with the characterization that Rule 16 is intraparty discovery, whereas Rule 17 relates to third party information, and Rule 17 should permit ex parte process. Judge Dever also asked for comment on the proposed interest of justice exception and suggested that the exception would introduce ambiguity and expand the change beyond the problems identified. He suggested someone could try to use a subpoena in connection with a compassionate release motion to get proof of innocence. He questioned whether the proposed exception would be proper.

A judge member thought that the interest of justice exception would be unnecessary and said that the Committee should avoid it.

Judge Nguyen thanked the reporters, Professors Beale and King, for their incredible work and time spent on Rule 17 issues. She also thanked Judge Dever for having the panelists appear before the full Committee. Judge Nguyen commented that the feedback from the panelists was much more meaningful with the questions and input from the full Committee.

Judge Nguyen said that the current rule does not speak to many of the issues discussed by the panelists. She thought that there was a consensus that a protective order may be sufficient for protected information, for example, and on an incremental change that does not try to address all of the problems raised. Judge Nguyen asked if the Committee had other views. Judge Nguyen also said that an incremental approach meant that many issues would not be addressed, at least in the text of the rule. She suggested that the committee note could provide guidance if the Committee seeks to adjust *Nixon*, and the note may advise that *Nixon's* admissibility standard is too tough and that the revision is meant to correct it. Judge Nguyen asked for feedback on what should be included. Lastly, she questioned the value of an interest of justice exception and suggested that it would cause an increase in litigation.

Ms. Tessier explained that the interest of justice provision meant to account for unpredicted circumstances because the DOJ had understood that defendants cannot identify the cases where they have not been able to receive needed information because they didn't know what they didn't get. Thus, it was meant as a narrow exception that pulled from language already in the rules. Ms. Tessier also cautioned against thinking that a small textual change to the rule would also be a narrow change. She said that the differences among the proposed changes to the admissibility standard—such as between likely admissible and possibly admissible or between likely admissible and likely to lead to admissible evidence—were enormous, and she raised a concern that a change to only the admissibility standard could lead to a significant change in practice. Ms. Tessier encouraged the Committee to consider the practical effect of any proposed change.

Judge Conrad said that the discussion had been helpful in clarifying that Rule 16 relates to intraparty information and Rule 17 relates to third-party information. He noted that the title of Rule 17 is "Subpoena" and inquired whether changing the titles of Rule 16 and Rule 17 could help understand the rules.

A practitioner member said that an issue that was raised as prohibitive in some districts at the Arizona conference was how the return for an ex parte motion is handled. She stated that some districts require the return to go to both parties. The member stated that an amendment should address who should receive the return from a subpoena, or the change would not have a meaningful impact on practice.

Judge Bates observed that the Committee appeared to have narrowed the proposed amendment it would consider. But he cautioned against putting broad ideas into the committee note that should rather be expressed in the rule text. Judge Bates stated that the committee note is not the place to make changes to the rules. Judge Dever agreed and clarified that changes cannot be made only to the committee note without changing the rule text.

A judge member said that he was most concerned about disclosure of personal or confidential information in the ex parte context. He recognized that it may make sense not to include this kind of amendment in the rule if the Committee seeks to make only a narrow change. However, the member encouraged the Committee to consider this risk and how districts like Ms. Smith's handle it when discussing ex parte procedures.

Judge Nguyen invited further comment. A practitioner member said that she would want to review the relevant case law, but an interest of justice exception seemed like it would be a radical departure. She said that the few circumstances in which she had participated in Rule 15 depositions were somewhat dramatic. Another practitioner member also questioned an interest of justice exception and agreed that it may cause additional litigation.

Professor King asked whether an amendment should discuss or mention *Nixon*. "How much of *Nixon* do you want to put in the text?" Ms. Tessier said that the rule should address all parts of *Nixon*. She said that discussing only one part of *Nixon* in a change would cause confusion. She noted that includes that the requested documents are not otherwise procurable reasonably in advance of the hearing, not limited to trial, that the party cannot properly prepare for the proceeding without the documents and the request is made in good faith. A judge liaison agreed and said that

the rule should specify which parts of *Nixon* the rule would change or retain. He was less sure about the concept of impeachment.

Professor King asked how a rule should phrase the requirements for issuance. A judge liaison said that the rule should phrase the standards as requirements for issuance even if there is no front-end motion requirement. It would serve as a check on lawyers as officers of the court, and could be invoked by a motion to quash.

Concluding Remarks

Professor Beale noted that the Rule 17 Subcommittee would continue its work and report its progress at the next Committee meeting. Judge Dever thanked Judge Nguyen and the reporters for their excellent work and again welcomed Mr. Naseem, Ms. Lonchena, and Justice Samour to the Committee. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025. He also thanked Mr. Byron and the members of the team at the Administrative Office. Judge Dever noted that Judge Birotte would chair the Rule 43 Subcommittee and Judge Harvey would chair the Rule 40 Subcommittee.

Judge Dever then announced that the meeting was adjourned.

TAB 8

TAB 8A

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act of 2024	**H.R. 7137** *Sponsor:* Fry (R-SC) *Cosponsors:* 38 bipartisan cosponsors **S. 4214** *Sponsor:* Gillibrand (D-NY) *Cosponsors:* 9 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7137/BILLS-118hr7137ih.pdf https://www.congress.gov/118/bills/s4214/BILLS-118s4214is.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 12/11/2024: H.R. 7137 reported by the Judiciary Committee; placed on the Union Calendar • 09/25/2024: H.R. 7137 Judiciary Committee mark-up session held; ordered to be reported from Committee • 04/30/2024: S. 4214 introduced in Senate; referred to Judiciary Committee • 01/30/2024: H.R. 7137 introduced in House; referred to Judiciary Committee
Weldon Angelos Presidential Pardon Expungements Act	**H.R. 10248** *Sponsor:* Armstrong (R-ND) *Cosponsors:* 4 Republican & 1 Democratic cosponsors	CR; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr10248/BILLS-118hr10248ih.pdf **Summary:** Would require the Director of the Administrative Office of the United States Courts, within 1 year of enactment, to promulgate procedures or practices for the review, expungement, sealing, sequester, and redaction of official records of an expungable event.	• 11/22/2024: H.R. 10248 introduced in House; referred to Judiciary Committee
Rape Shield Enhancement Act of 2024	**H.R. 10094** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr10094/BILLS-118hr10094ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 11/01/2024: H.R. 10094 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Transparency Act of 2024	**H.R. 9922** *Sponsor:* Issa (R-CA) *Cosponsors:* 4 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr9922/BILLS-118hr9922ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to product to the court and other parties any such agreement.	• 10/04/2024: H.R. 9922 introduced in House; referred to Judiciary Committee
Marijuana Misdemeanor Expungement Act	**H.R. 8917** *Sponsor:* Carter (D-LA) *Cosponsor:* Armstrong (R-ND)	CR; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8917/BILLS-118hr8917ih.pdf **Summary:** Would require the Supreme Court to prescribe rules, within one year of enactment, for the review, expungement, sealing, sequester, and redaction of official records related to certain marijuana misdemeanors and civil infractions.	• 07/02/2024: H.R. 8917 introduced in House; referred to Judiciary Committee
Closing Bankruptcy Loopholes for Child Predators Act of 2024	**H.R. 8077** *Sponsor:* Ross (D-NC) *Cosponsor:* Tenney (R-NY)	BK 2004, 9018	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf **Summary:** Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child.	• 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee
Bankruptcy Threshold Adjustment Extension Act	**S. 4150** *Sponsor:* Durbin (D-IL) *Cosponsors:* 5 bipartisan cosponsors	BK 1020; BK Forms 101 & 201	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf **Summary:** Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years.	• 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Bankruptcy Venue Reform Act **SHOP Act**	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsors:* 7 Democratic & 2 Republican cosponsors **S. 4095** *Sponsor:* McConnell (R-KY) *Cosponsors:* Cotton (R-AR) Tillis (R-NC)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee • 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 161 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP; BK; CV; CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 186 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/28/2023: H.R. 5048 referred to the subcommittee on Economic Development, Public Buildings, and Emergency Management • 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 20 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 22 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 34 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024 **Election Day Act** **Freedom to Vote Act**	**H.R. 7329** *Sponsor:* Eshoo (D-CA) **H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) **H.R. 11** *Sponsor:* Sarbanes (D-MD) **S.1; S. 2344** *Sponsor:* Klobuchar (D-MN) Each bill has several Democratic or Democratic-caucusing cosponsors.	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: H.R. 7329 introduced in House • 11/07/2023: H.R. 6267 introduced in House • 07/25/2023: S. 1 introduced in Senate • 07/18/2023: S. 2344 introduced in Senate • 07/18/2023: H.R. 11 introduced in House • Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors **S. 2970** *Sponsor:* Heinrich (D-NM) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee • 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee
Patriot Day Act	**H.R. 5366** *Sponsor:* Fitzpatrick (R-PA) *Cosponsors:* Gottheimer (D-NJ) Malliotakis (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf **Summary:** Would make Patriot Day a federal holiday.	• 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 16 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 8B

Agenda Item
January 2025
Action

Judiciary Strategic Planning

Issue

The Committee is asked to identify any changes it believes should be considered in updating the Strategic Plan for the Federal Judiciary ("Strategic Plan").

Background

Strategic planning is among the oversight and policy advisory functions of Judicial Conference committees. The Executive Committee, which facilitates and coordinates planning efforts, designated Chief Judge Michael A. Chagares as the Judiciary Planning Coordinator.

The Strategic Plan, first approved by the Judicial Conference in September 2010 and updated every five years, identifies strategies and goals to address judiciary trends, issues, challenges, and opportunities (JCUS-SEP 2010, pp. 5-6; JCUS-SEP 2015, pp. 5-6; JCUS-SEP 2020, pp. 13-14).

The process for updating the Strategic Plan was reviewed by committees during their summer 2024 meetings and approved by the Executive Committee at its August 2024 meeting.

Discussion

Consideration of Trends and Issues

The approved process for updating the Strategic Plan calls for an analysis of trends and issues affecting the judiciary and their implications. The updated Strategic Plan will be a public statement about critical issues facing the judiciary and the judiciary's responses to those issues in ways that benefit the judicial branch and the public it serves.

Update to the Strategic Plan

Chief Judge Chagares has asked Committees to consider proposed changes to the current Strategic Plan (Attachment). These changes should reflect any significant policy changes that have occurred since September 2020, trends and issues expected to affect the judiciary, progress that has been achieved since the latest Strategic Plan update, and challenges that remain.

> **Recommendation:** That the Committee authorize the Chair, working with the Secretary of the Committee, to identify sections of the Strategic Plan for revision, and to propose any changes for inclusion in the 2025 update, including a thorough explanation of any edits.

Attachment

Strategic Plan for the Federal Judiciary

September 2020

Judicial Conference of the United States

This Page Intentionally Left Blank

Strategic Plan for the Federal Judiciary

Judicial Conference of the United States
James C. Duff, Secretary
Administrative Office of the U.S. Courts
Washington, DC 20544
202-502-1300

www.uscourts.gov

This Page Intentionally Left Blank

Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law.

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect.

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management.

Diversity and Respect: a workforce of judges and employees that reflects the diversity of the public it serves; an exemplary workplace in which everyone is treated with dignity and respect.

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and employees; commitment to innovative management and administration; availability of sufficient financial and other resources.

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner.

The Plan in Brief

The *Strategic Plan for the Federal Judiciary*, updated in 2020, continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, this plan recognizes that the future may provide tremendous opportunities for improving the fair and impartial delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency; attracts to judicial service the nation's finest legal talent; is an employer of choice providing an exemplary workplace for a diverse group of highly qualified judges and employees; works effectively with the other branches of government; and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, this plan focuses on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in this plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes the fair and impartial delivery of justice; the public's trust and confidence in, and understanding of, the federal courts; the effective and efficient management of resources; a diverse workforce and an exemplary workplace; technology's potential; access to justice and the judicial process; and relations with the other branches of government.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues— fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Providing Justice
Issue 2: Preserving Public Trust, Confidence, and Understanding
Issue 3: The Effective and Efficient Management of Public Resources
Issue 4: The Judiciary Workforce and Workplace
Issue 5: Harnessing Technology's Potential
Issue 6: Enhancing Access to Justice and the Judicial Process
Issue 7: The Judiciary's Relationships with the Other Branches of Government

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Providing Justice

How can the judiciary provide fair and impartial justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality employees, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Equal justice requires fairness and impartiality in the delivery of justice and a commitment to non-discrimination, regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability. Scarce resources, changes in litigation and litigant expectations, and certain changes in the law, challenge the federal judiciary's effective and prompt delivery of justice. This plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the fair, impartial, and effective administration of justice:

Pursue improvements in the delivery of fair and impartial justice on a nationwide basis. (Strategy 1.1)

Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.2)

Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations. (Strategy 1.3)

Strategy 1.1. Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of civil case management, and has a number of mechanisms to identify and assist stressed courts. These mechanisms include biannual reports of pending civil cases and motions required under the Civil Justice Reform Act of 1990, and identifying stressed courts and the categories of cases with the longest disposition times.

National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, some pockets of case delays and backlogs persist in the courts. Some delays are due to external forces beyond the judiciary's control, cannot be avoided, and do not reflect on a court's case management practices. With this understanding, this plan calls for the courts, Judicial Conference committees, and circuit judicial councils to undertake reasonable, concerted, and collaborative efforts to reduce the number and length of preventable case delays and backlogs.

The fair and impartial delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 6. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to avoid unnecessary costs and delay.

This strategy also includes a goal to ensure that all persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions, subject to Judicial Conference policy.

In addition, this plan includes a goal to enhance the fair and effective management of all persons under supervision. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the management of persons under supervision.

Other efforts to improve the fair and impartial delivery of justice must continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services offices has also been enhanced through the use of applications that integrate data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Goal 1.1a: Reduce delay through the dissemination of effective case management methods and the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Avoid unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that all persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of all criminal defendants.

Goal 1.1d: Enhance the management of all persons under supervision to reduce recidivism and improve public safety.

Strategy 1.2. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. The judiciary is facing an uncertain federal budget environment, with likely constraints on the ability of congressional appropriations committees to meet judiciary funding requirements. Multiweek government shutdowns have happened twice in the recent past (2013 and 2018/2019). The judiciary was able to remain open through reliance on fees and other no year balances, and by delaying contractual obligations not critical to the performance of constitutional responsibilities. However, judges, judicial employees, the bar and the public were impacted by the shutdown of many executive branch agencies and operations; by limits on normal court operations; and by time and resources being diverted to manage the effects of the funding lapse. Uncertainty and shortfalls, when they occur, present particular challenges to clerks offices, probation and pretrial services offices, and federal defender organizations in ensuring that operations are adequately staffed.

Another key challenge for the judiciary is to address critical longer-term resource needs. Many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Resources are also needed for jurors. Compensation for jurors is limited and inadequate compensation creates a financial hardship for many jurors. While the judiciary has made progress in securing needed space — including the construction of new courthouses and annexes — some

court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality. The judiciary will need to continue apportioning resources based on priorities determined by the consistent application of policies across the courthouse portfolio.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must continue to work with these agencies to ensure that the judiciary's resource needs are met.

The ability to secure adequate resources serves as the foundation for a vast majority of the judiciary's plans and strategies. For example, to ensure the well qualified representation of criminal defendants (Goal 1.1c), the defender services program requires funding sufficient to accomplish its mission. Additionally, to enhance the management of persons under supervision to reduce recidivism and improve public safety (Goal 1.1d), probation and pretrial services offices require sufficient funding. Strategy 4.4 and its associated goals focus on the importance of attracting, recruiting, developing, and retaining the competent employees that are required for the effective performance of the judiciary's mission, and critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 5.1 urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Goal 1.2a: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.2b: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

Goal 1.2c: Secure adequate compensation for jurors.

Goal 1.2d: Secure adequate resources to provide the judiciary with the employees and resources necessary to meet workload demands

Strategy 1.3. Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody.

Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, assisting judges in taking steps to protect themselves while away from court facilities, and educating judges on how they can minimize the availability of personal information on the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.2 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 5.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.3a: Improve the protection of judges, court employees, and the public in all court facilities, and the protection of judges in off-site judicial locations.

Goal 1.3b: Improve the protection of judges and their families at home and in non-judicial locations.

Goal 1.3c: Provide continued training to raise the awareness of judges and judiciary employees on a broad range of security topics.

Goal 1.3d: Improve the interior and exterior security of court facilities through the collaborative efforts of the judiciary, the U.S. Marshals Service, the Federal Protective Service, and the General Services Administration.

Goal 1.3e: Work with the U.S. Marshals Service and others to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Issue 2. Preserving Public Trust, Confidence, and Understanding

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary. In large part, the judiciary earns that trust and confidence by faithfully performing its duties; adhering to ethical standards; and effectively carrying out internal oversight, review, and governance responsibilities. These responsibilities include accountability for a failure to observe scrupulous adherence to ethical standards. The surest way to lose trust and confidence is failure to live up to established ethical standards and failure to hold judges and judiciary personnel accountable for misconduct. Transparency in efforts to ensure accountability for misconduct, where possible and appropriate, helps foster public trust and confidence.

Public perceptions of the judiciary are often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate. Changes in social media and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. This challenge is especially difficult because judges are constrained in their ability to participate in public discourse. This plan includes four strategies to enhance public trust and confidence in, and understanding of, the judiciary:

> Assure high standards of conduct and integrity for judges and employees. (Strategy 2.1)
>
> Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct. (Strategy 2.2)
>
> Improve the sharing and delivery of information about the judiciary. (Strategy 2.3)
>
> Encourage involvement in civics education activities by judges and judiciary employees. (Strategy 2.4)

Strategy 2.1. Assure high standards of conduct and integrity for judges and employees.

> **Background and Commentary.** Judges and judiciary employees are guided by codes of conduct, internal policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include disciplinary action, as well as formal complaint procedures for impacted employees to seek redress, such as dispute resolution processes, audits, program reviews of judiciary operations, internal control and information technology self-assessments, and workplace conduct oversight and response processes. The judiciary has adopted several measures, described in Issue 4 of this plan, to ensure an exemplary workplace in which all employees are treated with dignity and respect, and on a non-discriminatory basis.

Accountability mechanisms must address critical risks, keep pace with changes in regulations and business practices, and respond to public and government interest in detailed and accessible information about the judiciary. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and employees, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical integrated internal controls; governance of judiciary financial information; audit, investigation, and discipline functions; risk management practices; and self-assessment programs.

Goal 2.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, accountability, and workplace conduct.

Goal 2.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

Strategy 2.2. Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct.

Background and Commentary. The judiciary seeks to ensure accountability by openly receiving information about potential misconduct and following existing procedures to address misconduct. Credible allegations of misconduct will be examined, investigated, and subject to appropriate action in accordance with existing statutory, policy, and other procedures. Individuals who experience or witness possible misconduct should be able to seek redress or satisfy their obligation to take appropriate action by bringing these issues to the attention of an appropriate official without fear of retaliation or adverse consequences. The judiciary's codes of conduct, Rules for Judicial Conduct and Judicial Disability Proceedings, and Model Employment Dispute Resolution Plan were updated in 2019 to reinforce these principles.

Transparency, to the extent permissible and possible, demonstrates the judiciary's fidelity to accountability for misconduct. Law and policy related to confidentiality and the legitimate privacy interests of victims, witnesses, and others may limit what information can be made public. The judiciary strives to make public information about misconduct procedures and related actions, where permissible and appropriate.

Goal 2.2a: Ensure avenues for seeking advice, obtaining assistance as to potential misconduct, obtaining redress, where appropriate, and filing a complaint are easily accessible.

Goal 2.2b: Ensure timely action is taken on credible allegations of misconduct according to established procedures, and when the evidence supports it, ensure action is taken with regard to misconduct.

Goal 2.2c: Ensure each circuit's website prominently displays actions taken under the Judicial Conduct and Disability Act and Rules for Judicial Conduct and Judicial Disability Procedures, in accordance with the requirements of the Act and the Rules, and summaries of other records or reports of workplace conduct issues, where permissible and appropriate.

Goal 2.2d: Consider conducting reviews of systemic issues, when appropriate.

Strategy 2.3. Improve the sharing and delivery of information about the judiciary generally.

Background and Commentary. Sources of news, analysis, and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and the justice system. Enhanced communication between the judiciary and the media is one way to help increase the accuracy of stories about the justice system and public understanding of the courts. Since the media is a significant way in which the public learns about the judiciary, helping reporters understand court processes is one way to improve the public understanding of the justice system. Judges can undertake these efforts within the parameters of the Code of Conduct and while avoiding discussion of any specific cases.

It is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The judiciary should continue to work with the executive branch when called on to communicate with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 2.3a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications and the ability of federal judges and employees to communicate directly with the public.

Goal 2.3b: Develop or increase communications and relationships between judges and journalists, consistent with the Code of Conduct and not specific to any case, to foster increased understanding of the judiciary.

Goal 2.3c: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategy 2.4. Encourage involvement in civics education activities by judges and judiciary employees.

Background and Commentary. The federal judiciary relies on public respect, understanding, and acceptance. The lack of civics knowledge can have an adverse effect on the branch. A civically

informed public will also be better inoculated against attempts to undermine trust in the justice system. As noted by the Chief Justice of the United States in his 2019 Year End Report on the Federal Judiciary, "[t]he judiciary has an important role to play in civic education ... " Reinforcing the perspective of the Chief Justice, at its March 2020 session, the Judicial Conference of the United States "affirmed that civics education is a core component of judicial service; endorsed regularly-held conferences to share and promote best practices of civics education; and encouraged circuits to coordinate and promote education programs."

Public outreach and civics education efforts by judges and judiciary employees take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civics education organizations. Resources to help judges and judiciary employees participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

Goal 2.4a: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary and its accountability and oversight mechanisms and external financial reporting.

Goal 2.4b: Facilitate participation by judges and court employees in public outreach and civics education programs.

Goal 2.4c: Support education about the defense function and the critical role it plays in ensuring fair trials and proceedings, as well as in maintaining public confidence in the justice system.

Issue 3. The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The judiciary's pursuit of cost-containment initiatives has helped to reduce current and future costs for rent, information technology, the compensation of court employees and law clerks, and other areas. These initiatives have also improved resource allocation within the bankruptcy judges system, as well as the prudent allocation and management of resources within the magistrate judges system, and have helped the judiciary operate under difficult financial constraints. Cost-containment efforts have also helped the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.2).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, employees, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing, and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices must be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary wide. This plan includes a single strategy to address this issue.

Strategy 3.1. Allocate and manage resources more efficiently and effectively.

> **Background and Commentary.** The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.
>
> For example, over the past several years, court units throughout the judiciary have developed and implemented alternative approaches for carrying out their operational and administrative functions. These approaches have helped courts maintain the level and quality of services they deliver, and in many instances, have increased efficiencies and controlled costs associated with providing those services.
>
> This strategy also includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and court employees to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations and anticipate alternative delivery of services when disaster strikes.

Goal 3.1a: Make more effective use of judges to relieve overburdened and congested courts, including expanding ways to provide both short- and long-term assistance to districts and circuits with demonstrated needs for additional resources, and ensuring the effective utilization of magistrate judge resources.

Goal 3.1b: Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational employees but do not jeopardize public safety or negatively impact outcomes or mission.

Goal 3.1c: Manage the judiciary's infrastructure in a manner that supports effective and efficient operations, and provides for a safe and secure environment.

Goal 3.1d: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue 4. The Judiciary Workforce and Workplace

How can the judiciary attract, develop, and retain a highly diverse and competent complement of judges, employees, and Criminal Justice Act (CJA) attorneys, and ensure an exemplary workplace in which everyone is treated with dignity and respect?

Issue Description. The judiciary can retain public trust and confidence and meet workload demands only if it is comprised of a diverse complement of highly competent judges, employees, and CJA attorneys. It cannot attract and retain the most capable people from all parts of society, nor can it keep the public's trust and confidence, unless it maintains a diverse and exemplary workplace in which all are treated with dignity and respect and are valued for their contributions regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability. Attracting and retaining highly capable and diverse judges, employees, and CJA attorneys, will require fair and competitive compensation and benefit packages. The judiciary must abide by and enhance, where appropriate, its standards and procedures to assure proper workplace conduct, and must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Three strategies to address this issue follow:

> Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements. (Strategy 4.1)
>
> Support a lifetime of service for federal judges. (Strategy 4.2)
>
> Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct. (Strategy 4.3)

Strategy 4.1. Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements.

> **Background and Commentary.** Public trust and confidence are enhanced when the judiciary's workforce – judges, employees, and CJA attorneys – broadly reflects the diversity of the public it serves. While it has no control over the appointment of Article III judges, the judiciary can and should strive for diversity in all other positions, particularly bankruptcy judges, magistrate judges, federal defenders, and CJA panel attorneys, all of whom occupy positions highly visible to the public. The judiciary must continue to pursue initiatives to attract future judges, such as the "Roadways to the Bench" programs, that are designed to secure a wide and diverse pool of applicants for every position, and ensure diversity among members of screening and selection committees. Judges must be encouraged to give special attention to diversity in their law clerk hiring practices.
>
> The judiciary must also continue to pursue initiatives to retain its position as an employer of choice. The judicial branch provides employees with many resources and services, including training and education programs. To remain competitive, especially with hard-to-fill occupations, the judiciary must have a strong program to attract, recruit, develop, and retain a diverse and highly qualified workforce.

Ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career and work-life expectations, and the unique challenges faced by probation and pretrial services offices in recruiting, retaining, training, and ensuring the physical and mental well-being of officers. Changes in how employees communicate and interact, and in how and where work is performed, are related to Strategy 3.1, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment. The judiciary must continue to invest in technology and explore changes to policy and procedures that allow for an effective remote and mobile workforce.

In addition, the judiciary must develop the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The judiciary must maintain a meaningful leadership and executive development training program and create executive relocation programs to ensure a wide pool of qualified internal applicants, while also conducting outreach efforts to attain a diverse and talented field of candidates.

Goal 4.1a: Establish, maintain and expand outreach efforts and procedures to make diverse audiences aware of employment opportunities in the judiciary, including as judicial officers.

Goal 4.1b: Strengthen the judiciary's commitment to workforce diversity, equity, and inclusion by expanding diversity program recruitment, education, and training; identifying barriers to recruitment of a diverse workforce; ensuring all recruitments are designed to attract and consider a diverse pool of applicants; and ensuring screening and hiring committees consist of diverse members.

Goal 4.1c: Identify current and future workforce challenges and develop and evaluate strategies to enhance the judiciary's standing as an employer of choice while enabling employees to reach their full potential.

Goal 4.1d: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead employees.

Goal 4.1e: Provide mentoring and career advancement opportunities to all employees.

Goal 4.1f: Provide resources and develop Health and Wellness Committees to examine policy, practices, and programs that provide a supportive and healthy work environment for the maintenance or restoration of judiciary employees to promote health and competence throughout their career and beyond.

Strategy 4.2. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges.

In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Training and education programs, and other services that enhance the well-being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 4.2a: Strengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement must be provided the support necessary for them to fully discharge their duties.

Goal 4.2b: Seek the views of judges on practices that support their development, retention, and morale, and evolve and adapt education, training, and orientation programs to meet the needs of judges.

Goal 4.2c: Encourage circuits to develop circuit-wide Health and Wellness Committees to promote health and wellness programs, policies, and practices that provide a supportive environment for the maintenance or restoration of health and wellness in support of a lifetime of service for judges.

Strategy 4.3. Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.

Background and Commentary. Public trust and confidence and workforce morale and productivity are enhanced when the judiciary provides an exemplary workplace for everyone. As a result of efforts by the judiciary's Workplace Conduct Working Group – which recommended more than thirty measures to enhance the judiciary's workplace policies and procedures – the judiciary has adopted amendments to the applicable codes of conduct and the Rules for Judicial Conduct and Judicial Disability Proceedings to expressly state that sexual and other harassment, discrimination, abusive conduct, and retaliation are misconduct. In addition, the judiciary has adopted an improved Model Employment Dispute Resolution Plan to clearly describe prohibited conduct and provide simplified and effective redress, has established a Judicial Integrity Office and regional workplace conduct committees and workplace relations directors, and has undertaken extensive training on workplace civility and preventing harassment and other forms of discrimination. Beyond these and other measures already taken, the judiciary can continuously improve. The judiciary must diligently continue to work to ensure that it provides an exemplary workplace for all of its employees.

Goal 4.3a: Educate all judges and employees on standards of appropriate and inappropriate conduct, with continuing education on a regular basis, including as related to the codes of conduct and judicial conduct and disability procedures.

Goal 4.3b: Educate all judges and employees about the obligation to take appropriate action when they have reliable information about misconduct by a judge or other person, and about the available options for guidance regarding reporting misconduct, as well as mechanisms to report misconduct.

Goal 4.3c: Enhance accountability and effective redress, where appropriate, through universal adoption and conscientious application of the Model Employment Dispute Resolution Plan, and be transparent regarding judicial conduct and disability proceedings and other workplace conduct procedures in furtherance of and consistent with the law, related judiciary policy, and legitimate privacy interests.

Goal 4.3d: Provide a circuit director of workplace relations in each circuit, to whom employees within the circuit can report wrongful conduct concerns, and who will provide circuit-wide assistance to managers and employees on workplace conduct issues, including training, conflict resolution, and workplace investigations. Ensure that all court Employment Dispute Resolution (EDR) Coordinators are trained and certified under the CourtsLearn EDR Coordinator Certification course.

Goal 4.3e: Consider conducting reviews of systemic issues related to workplace conduct at the circuit and district level, when appropriate, and systematically evaluate whether guidance and procedures designed to foster an exemplary workplace are effective and whether additional action may be needed.

.

Issue 5. Harnessing Technology's Potential

How can the judiciary develop, operate, and secure cost-effective national and local systems and infrastructure that meet the needs of court users and the public for information, service, and access to the courts?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, judiciary employees, and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build, maintain, and continuously enhance effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

Responsibility for developing major national IT systems is shared by several Administrative Office divisions and Judicial Conference committees, and many additional applications are developed locally. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides a great deal of flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge will be to balance the economies of scale that may be achieved through operating as an enterprise with the creative solutions that may result from allowing and fostering a more distributed model of IT development and administration. The judiciary's strategy for addressing this issue follows.

Strategy 5.1. Harness the potential of technology to identify and meet the needs of judiciary users and the public for information, service, and access to the courts.

> **Background and Commentary.** The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. Next-generation case management systems are being developed, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology. In addition, technology is allowing for exponentially more data to be created, stored, and managed. The effective use of data tools supports evidence-based decision making.
>
> The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective for the development of certain systems. Another goal in this section focuses on the security of judiciary-related records and information.
>
> The effective use of technology is critical to furthering other strategies in this plan. In particular, the effective use of technology is critical to judiciary efforts to contain costs, and to effectively

allocate and manage resources (Strategy 3.1). Technology also supports improvements in the delivery of justice (Strategy 1.1); efforts to strengthen judicial security (Strategy 1.2); the delivery of training and remote access capabilities (Strategies 4.3 and 4.4); the accessibility of the judiciary for litigants and the public (Strategies 6.1 and 6.2); and judiciary accountability mechanisms (Strategies 2.1, 2.2, and 2.3). In addition, the judiciary must be aware of the ongoing threat of cyberattacks from domestic and foreign actors, and both individual and state-backed threats, and prepared to maintain the integrity of judiciary IT systems.

An effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, it is critical that the judiciary succeed in recruiting, developing, and retaining highly competent employees (Strategy 4.4). Investments in technology also require adequate funding (Strategy 1.2).

Goal 5.1a: Continue to build, maintain, and continuously enhance robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, public access, case management, and administrative support.

Goal 5.1b: Coordinate and integrate national IT systems and applications from a judiciary-wide perspective; continue to utilize local initiatives to improve services; and leverage judiciary data to facilitate decision-making.

Goal 5.1c: Develop system-wide approaches to the utilization of technology toachieve enhanced performance and cost savings.

Goal 5.1d: Continuously improve security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.

Issue 6. Enhancing Access to Justice and the Judicial Process

How can the judiciary ensure that justice in the federal courts is fair, impartial, and accessible to all, regardless of wealth or status, and that the courts remain comprehensible, accessible, and affordable for people who participate in the judicial process?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. In the criminal context, where the vast majority of federal criminal defendants are eligible for the appointment of counsel, the judiciary must ensure that the needs of appointed counsel and the clients they represent are met. This plan includes three strategies that focus on identifying unnecessary barriers to justice and court access, and taking steps to eliminate them.

> Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 6.1)
>
> Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process. (Strategy 6.2)
>
> Promote effective administration of the criminal defense function in the federal courts. (Strategy 6.3)

Strategy 6.1. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

> **Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood.
>
> To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation have been implemented to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.

To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:

Goal 6.1a: Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

Goal 6.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Strategy 6.2. Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, bankruptcy participants, witnesses, journalists, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants and bankruptcy participants. Continued efforts are needed, and this strategy sets forth four goals to make courts more accessible for jurors, litigants, bankruptcy participants, witnesses, and others.

Goal 6.2a: Provide jurors, litigants, bankruptcy participants, witnesses, journalists, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 6.2b: Improve the extent to which juries are representative of the communities in which they serve, reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petitjurors.

Goal 6.2c: Develop best practices for handling claims of pro se litigants in civil and bankruptcy cases.

Strategy 6.3. Promote effective administration of the criminal defense function in the federal courts.

Background and Commentary. In the criminal context, access to fair and impartial justice is supported by appointing counsel to represent defendants who cannot afford to pay for their own counsel or other services necessary for their defense. Under the Criminal Justice Act (CJA), the judiciary oversees the provision of these defense services to eligible criminal defendants. In exercising this role, consistent with the Sixth Amendment, judges, acting as neutral arbiters in individual cases, must fairly and reasonably determine the resources available to the defense in any given case involving appointed counsel. To ensure the effective operation of the adversarial system and access to effective and conflict-free representation, the judiciary must strive to ensure that CJA practitioners can mount a skilled and vigorous defense of their clients, regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability, so that the rights of individual defendants are safeguarded and enforced.

Consistent with the recommendations of the Judicial Conference's Ad Hoc Committee to Review the Criminal Justice Act Program, the judiciary must continue to consider improvements to the national administration of the defender services program.

This strategy supports the judiciary's efforts to pursue improvements in the fair and impartial delivery of justice (Strategy 1.1) and promotes public trust and confidence in the justice system by ensuring fair trials and proceedings (Issue 2), through three goals:

Goal 6.3a: Encourage districts to adopt and implement CJA plans based on the judiciary's model CJA plan to ensure compliance with relevant Judicial Conference policies.

Goal 6.3b: Ensure that CJA practitioners have the resources to provide effective and conflict-free representation.

Goal 6.3c: Provide training regarding best practices for criminal defense representation.

Issue 7. The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. The judiciary is an independent branch of government with the solemn responsibility of safeguarding the constitutional rights and liberties of the nation's citizens, not simply a line item in the non-defense discretionary portion of the federal budget.

An effective relationship with Congress is critical to success in securing adequate resources. The judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review that ensures the integrity of financial information, provides comprehensive financial reporting, and builds upon its foundation of internal controls and methods to prevent and detect fraud, waste, and abuse.

The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as reporting on annual government-wide financial activity, judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

> Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress. (Strategy 7.1)
>
> Strengthen the judiciary's relations with the executive branch. (Strategy 7.2)

Strategy 7.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

> **Background and Commentary.** This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may also strengthen the judiciary's relationship with Congress. Congressional awareness of the judiciary's ongoing efforts to strengthen its financial oversight and reporting — building upon its existing foundation of internal controls and methods to prevent and detect fraud, waste and abuse — is critical to assure oversight bodies, as well as the public, that the judiciary has a robust program of oversight and effective controls in place.

Goal 7.1a: Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Goal 7.1b: Implement effective approaches, including partnerships with legal, academic, and private sector organizations, to achieve the judiciary's legislative goals.

Goal 7.1c: Encourage judges to engage with members of their local congressional delegation to foster mutual understanding and respect, and to establish lines of communication between the two branches.

Strategy 7.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. The executive branch is also a source of financial reporting requirements for government-wide financial activity. The judiciary's ongoing efforts to transform financial reporting, enhance the judiciary's internal controls programs, and strengthen the integrity of judiciary financial data, provide tangible assurance to judiciary officials, oversight bodies, taxpayers, and others for whom the judiciary holds money in trust. This strategy focuses on enhancing the ability of the judiciary to provide input and information to its executive branch partners.

Goal 7.2a: Improve communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs, and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved a number of enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies issues, strategies, or goals to receive priority attention every two years.

Integration: The committees of the Judicial Conference integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy activities, including through the development and implementation of committee strategic initiatives – projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan*.

Assessment of Progress: For every goal in the *Strategic Plan,* mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the *Strategic Plan for the Federal Judiciary* require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the *Strategic Plan for the Federal Judiciary* supersede previous long-range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts*.

Acknowledgements

On the recommendation of its Executive Committee, the 2020 edition of the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference of the United States on September 15, 2020. This edition was prepared following an assessment of the implementation of the 2015 *Strategic Plan*, an analysis of issues and trends likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

CHAIRS, COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
SEPTEMBER 2020

THE EXECUTIVE COMMITTEE
Honorable Claire V. Eagan
U.S. District Court, Northern District of Oklahoma

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY
Honorable Kevin Michael Moore
U.S. District Court, Southern District of Florida

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM
Honorable Sara Darrow
U.S. District Court, Central District of Illinois

COMMITTEE ON THE BUDGET
Honorable John W. Lungstrum
U.S. District Court, District of Kansas

COMMITTEE ON CODES OF CONDUCT
Honorable Ralph R. Erickson
U.S. Court of Appeals, Eighth Circuit

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
Honorable Audrey G. Fleissig
U.S. District Court, Eastern District of Missouri

COMMITTEE ON CRIMINAL LAW
Honorable Ricardo S. Martinez
U.S. District Court, Western District of Washington

COMMITTEE ON DEFENDER SERVICES
Honorable Raymond J. Lohier, Jr.
U.S. Court of Appeals, Second Circuit

COMMITTEE ON FEDERAL-STATE JURISDICTION
Honorable D. Michael Fisher
U.S. Court of Appeals, Third Circuit

COMMITTEE ON FINANCIAL DISCLOSURE
Honorable Anthony John Trenga
U.S. District Court, Eastern District of Virginia

COMMITTEE ON INFORMATION TECHNOLOGY
Honorable Thomas M. Hardiman
U.S. Court of Appeals, Third Circuit

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS
Honorable Nicholas G. Garaufis
U.S. District Court, Eastern District of New York

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS
Honorable Sidney H. Stein
U.S. District Court, Southern District of New York

COMMITTEE ON THE JUDICIAL BRANCH
Honorable Rodney W. Sippel
U.S. District Court, Eastern District of Missouri

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
Honorable Anthony J. Scirica
U.S. Court of Appeals, Third Circuit

COMMITTEE ON JUDICIAL RESOURCES
Honorable Roslynn R. Mauskopf
U.S. District Court, Eastern District of New York

COMMITTEE ON JUDICIAL SECURITY
Honorable David W. McKeague
U.S. Court of Appeals, Sixth Circuit

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM
Honorable Nancy Freudenthal
U.S. District Court, District of Wyoming

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Honorable David G. Campbell
U.S. District Court, District of Arizona

ADVISORY COMMITTEE ON APPELLATE RULES
Honorable Michael A. Chagares
U.S. Court of Appeals, Third Circuit

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Honorable Dennis Dow
U.S. Bankruptcy Court, Western District of Missouri

ADVISORY COMMITTEE ON CIVIL RULES
Honorable John D. Bates
U.S. District Court, District of Columbia

ADVISORY COMMITTEE ON CRIMINAL RULES
Honorable Raymond M. Kethledge
U.S. Court of Appeals, Sixth Circuit

ADVISORY COMMITTEE ON EVIDENCE RULES
Honorable Debra Ann Livingston
U.S. Court of Appeals, Second Circuit

COMMITTEE ON SPACE AND FACILITIES
Honorable Jeffrey J. Helmick
U.S. District Court, Northern District of Ohio

AD HOC STRATEGIC PLANNING GROUP
SEPTEMBER 2020

Honorable Carl E. Stewart, Chair
Judge, U.S. Court of Appeals
Fifth Circuit
Judiciary Planning Coordinator

Honorable Susan R. Bolton
Judge, U.S. District Court
District of Arizona
At Large

Honorable Timothy Burgess
Chief Judge, U.S. District Court
District of Alaska
At Large

Honorable Helen E. Burris
Chief Judge, U.S. Bankruptcy Court
District of South Carolina
At Large

Ms. Jeannette J. Clack
Clerk of Court, U.S. District Court
Western District of Texas
At Large

Honorable Audrey G. Fleissig
Judge, U.S. District Court
Eastern District of Missouri
Chair, Committee on Court Administration and Case Management

Ms. Susan Goldberg
Circuit Executive, U.S. Court of Appeals
First Circuit
At Large

Honorable Thomas M. Hardiman
Judge, U.S. Court of Appeals
Third Circuit
Chair, Committee on Information Technology

Honorable Jeffrey R. Howard
Chief Judge, U.S. Court of Appeals
First Circuit
Member, Executive Committee

Mr. A.J. Kramer
Federal Public Defender, U.S. District Court
District of Columbia
At Large

Mr. Nathan Lee
Clerk of Court, U.S. Bankruptcy Court
Eastern District of Kentucky
At Large

Honorable Raymond J. Lohier, Jr.
Judge, U.S. Court of Appeals
Second Circuit
Chair, Committee on Defender Services

Honorable John W. Lungstrum
Judge, U.S. District Court
District of Kansas
Chair, Committee on Budget

Honorable Ricardo S. Martinez
Chief Judge, U.S. District Court
Western District of Washington
Chair, Committee on Criminal Law

Honorable Roslynn R. Mauskopf
Chief Judge, U.S. District Court
Eastern District of New York
Chair, Committee on Judicial Resources

Honorable John H. Rich, III
Magistrate Judge, U.S. District Court
District of Maine
At Large

Honorable Karen E. Schreier
Judge, U.S. District Court
District of South Dakota
At Large

Honorable Rodney W. Sippel
Chief Judge, U.S. District Court
Eastern District of Missouri
Chair, Committee on the Judicial Branch

Mr. Eddie Towe
Chief Probation Officer, U.S. District Court
Eastern District of Arkansas
At Large

Honorable Claire V. Eagan (ex-officio)
Judge, U.S. District Court
Northern District of Oklahoma
Chair, Executive Committee

Mr. James C. Duff (ex-officio)
Director, Administrative Office of the U.S. Courts

EXECUTIVE COMMITTEE
JUDICIAL CONFERENCE OF THE UNITED STATES
SEPTEMBER 2020

Honorable Claire V. Eagan, Chair
Judge, U.S. District Court
Northern District of Oklahoma

Honorable Robert James Conrad, Jr.
Judge, U.S. District Court
Western District of North Carolina

Honorable L. Scott Coogler
Judge, U.S. District Court
Northern District of Alabama

Honorable Jeffrey R. Howard
Chief Judge, U.S. Court of Appeals
First Circuit

Honorable D. Brooks Smith,
Chief Judge, U.S. Court of Appeals
Third Circuit

Honorable Lavenski R. Smith
Chief Judge, U.S. Court of Appeals
Eighth Circuit

Honorable Sidney R. Thomas Chief
Judge, U.S. Court of Appeals
Ninth Circuit

Mr. James C. Duff (ex-officio)
Director
Administrative Office of the U.S. Courts

This Page Intentionally Left Blank

JUDICIAL CONFERENCE OF THE UNITED STATES
Washington, D.C.
www.uscourts.gov