ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington D.C.

October 30, 2019

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 30, 2019
Washington, DC

Table of Contents

B. Rule 25 and Railroad Retirement Act (18-AP-E; 18 –CV-EE)

Tab 5B: Kocur Memo of December 18, 2018
Tab 5C: Subcommittee Report

VI. Discussion of Matters before Joint Subcommittees

A. Electronic Filing Deadline (19-AP-E)

Tab 6A: Chagares Memo

B. Finality in Consolidated Cases after Hall

Tab 6B: Cooper Memo

VII. Discussion of Recent Suggestions

A. Defining Good Cause for Extensions (19-AP-A)

Tab 7A: Ratkowski Memo of March 13, 2019
Tab 7B: Reporter's Memo

B. Decisions on Unbriefed Grounds (19-AP-B)

Tab 7C: AAAL letter of April 26, 2019
Tab 7D: Reporter's Memo

C. IFP Standards (19-AP-C)

Tab 7E: Sai memo
Tab 7F: Reporter's Memo

D. Court Calculated Deadlines (19-AP-D)

Tab 7G: Sai memo
Tab 7H: Reporter's Memo

VIII. New Business

IX. Next meeting: April 3, 2020, in Palm Beach, Florida

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON APPELLATE RULES

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

Members

Honorable Jay S. Bybee
United States Court of Appeals
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South, Suite 7080
Las Vegas, NV 89101-7065

Honorable Noel J. Francisco*
Solicitor General (ex officio)
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

*Alternate Representative:
H. Thomas Byron III, Esq.
United States Department of Justice
950 Pennsylvania Ave, N.W.
Washington, DC 20530

Honorable Judith L. French
Ohio Supreme Court
65 South Front Street
Columbus, OH 43215

Honorable Stephen J. Murphy III
United States District Court
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 235
Detroit, MI 48226

Professor Stephen E. Sachs
Duke Law School
210 Science Drive
Box 90360
Durham, NC 27708-0360

Danielle Spinelli, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington DC 20006

Honorable Paul J. Watford
United States Court of Appeals
Richard H. Chambers Building
125 South Grand Avenue, 6th Floor
Pasadena, CA 91105-1621

Lisa B. Wright, Esq.
Office of the Federal Public Defender
625 Indiana Avenue, NW, Suite 550
Washington, DC 20004

Liaisons

Honorable Frank M. Hull
(*Standing*)
United States Court of Appeals
Elbert P. Tuttle Court of
Appeals Building
56 Forsyth Street, N.W., Room 300
Atlanta, GA 30303

Clerk of Court Representative

Patricia S. Dodszuweit
Clerk
United States Court of Appeals
James A. Byrne U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106-1729

Secretary, Standing Committee and Rules Committee Chief Counsel

Rebecca A. Womeldorf
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Michael A. Chagares Chair	C	Third Circuit	2011 Member: 2017 Chair:	---- 2020
Jay S. Bybee	C	Ninth Circuit	2017	2020
Noel Francisco*	DOJ	Washington, DC	----	Open
Judith L. French	JUST	Ohio	2016	2022
Stephen Joseph Murphy III	D	Michigan (Eastern)	2015	2021
Stephen E. Sachs	ACAD	North Carolina	2016	2022
Danielle Spinelli	ESQ	Washington, DC	2017	2020
Paul J. Watford	C	Ninth Circuit	2018	2021
Lisa Burget Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)	2019	2022
Edward Hartnett Reporter	ACAD	New Jersey	2018	2023

Principal Staff: Rebecca Womeldorf 202-502-1820

_____

* Ex-officio - Solicitor General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* TBD *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. A. Benjamin Goldgar *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

Rebecca A. Womeldorf, Esq.
Chief Counsel
Administrative Office of the U.S. Courts
Office of General Counsel – Rules Committee Staff
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544
Main: 202-502-1820

Bridget M. Healy, Esq.
Counsel *(Appellate, Bankruptcy, Evidence)*

S. Scott Myers, Esq.
Counsel *(Bankruptcy, Standing)*

Julie M. Wilson, Esq.
Counsel *(Civil, Criminal, Standing)*

Shelly Cox
Management Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 6-100
Washington, DC 20544

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

Molly T. Johnson, Esq.
Senior Research Associate *(Bankruptcy)*

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

Marie Leary, Esq.
Senior Research Associate *(Appellate)*

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

Tim Reagan, Esq.
Senior Research Associate *(Standing)*

TAB 1B

THIS PAGE INTENTIONALLY BLANK

	FRAP Item	Proposal	Source	Current Status
7	08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18 Approved by Supreme Court 4/19
7	08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 4/09 Discussed and retained on agenda 4/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 4/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18 Approved by Supreme Court 4/19
7	11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 4/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18

	FRAP Item	Proposal	Source	Current Status
				Submitted to Supreme Court 10/18 Approved by Supreme Court 4/19
7	11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 9/12 Discussed and retained on agenda 4/13 Discussed and retained on agenda 4/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 4/15 Discussed and retained on agenda 10/15 Draft approved 4/16 for submission to Standing Committee Approved for publication by Standing Committee 6/16 Revised draft approved 5/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 6/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 9/17 Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018 Final approval of subsection (d)(1) for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18 Approved by Supreme Court 4/19

	FRAP Item	Proposal	Source	Current Status
7	15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved 5/17 for submission to Standing Committee Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18 Approved by Supreme Court 4/19
6	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting Proposed draft for publication approved for submission to Standing Committee 4/18 Draft approved for publication by Standing Committee 6/18 Discussed at 10/18 meeting Final approval for submission to Standing Committee 4/19 Approved by Standing Committee 6/19 Approved by Judicial Conference 9/19
3	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19
3	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and continued review Discussed at 4/19 meeting and continued review

	FRAP Item	Proposal	Source	Current Status
1	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed
1	19-AP-A	Define Good Cause for Extensions	Nico Ratkowski	Initial consideration 10/19
1	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19
1	19-AP-D	Court Calculated Deadlines	Sai	Initial consideration 10/19
0	None assigned	Consider if time limits in Rules should be better aligned with the statute, in light of *Hamer*, 138 S. Ct. 13 (2017)	Christopher Landau	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and tabled pending *Nutraceutical* Discussed at 4/19 meeting and removed from agenda in light of *Nutraceutical*
0	18-AP-D	Do not count votes of judges who have left office before delivery of order or opinion to clerk	Stephen Sachs	Considered at 10/18 meeting and subcommittee formed to consider if *Yovino* denied Discussed at 4/19 meeting and removed from agenda in light of decision in *Yovino*
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21

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

TAB 1C

THIS PAGE INTENTIONALLY BLANK

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule."	
AP 29	An exception added to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	Adds a provison to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond"; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Revised August 2019

Effective (no earlier than) December 1, 2019

Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Published in 2016-17. Eliminates unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Unpublished. Technical amendments to remove the term "proof of service."	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Proposed subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2019 Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019) REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2020 Current Step in REA Process: approved by the Standing Committee (June 2019) REA History: approved by the relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. The phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3) with "[a] court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised August 2019

THIS PAGE INTENTIONALLY BLANK

TAB 1D

THIS PAGE INTENTIONALLY BLANK

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

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Federal Courts Access Act of 2019	**S. 297** *Sponsor:* Lee (R-UT)	CV	**Bill Text:** https://www.congress.gov/116/bills/s297/BILLS-116s297is.pdf **Summary:** Amends title 28, U.S.C., to modify the amount in controversy requirement and remove the complete diversity requirement. **Report:** None.	• 1/31/19: Introduced in the Senate; referred to the Judiciary Committee
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) to require that federal judges in criminal proceedings issue an order confirming the obligation of the prosecutor to disclose exculpatory evidence. Specifically, the rule would be amended by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: Introduced in the Senate; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "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." **Report:** None.	• 5/15/19: Introduced in the Senate; referred to Judiciary Committee
HAVEN Act (Honoring American Veterans in Extreme Need Act of 2019)	**H.R. 2938** *Sponsor:* McBath (D-GA-6) *Co-Sponsors:* 38 (D-35, R-3) **S. 679** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19; R-21; I-1)	BK Official Forms 122A-1, 122B, & 122C-1 lines 9-10	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/2938/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense." **Report:** None.	• 8/26/19: became P.L. No. 116-52 • 7/23/19: Passed/agreed to in House. • 3/06/19: Introduced into the Senate, referred to the Committee on the Judiciary.

Small Business Reorganization Act of 2019	**H.R. 3311** *Sponsor:* Cline (R-VA) *Co-Sponsors:* 3 (D-2, R-1) **S. 1091** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19, R-21, I-1)	BK 1020, 2007.1, 2009, 2012, 2015; Official Form 201	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/3311/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes." **Report:** None.	• 8/26/19: Became P.L. No. 116-54. • 7/23/19: Passed/agreed to in House. • 6/16/19: Introduced in House • 4/09/19: Introduced into the Senate, referred to the Committee on the Judiciary.
N/A	N/A	CV 26	**Bill Text:** None. *But see* H.R. 1164/S. 2064 "Electronic Court Records Reform Act of 2019." In addition, during the hearing, Rep. Nadler indicated that he intends to reintroduce the Sunshine in Litigation Act. **Summary:** Topics discussed in the hearing included PACER, cameras in the courtroom, and sealing of court filings. Link to list of witnesses and documents: https://judiciary.house.gov/legislation/hearings/federal-judiciary-21st-century-ensuring-public-s-right-access-courts	• 9/26/19: House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet hearing held – "The Federal Judiciary in the 21 Century: Ensuring the Public's Right of Access to the Courts"

TAB 2

THIS PAGE INTENTIONALLY BLANK

TAB 2A

THIS PAGE INTENTIONALLY BLANK

Agenda E-19 (Summary)
Rules
September 2019

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 35 and 40 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. 2-3

2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve effective December 1, 2019, Official Form 122A-1 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. 6-10

3. Approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 13-15

4. Approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 20-21

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

Agenda E-19
Rules
September 2019

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 25, 2019. All members participated.

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

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

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

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

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term "answer" in Rule 40(a)(3) to the term "response," making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology." The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure

and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 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 Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 3, 6, and 42, and Forms 1 and 2, with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3 (Appeal as of Right – How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendments address the effect on the scope of an appeal of designating a specific interlocutory order in a notice of appeal. The initial suggestion pointed to a line of cases in one circuit applying an expressio unius rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order rather than treating a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment. Research conducted after receiving the suggestion revealed that the problem is not confined to a single circuit, but that there is substantial confusion both across and within circuits.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. However, some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal – the one

serving as the basis of the court's appellate jurisdiction and from which time limits are calculated – and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Advisory Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result would require the appellant to designate the judgment – or the appealable order – from which the appeal is taken. Additional new subsections of Rule 3(c) would call attention to the merger principle.

The proposed amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court). Having different suggested forms for appeals from final judgments and appeals from other orders clarifies what should be designated in a notice of appeal. In addition, the Advisory Committee recommended conforming amendments to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B).

Rule 42 (Voluntary Dismissal)

Current Rule 42(b) provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." Prior to the 1998 restyling of the rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Although the 1998 amendment to Rule 42 was intended to be stylistic only, some courts have concluded that there is now discretion to decline to dismiss. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

In addition, current Rule 42(b) provides that "no mandate or other process may issue without a court order." This language has created some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court.

The issues with the language "no mandate or other process may issue without a court order" are avoided – and the purpose of that language served – by deleting it and instead stating directly in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Information Items

The Advisory Committee on Appellate Rules met on April 5, 2019. Discussion items included undertaking a comprehensive review of Rules 35 and 40, as well as a suggestion to

limit remote access to electronic files in actions for benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v.

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

As detailed above, the proposed amendments to Rules 35 and 40 published for public comment in August 2018 create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider discrepancies between Rules 35 and 40. The discrepancies are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could "suggest" rehearing en banc. The Advisory Committee determined not to make the rules more parallel but continues to consider possible ways to clarify practice under the two rules.

Privacy in Railroad Retirement Act Benefit Cases

The Advisory Committee was forwarded a suggestion directed to the Advisory Committee on Civil Rules. The suggestion requested that Civil Rule 5.2(c), the rule that limits remote access to electronic files in certain types of cases, be amended to include actions for benefits under the Railroad Retirement Act because of the similarities between actions under the Act and the types of cases included in Civil Rule 5.2(c). But review of Railroad Retirement Act decisions lies in the courts of appeals. For this reason, the Advisory Committee on Appellate Rules will take the lead in considering the suggestion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021, and Official Form 122A-1, with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the

rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules and the official form are technical or conforming in nature and are recommended for final approval without publication.

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

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a

statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income)

The Advisory Committee received a suggestion from an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California. He noted that Official Form 122A-1 contains an instruction at the end of the form, after the debtor's signature line, explaining that the debtor should *not* complete and file a second form (Official Form 122A-2) if

the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. He suggested that the instruction not to file also be added at the end of line 14a of Form 122A-1, where the debtor's current monthly income is calculated. The Advisory Committee agreed that repeating the instruction as suggested would add clarity to the form and recommended the change. The Standing Committee approved the change.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revision of Official Bankruptcy Form 122A-1 and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 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, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036 with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

Judge Brian Fenimore of the Western District of Missouri noted that Rule 2005(c) – a provision that deals with conditions to assure attendance or appearance – refers to now-repealed provisions of the Criminal Code. The Advisory Committee agreed that the current reference to 18 U.S.C. § 3146 is no longer accurate and recommended replacing it with a reference to 18 U.S.C. § 3142, where the topic of conditions is now located. Because 18 U.S.C. § 3142 also

addresses matters beyond conditions to assure attendance or appearance, the proposed rule amendment will state that only "relevant" provisions and policies of the statute should be considered.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007 clarifies that only an insurance depository institution as defined by section 3 of the Federal Deposit Insurance Act (FDIA) is entitled to heightened service of a claim objection, and that an objection to a claim filed by a credit union may be served on the person designated on the proof of claim.

Rule 3007 provides, in general, that a claim objection is not required to be served in the manner provided by Rule 7004, but instead can be served by mailing it to the person designated on a creditor's proof of claim. The rule includes exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." The purpose of this exception is to comply with a legislative mandate in the Bankruptcy Reform Act of 1994, set forth in Rule 7004(h), providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The current language in Rule 3007(a)(2)(A)(ii) is arguably too broad in that it does not qualify the term "insured depository institution" as being defined by the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under the rule. The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in

Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Rule 7007.1 (Corporate Ownership Statement)

Continuing the advisory committees' efforts to conform the various disclosure statement rules to the pending amendment to Appellate Rule 26.1, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1.

Rule 9036 (Notice by Electronic Transmission)

The proposed amendment would implement a suggestion from the Committee on Court Administration and Case Management requiring high-volume-paper-notice recipients to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 will change to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Information Items

The Advisory Committee met on April 4, 2019. The agenda for that meeting included a report on the work of the Restyling Subcommittee on the process of restyling the Bankruptcy Rules. The Advisory Committee anticipates this project will take several years to complete.

The Advisory Committee also reviewed a proposed draft Director's Bankruptcy Form for an application for withdrawal of unclaimed funds in closed bankruptcy cases, along with proposed instructions and proposed orders. The initial draft was the product of the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System. The Advisory Committee supported the idea of a nationally available form to aid in processing unclaimed funds, made minor modifications, and recommended that the Director adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee's agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;

2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;

4. Forbidding contention questions in Rule 30(b)(6) depositions;

5. Adding a provision to Rule 30(b)(6) for objections; and

6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was

strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the "number and description of" the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee's report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the "continuing as necessary" language; (3) deleting the "number and description of" language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 7.1, the rule that addresses disclosure statements, with a request that it be published for comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7.1 would do two things. First, it would require a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to proposed amendments to Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019) and Bankruptcy Rule 8012 (to be considered by the Conference at its September 2019 session). Second, the proposal would amend the rule to require a party in a diversity case to disclose the citizenship of every individual or entity whose citizenship is attributed to that party.

The latter change aims to facilitate the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of an individual or entity attributed to a party. For example, a limited liability company takes on the citizenship of each of its owners. If one of the owners is a limited liability company, the citizenships of all the owners of that limited liability company pass through to the limited liability company that is a party in the action. Requiring disclosure of "every individual or entity whose citizenship is attributed" to a party will ensure early determination that jurisdiction is proper.

Information Items

The Advisory Committee met on April 2-3, 2019. Among the topics for discussion was the work of two subcommittees tasked with long-term projects, and the creation of a joint Appellate-Civil subcommittee.

Multidistrict Litigation Subcommittee

As previously reported, since November 2017, this subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC.

Subcommittee members have also participated in several conferences hosted by different constituencies, including MDL transferee judges.

At the Advisory Committee's April 2019 meeting, there was extensive discussion of the various issues on which the subcommittee has determined to focus its work. The Advisory Committee agreed with the subcommittee's inclination to focus primarily on four issues: (1) use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of some district court orders in MDL proceedings; (3) addressing the court's role in relation to global settlement of multiple claims; and (4) third-party litigation funding. It is still too early to know whether this work will result in any recommendation for amendments to the Civil Rules.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The subcommittee developed a preliminary draft rule for discussion purposes, including for discussion at the Advisory Committee's April 2019 meeting. On June 20, 2019, the subcommittee convened a meeting to obtain feedback on its draft rule. Invited participants included claimants' representatives, a magistrate judge, as well as representatives of ACUS, the Social Security Administration, and the DOJ. One of the authors of the study that forms the basis of the ACUS suggestion also attended. Each participant provided his or her perspective on the draft rule, followed by a roundtable discussion.

The subcommittee will continue to gather feedback on the draft rule, including from magistrate judges. The subcommittee hopes to come to a decision as to whether pursuit of a rule is advisable in time for the Advisory Committee's October 2019 meeting.

Subcommittee on Final Judgment in Consolidated Cases

The Civil and Appellate Rules Advisory Committees have formed a joint subcommittee to consider whether either rule set should be amended to address the effect on the "final judgment rule" of consolidating initially separate cases.

The impetus for this project is *Hall v. Hall,* 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. If so, the subcommittee will determine the value of any rules amendments to address those problems.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on May 7, 2019. The bulk of the meeting focused on work of the Rule 16 Subcommittee, formed to consider suggestions from two district judges that

pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the robust expert disclosure requirements in Civil Rule 26. The Advisory Committee charged the subcommittee with studying the issue, including the threshold desirability of an amendment, as well as the features any recommended amendment should contain.

Early on, the subcommittee determined that it would be useful to hold a mini-conference to explore the contours of the issue with all stakeholders. At its October 2018 meeting (in anticipation of the mini-conference), the Advisory Committee heard a presentation by the DOJ on its development and implementation of policies governing disclosure of forensic and non-forensic evidence.

Participants in the May 6, 2019 mini-conference included defense attorneys, as well as prosecutors and representatives from the DOJ, each of whom has extensive personal experience with pretrial disclosures and the use of experts in criminal cases. The discussion proceeded in two parts. First, participants were asked to identify any concerns or problems with the current rule. Second, they were asked to provide suggestions on how to improve the rule.

The defense attorneys identified two problems with Rule 16 in its current form: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Defense practitioners reported they sometimes receive summaries of expert testimony a week or the night before trial, which significantly impairs their ability to prepare for trial. They also reported that they often do not receive sufficiently detailed disclosures to allow them to prepare to cross examine the expert witness. In stark contrast, the DOJ representatives reported no problems with the current rule.

As to the subcommittee's second inquiry concerning ways to improve the rule, participants discussed possible solutions on the issues of timing and completeness of expert

discovery. Significant progress was made in identifying common ground; the discussion produced concrete suggestions for language that would address the timing and sufficiency issues identified by defense practitioners. The subcommittee plans to present its report and a proposed amendment to Rule 16 at the Advisory Committee's September 2019 meeting.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term "non-propensity purpose" to "permitted purpose."

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on May 3, 2019. The agenda included discussion of possible amendments to Rules 106, 615, and 702. The Advisory Committee also continues to monitor the development of the law following the decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

A subcommittee on Rule 702 has been considering questions that arise in the application of the rule, including treatment of forensic expert evidence. The subcommittee, after extensive discussion, made three recommendations with which the Advisory Committee agreed: (1) it would be difficult to draft a freestanding rule on forensic expert testimony because any such amendment would have an inevitable and problematic overlap with Rule 702; (2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note

because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and (3) it would not be advisable to publish a "best practices manual" for forensic evidence.

The subcommittee expressed interest in considering an amendment to Rule 702 that would focus on the important problem of overstating results in forensic and other expert testimony. One example: an expert stating an opinion as having a "zero error rate" where that conclusion is not supportable by the methodology. The Advisory Committee has heard extensively from the DOJ on its efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Advisory Committee is considering other ways to aid courts and litigants in meeting the challenges of forensic evidence, including assisting the FJC in judicial education. In this regard, the Advisory Committee is holding a mini-conference on October 25, 2019 at Vanderbilt Law School. The goal of the mini-conference is to determine "best practices" for managing *Daubert* issues. A transcript of the mini-conference will be published in the *Fordham Law Review*.

Possible Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)

The Advisory Committee continues to consider whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. A suggestion from a district judge noted two possible amendments: (1) to provide that a completing statement is admissible over a hearsay objection; and (2) to provide that the rule covers oral as well as written or recorded statements.

Several alternatives for an amendment to Rule 106 are under consideration. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

Possible Amendments to Rule 615 (Excluding Witnesses)

The Advisory Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order and whether it applies only to exclude witnesses from the courtroom (as stated in the text of the rule) or if it can extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony. Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Advisory Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Advisory Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the scope of the order is desirable. The investigation of this problem is consistent with the Advisory Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given increasing witness access to information about testimony through news, social media, or daily transcripts.

At its May 2019 meeting, the Advisory Committee resolved that any amendment to Rule 615 should allow, but not mandate, orders that extend beyond the courtroom. One issue that the Advisory Committee must work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

OTHER ITEMS

The Standing Committee's agenda included four information items. First, the Committee discussed a suggestion from the Chair of the Advisory Committee on Appellate Rules that a study be conducted to determine whether the Appellate, Bankruptcy, Civil, and Criminal Rules should be amended to change the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone.

The Chair authorized the creation of a joint subcommittee comprised of representatives of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and delegated to Judge Chagares the task of coordinating the subcommittee's work. The subcommittee plans to present its report to the Committee at its January 2020 meeting.

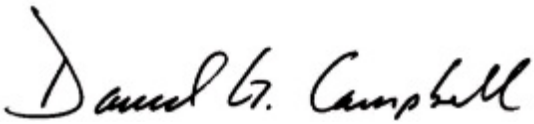
Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, based on feedback received at the Committee's January 2019 meeting, the Reporter to the Committee drafted revised proposed procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. The Committee discussed and approved those procedures.

Fourth, at the request of the Judiciary Planning Coordinator, Committee members discussed the extent to which the Committee's current strategic initiatives have achieved their desired outcomes and the proposed approach for the 2020 update to the *Strategic Plan for the*

Federal Judiciary, and authorized Judge Campbell to convey the Committee's views to the Judiciary Planning Coordinator.

Respectfully submitted,



David G. Campbell, Chair

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

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Form (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Appendix D – Federal Rules of Evidence (proposed amendment and supporting report excerpt)

TAB 2B

THIS PAGE INTENTIONALLY BLANK

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 25, 2019 | Washington, DC

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Washington, DC, on June 25, 2019. The following members participated in the meeting:

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

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew D. Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the Advisory Committees:

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

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

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

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

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

Others providing support to the Committee 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; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Washington, DC. This meeting is the last for two members, Judge Susan Graber and Judge Amy St. Eve. Judge Campbell thanked Judge Graber for her contributions as a member of the Committee and for her service as liaison to the Advisory Committee on Bankruptcy Rules. Judge Campbell thanked Judge St. Eve for her contributions as a member of the Committee and her leadership on the Task Force on Protecting Cooperators and wished her luck on her new assignment as a member of the Budget Committee. Judge Campbell also noted this would be the last Standing Committee meeting for Judge Donald Molloy, Chair of the Advisory Committee on Criminal Rules, and thanked him for his many years of service to the rules process. Judge Campbell also recognized Scott Myers for twenty years of federal government service, which has included time as a member of the United States Marine Corps, a law clerk, and counsel to the Rules Committees.

Rebecca Womeldorf reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that the rules adopted by the Supreme Court on April 25, 2019 will go into effect on December 1, 2019 provided Congress takes no contrary action.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the January 3, 2019 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules.

Action Items

Final Approval of Proposed Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). Judge Chagares asked the Committee to recommend final approval of proposed amendments to Rules 35 and 40 which will set length limits applicable to a response filed to a petition for en banc review or for panel rehearing. The proposed amendments were published for public comment in August 2018. The one written comment received was supportive and Judge Chagares reported receiving informal favorable comments from colleagues. No revisions were made after publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 35 and Rule 40 for approval by the Judicial Conference**.

Publication of Proposed Amendments to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares asked the Committee for approval to publish for public comment proposed amendments to Rule 3(c) regarding contents of the notice of appeal, along with conforming amendments to Rule 6 and Forms 1 and 2. Judge

Chagares noted by way of background the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act.

Judge Chagares explained that this proposal originated in a 2017 suggestion that pointed to a problem in the caselaw concerning the scope of notices of appeal. Some cases, the suggestion noted, apply an *expressio unius* approach to interpreting the notice of appeal. Under that approach, for example, if the notice of appeal designates a particular interlocutory order in addition to the final judgment, such courts might limit the scope of the appeal to the designated order rather than treating the notice as bringing up for review all interlocutory orders that merged into the judgment. Extensive research revealed confusion on the issue both across and within circuits. Professor Hartnett noted another problematic aspect of the caselaw: numerous decisions treat notices of appeal that designate an order that disposed of all remaining claims in a case as limited to the claims disposed of in the designated order. Judge Chagares noted that the Advisory Committee's goal in proposing amendments to Rule 3(c) is to ensure that the filing of a notice of appeal is a simple, non-substantive act that creates no traps for the unwary.

Professor Hartnett reviewed the rationale behind the Advisory Committee's proposed amendments. Professor Hartnett noted that one source of the problem was Rule 3(c)(1)(B)'s current requirement that a notice of appeal "designate the judgment, order, or part thereof being appealed." Some have read this provision to require designation of any order that the appellant wishes to challenge on appeal, rather than simply designation of the judgment or order that serves as the basis of the court's appellate jurisdiction and from which time limits are calculated.

The Advisory Committee proposed four interrelated changes to Rule 3(c)(1)(B) to address the structure of the rule and to provide greater clarity. First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the terms "judgment" and "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result requires the appellant to designate the judgment – or the appealable order – from which the appeal is taken. To underscore the distinction between an appeal from a judgment and an appeal from an appealable order, Professor Hartnett noted, the proposed conforming amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and a Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court).

Other proposed changes address the merger rule. A new paragraph (4) was added to underscore the merger rule, which provides that when a notice of appeal identifies a judgment or order, this includes all orders that merge into the designated judgment or order for purposes of appeal. The Advisory Committee also added to the Committee Note a paragraph discussing the

merger principle. In addition, the Advisory Committee added a fifth paragraph to the rule addressing two kinds of scenarios where an appellant's designation of an order should be read to encompass the final judgment in a civil case. In one scenario, some pieces of the case are resolved earlier, and others only later; a notice of appeal designating the order that resolves all remaining claims as to all parties should be read as a designation of the final judgment. In the other scenario, a notice of appeal designates the order disposing of a post-judgment motion of a kind that re-started the time to appeal the final judgment; that notice should be read to encompass a designation of the final judgment. In both scenarios, the proposed rule operates whether or not the court has entered judgment on a separate document.

A new sixth paragraph was added providing that "[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal." The final sentence was added to expressly reject the *expressio unius* approach. The Advisory Committee settled on this approach to avoid the inadvertent loss of appellate rights while empowering litigants to define the scope of their appeal.

Finally, the Advisory Committee recommended conforming changes to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and conforming changes to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B). The Advisory Committee consulted with reporters to the Advisory Committee on Bankruptcy Rules regarding the amendments to Rule 6.

A member asked why the Advisory Committee referenced but did not define the merger rule in the rule text. Professor Hartnett explained that the Advisory Committee did not want to limit the merger principle's continuing development by codifying it in the rule. The rule's reference to the merger rule will prompt an inexperienced litigant to review the Committee Note for more information. Judge Campbell observed that an attempt to define the merger rule in the Rule text could change current law by overriding existing nuances. Two judge members expressed concern that the Rule needs to be understandable to pro se litigants and unsophisticated lawyers. One of these members asked why the Rule text could not state in simple terms the outlines of the merger principle – e.g., "an appeal from a final judgment brings up for review any order that can be appealed at that time"? Professor Hartnett responded that the Advisory Committee was concerned that such a formulation in the Rule text might alter current law; he stated that the Advisory Committee wanted to alert litigants to the merger rule in the rule itself and provide additional guidance for litigants in the Committee Note. An attorney member suggested that the proposed draft offered the most elegant solution – using Rule text that serves as a placeholder for the merger doctrine. A judge member expressed agreement with this view.

That judge member next asked why the Advisory Committee proposed to retain, in new subdivision (c)(6), the appellant's ability to designate only part of a judgment or order. Professor Hartnett suggested that a designation of just part of a judgment might serve the interest of repose by assuring other parties that the scope of the appeal was limited. Professor Cooper offered as an example an instance in which the plaintiff's claims against both of two defendants have been dismissed but the plaintiff has no wish to challenge the dismissal as to one of the defendants; a

limited notice of appeal, in such a case, would reassure the defendant whom the plaintiff no longer wishes to pursue.

A judge asked about the potential for over-inclusion in notices of appeal as a result of the proposed amendments, and whether there is a benefit to requiring that parties be specific about what they are appealing. Professor Hartnett responded that the notice is not the place to limit the issues on appeal. A notice is just a simple document transferring jurisdiction from the district court to the appellate court. The scope of the appeal can be clarified in the ensuing briefing.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rules 3 and 6 and Forms 1 and 2.**

Professor Struve congratulated the Advisory Committee and Professor Hartnett for a clever solution to a very tough problem. Professor Hartnett thanked Professor Cooper for his assistance.

Publication of Proposed Amendments to Rule 42(b) (Voluntary Dismissal). Judge Chagares stated that the Advisory Committee sought publication of proposed amendments to Rule 42(b). Rule 42(b) currently provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Prior to the 1998 non-substantive restyling of the Appellate Rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Following the 1998 restyling, some courts have concluded that discretion exists to decline to dismiss. Attorneys cannot advise their clients with confidence that an action will be dismissed upon agreement by the parties. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

Judge Chagares explained that the phrase "no mandate or other process may issue without a court order" in current Rule 42(b) has caused confusion as well. Some circuit clerks have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. These issues are avoided – and the purpose of that language served – by deleting the phrase and instead stating directly, in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them."

A member suggested that language from the proposed Committee Note be moved to the rule itself, creating a new subdivision stating that the Rule does not affect any law that requires court approval of a settlement. Four other members expressed agreement with the idea of putting such a caveat into the Rule text. A motion was made and seconded to amend the proposal to include such a caveat; the motion passed. The Committee discussed how to draft the caveat; it started by considering language that had been used in a prior draft, as follows: "If court approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand to consider whether to approve it." Following a break and extensive discussion of

possible language, including suggestions from the style consultants, Judge Chagares proposed instead to add a new subdivision (c) which would modify both preceding paragraphs of Rule 42 and state as follows: "(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration." The Committee Note was revised to add a cite to "F.R.Civ.P. 23(e) (requiring district court approval)" and to explain that the "amendment replaces old terminology and clarifies that any order beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order." By consensus, this new subdivision (c) was incorporated into the proposed amendments to Rule 42, upon which the Committee proceeded to vote.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 42.**

Information Items

Possible Additional Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares advised that the Advisory Committee continued to study whether amendments were warranted to clarify and codify practices under Rules 35 and 40.

Rule 4 (Appeal as of Right – When Taken). Judge Chagares explained that the Advisory Committee has been considering whether to amend Rule 4(a)(5)(C) (which deals with extensions of time to appeal) in light of the Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court distinguished time limits imposed by rule from those imposed by statute, characterizing time limits set only by rules as non-jurisdictional procedural limits. Professor Hartnett noted that the Advisory Committee tabled its consideration of the issue pending the Court's decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). In *Nutraceutical*, the Court held that a mandatory claim-processing rule was not subject to equitable tolling. After reviewing this holding, the Advisory Committee decided not to take action on a possible amendment to Rule 4(a)(5)(C).

Potential Amendment to Rule 36. The Advisory Committee considered an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Consideration was tabled pending the Court's decision in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), addressing whether a federal court may count the vote of a judge who dies before the decision is issued. The Court answered this question in the negative, explaining that "federal judges are appointed for life, not for eternity." Since the Court has resolved the question, the Advisory Committee removed this item from its docket.

Suggestion Regarding the Railroad Retirement Act and Civil Rule 5.2. Judge Chagares noted that the U.S. Railroad Retirement Board's General Counsel submitted a suggestion that cases brought under the Railroad Retirement Act should be among the cases excluded (under Civil Rule 5.2) from certain types of electronic access. Petitions for review of the Railroad Retirement Board's final decisions go directly to the courts of appeals, not the district courts; thus, any change would need to be to the Federal Rules of Appellate Procedure. Judge Chagares has appointed a subcommittee to consider the suggestion and to investigate whether any other

benefit regimes would warrant similar treatment. The subcommittee is consulting with the Committee on Court Administration and Case Management.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules.

Action Items

Judge Dow first addressed proposed amendments to three rules published for comment last August: Rule 2002 (Notices), Rule 2004 (Examination), and Rule 8012 (Corporate Disclosure Statement).

Final Approval of Proposed Amendments to Rule 2002 (Notices). Judge Dow explained that Rule 2002 generally deals with requirements for providing notice in bankruptcy cases, and that the proposed changes affect three subparts of the Rule. The first change involves Rule 2002(f)(7), which currently directs notices to be given of the "entry of an order confirming a chapter 9, 11, or 12 plan." Although it is unclear why the rule does not currently require notice of the entry of a Chapter 13 confirmation order, the Advisory Committee concluded that notice of a confirmation order is appropriate under all bankruptcy chapters. The one comment addressing this change argued that the amendment was not needed because at least one court already serves orders confirming Chapter 13 plans. Because that comment addressed a local practice only, however, the Advisory Committee recommended final approval of the amendment as proposed.

The Committee had no questions and Judge Campbell suggested that the Committee vote separately on the proposed amendments to each of the three relevant subparts of Rule 2002. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(f)(7) for approval by the Judicial Conference**.

The second change pertains to Rule 2002(h) which authorizes the court to direct that certain notices to creditors in chapter 7 cases be sent only to creditors that timely file a proof of claim. The proposed amendment would allow the court to exercise similar discretion in chapter 12 and 13 cases and would also conform time periods in the subdivision to the respective deadlines for filing proofs of claim set out in recently amended Rule 3002(c).

One of the comments on Rule 2002(h), while generally supportive, raised two issues. The first issue concerned whether the clerk's noticing responsibilities in a chapter 13 case should extend 30 days beyond the proof-of-claim deadline to give the debtor or trustee time to file a claim on behalf of a creditor. The Advisory Committee rejected this suggestion because the rule does not currently address such a situation in a chapter 7 case and the purpose of the proposed amendment is simply to extend the rule to chapter 12 and 13 cases. In addition, because the rule is permissive, a court already has authority to continue to provide notices until after the expiration of a debtor or trustee's derivative authority to file a proof of claim on behalf of a creditor.

The second issue raised was whether notice of the proposed use, sale, or lease of property of the estate and the hearing on approval of a compromise or settlement should be given to all

creditors otherwise entitled to service of the noticed motion, even if they have not timely filed a proof of claim. No justification was provided for this suggestion and the Advisory Committee saw no reason to amend the rule in this respect. It recommended that Rule 2002(h) be approved as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(h) for approval by the Judicial Conference**.

The final amendment to Rule 2002 concerned subdivision (k) which addresses providing notices under specified parts of Rule 2002 to the U.S. trustee. The change adds a reference to subdivision (a)(9) of the rule, corresponding to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The change ensures that the U.S. trustee will continue to receive notice of this deadline.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(k) for approval by the Judicial Conference**.

Judge Dow next addressed the proposed amendments to Rule 2004. He explained that the rule provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case, and that it includes provisions to compel the attendance of witnesses and the production of documents. The Advisory Committee received a suggestion that the rule be amended to impose a proportionality limitation on the scope of the production of documents and electronically stored information.

The Advisory Committee considered this issue over three meetings. By a close vote, the Committee ultimately decided not to add proportionality language because the rule already allows the court to limit the scope of a document request, and because the change might prompt additional litigation. The Advisory Committee did, however, decide to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

After considering the comments, the Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. Two of the three comments submitted supported the proposal as published. Although a third comment urged inclusion of proportionality language, the Advisory Committee declined to revisit that issue as it had been carefully considered and rejected by the Advisory Committee prior to publication.

Judge Campbell recalled discussion at the Advisory Committee meeting of the fact that debtor examinations in bankruptcy are intended to be broad in scope and of a concern that adding proportionality language might signal an intent to limit those examinations. Judge Dow agreed.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2004 for approval by the Judicial Conference**.

Final Approval of Proposed Amendments to Rule 8012 (Corporate Disclosure Statement). Current Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is based on Federal Rule of Appellate Procedure 26.1. Amendments to Rule 26.1 were promulgated by the Supreme Court on April 25, 2019 and are scheduled to go into effect December 1, 2019 absent contrary action by Congress.

The Advisory Committee's proposed amendments to Rule 8012 track the relevant amendments to Appellate Rule 26.1. An amendment to 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors, and a new subsection (b) requires disclosure of debtors' names and requires disclosures about nongovernmental corporate debtors. Publication of the proposed amendments to Rule 8012 elicited three supportive comments and no suggestions for revision.

Judge Dow noted that, during the consideration of the proposed amendments, one member of the Advisory Committee suggested a need for additional amendments that would extend the Rules' disclosure requirements to a broader range of entities. Judge Dow said such an undertaking would require coordination with the other advisory committees and should not delay the current round of amendments, which are designed to conform Rule 8012 to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 8012 for approval by the Judicial Conference**.

Judge Dow then addressed several proposed amendments that the Advisory Committee considered to be technical in nature and appropriate for the Standing Committee's final approval without publication.

Proposed Amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Rule 2005(c), which addresses conditions to ensure attendance and appearance, refers to provisions of the federal criminal code (previously codified at 18 U.S.C. § 3146) that were repealed more than 30 years ago. The Advisory Committee considered the matter and recommended a technical amendment updating the statutory citation in the rule to 18 U.S.C. § 3142, the part of the criminal code that now addresses conditions to ensure attendance or appearance. Judge Dow explained, however, that after the Standing Committee's agenda book was published there was discussion among the reporters about whether such a change would be appropriate without publication.

Professor Struve explained her concerns with a technical amendment. Current Section 3142 contains a number of features that were not present in the old Section 3146. For example, it refers to statutory authorization for the collection of DNA samples. Presumably it is implausible to think that a debtor apprehended under Rule 2005 would be subjected to DNA collection as a condition of release. But, she suggested, such differences between the former and

present statutory provisions provided reason to send the proposed amendment through the ordinary process of notice and comment.

Professor Capra raised the issue of whether statutory citations should be included in the Rules at all given that statutes change. Perhaps it would be better for the Rule to direct the court to consider "the applicable requirement in the criminal code" in considering conditions to compel attendance or appearance. Professor Kimble suggested that a general reference would not help readers. If a particular statute is relevant it should be cited and updated as needed.

A member suggested that there was little risk that inapposite provisions of § 3142 would be applied under Rule 2005(c), and Professor Bartell stated that bankruptcy debtors are not arrestees, so there is not a realistic danger that they would be subjected to DNA collection.

Judge Campbell observed that the Committee must decide whether citation to an updated statutory cross reference was appropriate, or whether the prior statutory language should be inserted into the rule. In addition, even if only a statutory cross reference was appropriate, the Committee also needed to decide the separate issue of whether approval would be appropriate without public comment.

Professor Garner suggested that "applicable" or "relevant" be inserted prior to the Rule's reference to the "provisions and policies of" the statutory provision.

After further discussion Judge Campbell observed that it seemed clear that the Committee did not support amending the rule as a technical matter without publication, and Judge Dow amended the request on behalf of the Advisory Committee to seek the Standing Committee's approval to publish the amendment for public comment, with a slight revision. Instead of a simple change to replace the existing statutory citation with the new statutory citation, the proposed amendment to Rule 2005(c) would state that in determining the conditions that would reasonably ensure attendance the court would be "governed by the **relevant** provisions and policies of title 18 U.S.C. § **3142**." In addition, a new sentence was added to the Committee Note: "Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the 'relevant' provisions and policies of § 3142."

The Committee approved the proposed amendments to Rule 2005(c) for publication in August 2019.

Judge Dow next discussed proposed technical conforming amendments to Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The amendments would revise these Rules to accord with the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system and would revise Rule 8015 to accord with the pending amendment to Rule 8012.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendments to Rules 8013, 8015, and 8021 for approval by the Judicial Conference without prior publication**.

The final recommended technical change concerned Official Form 122A-1, the first part of a two-part form used to calculate the debtor's disposable income and to determine whether it is appropriate for the debtor to file under Chapter 7 of the Bankruptcy Code. An instruction at the end of Official Form 122A-1 tells the filer not to complete the second part of the form (Official Form 122A-2) if the box at line 14a is checked. Line 14a, in turn, should be checked if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. The Advisory Committee received a suggestion that the instruction at the bottom of the form is often overlooked, and that it should also be included at the end of line 14a. The Advisory Committee agreed that the suggested amendment would make it more likely that the forms would be completed correctly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendment to Official Form 122A-1 for approval by the Judicial Conference without prior publication.**

Professor Gibson next reported on three proposed amendments recommended for publication.

Rule 3007 (Objections to Claims). The proposed amendment addresses the narrow issue of how credit unions should be served with objections to their claims. Rule 3007 was amended in 2017 to clarify that objections to claims are generally not required to be served in the manner of a summons and complaint, as provided by Rule 7004, but instead may be served on most claimants by mailing them to the person designated on the proof of claim. Rule 3007 contains two exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." Rule 3007(a)(2)(A)(ii). The purpose of this exception is to comply with a legislative mandate (enacted as part of the Bankruptcy Reform Act of 1994 and set forth in Rule 7004(h)) providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The Advisory Committee concluded that the exception set out in Rule 3007(a)(2)(A)(ii) is too broad because it does not qualify the term "insured depository institution" by the definition set forth in section 3 of the Federal Deposit Insurance Act, as is the case in Rule 7004(h) itself. Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 which required special service requirements for insured depository institutions as defined under the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under Rule 3007(a)(2)(A)(ii). The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 3007.**

Rule 7007.1 governs disclosure statements in the bankruptcy court. Like the amendment to Rule 8012 discussed earlier, the proposed amendment to Rule 7007.1 would conform the rule to the pending amendments to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7007.1.**

The proposed amendment to Rule 9036 would implement a suggestion from the Committee on Court Administration and Case Management that high-volume-paper-notice recipients (initially defined as recipients of more than 100 court-generated paper notices in a calendar month) be required to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 is changed to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Proposed amendments to Rule 2002(g) and Official Form 410 were previously published in 2017. These proposed amendments (like the proposed amendments to Rule 9036) are designed to increase electronic noticing and service. The proposed amendments to Rule 2002 and Form 410 would create an 'opt-in' system at an email address indicated on the proof of claim. The Advisory Committee has not yet submitted those proposed amendments for final approval, however, because the comments recommended a delayed effective date of December 1, 2021 to provide time to make needed implementation changes to the courts' case management and electronic filing system. Because that is the same date the proposed changes to Rule 9036 would be on track to go into effect if published this summer, the recommended changes to Rules 2002(g) and 9036 and Official Form 410 could go into effect at the same time.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 9036.**

Information Items

Professor Bartell reported on two information items, beginning with the ongoing project to restyle the bankruptcy rules. The style consultants provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. Professor Bartell reported that she and Professor Gibson have been delighted at what the style consultants have done. She thinks the bench and bar will welcome the improvements to the Rules. She praised the style consultants for their work. When the consultants respond to the reporters' comments and produce another draft, the Restyling Subcommittee will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way.

The second information item concerns part of a larger project within the judiciary to address the problem of unclaimed funds in the bankruptcy system. The Committee on the Administration of the Bankruptcy System created an "Unclaimed Funds Task Force" to address this issue. Among other things, the Unclaimed Funds Task Force proposed adoption of a Director's Bankruptcy Form (along with proposed instructions and a proposed order) for applications for withdrawal of unclaimed funds in closed bankruptcy cases. The Advisory Committee concluded that standard documentation would be appropriate, made minor modifications to the draft submitted by the task force, and recommended that the Director of the Administrative Office adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

Judge Campbell praised the restyling effort and observed that the Advisory Committee is on track to consider the first batch of restyled rules at its fall 2019 meeting. Judge Campbell noted that the time is ripe to send a letter to the appropriate congressional leaders making sure they know the restyling effort is underway.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates provided the report of the Advisory Committee on Civil Rules, with support from Professors Cooper and Marcus. Judge Bates noted the Advisory Committee had two action items, one for final approval and the second for publication, and several information items.

Action Items

Rule 30(b)(6). The Advisory Committee recommended final approval of an amendment to Rule 30(b)(6), the rule that deals with depositions of an organization. This issue drew intense interest from the bar. After the proposed amendment was published for comment in August 2018, two public hearings were held. The first hearing in Phoenix drew twenty-five witnesses. Fifty-five witnesses testified at the second hearing in Washington, DC. Some 1780 written comments were submitted, although that number overstates the substance of the comments as many of those comments repeated points made in previous comments.

After considering the public comments, the Advisory Committee approved a modified version of the proposed amendment that was published for comment. Compared with the current rule, the central change made by the revised proposal is to require the party taking the deposition and the organization to confer in advance of the deposition about the matters for examination. Many commenters observed that conferring in advance of the deposition reflects best practice; this modest proposed rule change did not cause great concern from commenters and was uniformly supported by the Advisory Committee. The Advisory Committee made several changes to the proposed amendment as compared with the version that went out for comment. It deleted the proposed requirement that the parties confer about the identity of the witnesses that the organization would designate, and it also deleted the requirement that the parties confer about the "number and description of" the matters for examination. Because the conferring-in-advance requirement would be superfluous in connection with a deposition by written questions, the Advisory Committee added to the Committee Note the observation that the duty to confer about the matters for examination does not apply to depositions by written questions under Rule 31(a)(4).

Other proposed changes to Rule 30(b)(6) were the subject of active discussion and debate, although the Advisory Committee ultimately decided not to recommend them. One change considered by the Advisory Committee would have required the organization to identify the designated witness or witnesses at some specified time in advance of the deposition. Another change would have added a 30-day notice requirement for 30(b)(6) depositions. It was agreed that these changes would have likely required re-publication. After a great deal of discussion, the Advisory Committee determined, in a split but clear vote, not to pursue these amendments.

Professor Marcus agreed with the summary of the process of considering changes to Rule 30(b)(6) as related by Judge Bates and noted that the Standing Committee had also engaged in a vigorous discussion of the issues at previous meetings. Judge Bates noted that the Advisory Committee voted to approve the Committee Note language line-by-line, and virtually word-by-word. The ultimate proposal reflects the hard work of a subcommittee chaired by Judge Joan Ericksen.

A member voiced support for changes to a rule both sides of the bar agree is problematic but wondered whether much is accomplished by imposing a requirement to confer without specifying what must be discussed; this member suggested that the proposed amendment had "no meat on the bone." The Committee Note could provide additional guidance, but the current version does not do so. The member noted the difficulty in changing the rule given the differing views on what should be a required disclosure prior to a deposition. A judge member echoed the concern that the modest amendment does not add that much given that Rules 26 and 37 provide a process to handle any objection to a 30(b)(6) notice.

Judge Bates agreed that the amendment is modest and will not lead to a wholesale change in 30(b)(6) deposition practice. The amendment does put existing best practice in the rule itself, which may lead to improvements in some cases. The Advisory Committee ended up with this limited recommendation because it found agreement within the bar on this narrow issue, while in general other suggestions were met with intense disagreement from one side or the other.

A judge member stated that he understood the disagreement and the reasons for it but wondered why the Committee should endorse such a limited change given the presumption that something notable has changed. Judge Campbell responded that often rules are written for the weakest lawyers and gave his view that the modest change would improve practice in some cases. In his experience, the most frequent complaint from one side is that the witness is not adequately prepared while the most frequent complaint by the other is that the notice is not precise enough on what the matters are for examination. These complaints usually come to him from the lawyers who do not talk to each other in advance of the deposition. He has often thought if you could get people to talk in advance of the deposition both sides would have greater understanding going into the deposition and a better-prepared witness. It is a marginal change but one that will help. Judge Bates stated that this was the sentiment of the Advisory Committee.

Responding to the suggestion that Rules 26 and 37 already provide a process to handle disputes over Rule 30(b)(6) depositions, Professor Marcus noted that those rules address the handling of disputes that have already become combative; the proposed amendment to Rule 30(b)(6), by contrast, would require the parties to confer *before* conflict has a chance to arise. A member noted that he viewed the amendment as a warning of sorts not to engage in gamesmanship. If this does not work, this rule will come back to the Committee. Judge Bates noted that this rule comes back to the Advisory Committee every few years. The Federal Magistrate Judges Association, Professor Marcus noted, supported the proposed amendment while also suggesting that further changes might be warranted depending on how this change works in practice.

Professor Beale complimented the Advisory Committee on the consideration of a huge amount of input received from the public. She stated that Professor Marcus's presentation of that input could serve as a model for how to handle a large volume of comments. Judge Bates and Professor Coquillette echoed similar praise for the work of the Advisory Committee and Professor Marcus. Professor Coquillette emphasized that it is not just the result that matters, it is the public perception of the process. The Reporters and the Committee, he observed, had done much to build confidence in that process among members of the bar. Another member emphasized that with this particular rule, most changes proposed by one party were changes thought to alter the negotiating balance vis-à-vis the opposing party. The Advisory Committee's careful and impressive effort had been to improve the Rule without seeming to favor one side or the other.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 30(b)(6) for approval by the Judicial Conference**.

Rule 7.1. Judge Bates introduced the second action item from the Advisory Committee, a proposal to publish for comment amendments to Rule 7.1, the rule concerning disclosure statements. The first proposed amendment conforms Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) so that a disclosure statement is required of a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement, as that requirement has been rendered superfluous by electronic court dockets.

A second proposed amendment would add a new subsection 7.1(a)(2) requiring parties to disclose the name and citizenship of those whose citizenship is attributable to the party for purposes of determining diversity jurisdiction. A prominent example of the need for this amendment arises in cases where a party is a limited liability company (LLC). Many judges now require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a significant matter, and it protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery − perhaps even on appeal – that there is no diversity.

Judge Bates observed that a member of the Standing Committee had raised a question about the applicability of 7.1(b)(2), which requires a supplemental filing whenever information changes after the filing of a disclosure statement. Given that diversity is determined at the time of filing, a supplemental filing is irrelevant for diversity purposes. Accordingly, Judge Bates suggested a slight modification of the proposed language to 7.1(a)(2) to state: "at the time of filing." This would remove the obligation to make a supplemental filing when it is not relevant to the diversity determination.

A judge member spoke in favor of the proposal, as modified by the friendly amendment just described. He suggested a conforming change to the Committee Note (at page 232, line 273 of the agenda book).

Judge Campbell pointed to the language "unless the court orders otherwise" in proposed new subdivision (a)(2) as a safety valve for situations in which a party has a privacy concern connected to disclosure. In such an instance, the party could seek court protection from public disclosure of the information but would still need to provide the information bearing on the existence (or not) of diversity jurisdiction.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7.1.**

Information Items

Consideration of Proposals to Develop MDL Rules. Judge Bates reviewed the continuing examination of proposals to formulate rules for multidistrict litigation (MDL) proceedings, the work on which has been done by the MDL Subcommittee, chaired by Judge Robert Dow. Judge Bates described efforts by the subcommittee to obtain information on this complex set of issues. He noted that the Judicial Panel on Multidistrict Litigation (JPML) has been very helpful and engaged. Judge Bates observed that the consideration of possible MDL rules has generated a great deal of discussion among lawyers and judges, and the MDL process will likely be improved as a result, even if rules are not ultimately proposed.

Judge Bates described the focus of ongoing work, primarily on four subjects: (1) the use of Plaintiff Fact Sheets (PFSs) – and perhaps Defendant Fact Sheets (DFSs) – to organize MDL personal injury litigation, particularly in MDLs with a thousand or more cases, and to "jump start" discovery; (2) the feasibility of providing an additional avenue for interlocutory appellate review of district court orders in MDLs; (3) addressing the court's role in relation to global

settlement of multiple claims in MDLs; and (4) third-party litigation funding (TPLF), which is not unique to the MDL setting.

TPLF. Judge Bates noted that the general topic of TPLF has received a great deal of attention. TPLF is not unique to MDL proceedings, and indeed might be less prevalent in MDLs than other settings. Many courts require disclosure of TPLF information. TPLF is a rapidly evolving area. The TPLF topic remains on the subcommittee's agenda; it is not clear whether the subcommittee will recommend a rules response to this issue.

Judicial Involvement in MDL Settlements. The subcommittee continues to study judicial involvement in review of MDL settlements. Both the plaintiffs' and the defense bar would like to avoid rules that would require more judicial involvement in settlements. Current practice varies a lot by judge; transferee judges are split on it, with some being very active in settlements and others not. The issues are different than in a class action because every individual MDL plaintiff has an attorney.

PFSs/DFSs. Judge Bates stated that most of the subcommittee's attention has focused on PFSs and interlocutory appellate review. PFSs are used in some 80% of the big MDLs, although there is some definitional issue about what counts as a PFS. DFSs are also often used in large MDLs. A more recent proposal concerns something called an initial census of claims, which is similar to a PFS but more streamlined, and would be used early in the litigation to capture exposure and injury, not expert testimony or causation. This proposal has some support from both sides of the bar, which may mean there is no reason to have a rule. One problem with a PFS is the length of time to get those negotiated – sometimes as long as eight months – as well as the time necessary to produce responsive information. Something simpler that could be routinely used might be advantageous. The subcommittee continues to look for ideas that could get support from transferee judges as well as the plaintiffs' and defense bars.

Interlocutory Review. Judge Bates described the subcommittee's ongoing examination of issues concerning interlocutory review in MDL proceedings, a subject on which plaintiff and defense counsel have very different perspectives. One area of dispute is the utility of review under 28 U.S.C. § 1292(b). Different studies have reached different conclusions. The Advisory Committee received one study on the subject compiled by the defense bar. At a recent event in Boston, the plaintiffs' bar presented additional and contrary data in an oral presentation. The Advisory Committee asked the plaintiffs' bar to put their empirical data in writing. The defense bar felt it had not responded fully to the plaintiffs' presentation. The subcommittee is awaiting further information from both sides of the bar.

Professor Marcus noted that the process of considering rulemaking has generated good discussion about best practices that may ultimately be more beneficial than new rules.

A member asked whether the subcommittee had analyzed the grant rate for § 1292(b) applications by circuit. This member has asked an associate to look at this question but the research is not completed yet. The question, this member suggested, is whether the district court should continue to serve as a gatekeeper for these interlocutory appeals. This member noted that Rule 23(f) works well in the class action context and wondered about comparing the grant rate for Rule

23(f) petitions. Judge Bates responded that the bar is providing that data, and sometimes conflicting data. One might also investigate whether the defense bar sometimes opts not to seek review under § 1292(b). Professor Marcus indicated that the data are currently contested.

A judge member asked why the proposal under discussion would expand the availability of interlocutory review only for mass tort MDLs and not other complex litigation. Professor Marcus characterized the current issue as responding to the "squeaky wheel" and pointed to proposed legislation that addresses claims in the MDL setting. Professor Marcus noted that in rulemaking applicable to one type of case, you will always have to define what the rule does not apply to, which can be difficult. An attorney member suggested that expanded interlocutory review should apply to all MDLs, not merely a subset of them. Judge Bates observed that the more one increases the number of MDLs eligible for expanded interlocutory review, the harder it would become to provide expedited treatment for those appeals.

Judge Campbell noted that requiring PFSs in cases over a certain threshold, for example, MDLs over a thousand cases, will raise the issue that MDLs grow over time; by the time a given MDL hits the threshold, it might be late to require a PFS. Professor Marcus noted that because MDL centralization may often occur before a given threshold number of cases is reached, it is difficult to draft an applicable rule. Who monitors this, and how do you write that in a rule? Judge Bates stated this is an example of why transferee judges say they need flexibility.

Another judge member noted that there are two different things going on with regard to PFS proposals. The first is use of the PFS to jump start discovery. The second is use of the PFS to screen out meritless cases. These are two different objectives, which may require different solutions.

Social Security Disability Review. The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the handling of actions to review disability decisions under 42 U.S.C. § 405(g). This proposal originated from the Administrative Conference of the United States. Professor Cooper has worked on this effort along with the chair of the subcommittee, Judge Sara Lioi.

The Social Security Administration (SSA) is very enthusiastic about the idea of national rules, even the pared-down discussion draft that the subcommittee has discussed with SSA and other groups most recently. The DOJ is not as enthusiastic but is not voicing an objection. The plaintiffs' bar is coalescing in opposition to national rules, which it views as unnecessary. The subcommittee met on June 20, 2019 with claimants' representatives, the SSA, the DOJ, magistrate judges, and others who are familiar with present practices. The purpose of the meeting was to focus on getting input from the claimants' bar. It was a good meeting with positive input that will lead to changes in the working draft.

Professor Cooper stated the subcommittee hopes to make a recommendation at the Advisory Committee's October meeting on whether to proceed further with a rulemaking proposal on this topic. Such rulemaking, he noted, would be in tension with the important principle of trans-substantivity in the rules. Even so, Professor Cooper cautioned that the subcommittee should not lightly turn away from a proposal that could improve the lives of those

who deal with these cases. Social Security cases, he observed, constitute a large share (8%) of the federal civil docket. Another issue is how to draft a rule that would supersede undesirable local rules while permitting the retention of valuable ones.

Professor Coquillette emphasized the need to exercise caution when departing from the principle of trans-substantivity in rulemaking. As soon as one permits the insertion into the national Rules of substance-specific provisions, one increases the risk of lobbying by special interests. If there is a need for rules on Social Security review cases, one solution might be to create a separate set of rules for that purpose.

Other Information Items. Judge Bates briefly summarized the following additional information items:

(1) Questions have arisen about the meaning of the provisions in Civil Rule 4(c)(3) for service of process by a United States marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service.

(2) The Civil and Appellate Rules Committees have formed a joint subcommittee to consider whether to amend the rules – perhaps only the Civil Rules – to address the effect (on the final judgment rule) of consolidating initially separate actions. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely the actions have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291. The subcommittee has begun its deliberations with a conference call to discuss initial steps. The opinion in *Hall v. Hall* concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly."

(3) Rule 73(b)(1) was reviewed after the Advisory Committee received reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that "[a] district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral." No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature, but there may be a work-around that would obviate the need for a rule. The Advisory Committee has suspended consideration of possible rule amendments while a system fix is explored.

(4) The Advisory Committee continues to consider the privacy of disability filings under the Railroad Retirement Act. The Appellate Rules Committee is taking the lead because review of those cases goes to the courts of appeals in the first instance.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules. Judge Livingston explained that the Advisory Committee had one action item – the proposed amendment to Rule 404(b) for final approval – and three information items related to Rules 106, 615, and 702.

Proposed Amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts). The Advisory Committee sought final approval of proposed amendments to Rule 404(b). Professor Capra explained that the Advisory Committee had been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. He stated that the Advisory Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law because such amendments would make the rule rigid and more difficult to apply without achieving substantial improvement.

The Advisory Committee determined, however, that it would be useful to amend Rule 404(b) in some respects, especially with regard to the notice requirement in criminal cases. As to that requirement, the Committee determined that the notice should articulate the purpose for which the evidence will be offered and the reasoning supporting the purpose. Professor Capra noted issues that the Committee had observed with the operation of the current Rule. In some cases a party offers evidence for a laundry list of purposes, and the jury receives a corresponding laundry list of limiting instructions. Some courts rule on admissibility without analyzing the non-propensity purpose for which the evidence is offered. And some notices lack adequate specificity.

Professor Capra stated that the proposal to amend Rule 404(b) was published for comment in August 2018. Given how often 404(b) is invoked in criminal cases, Professor Capra expected robust comments, but only a few comments were filed, and they were generally favorable. In response to public comments and discussion before the Standing Committee, the Advisory Committee made two changes to the proposed Rule text as issued for public comment. Most importantly, the Committee changed the term "non-propensity" purpose to "permitted" purpose. Secondly, the Committee changed the notice provision to clarify that the "fair opportunity" requirement applies to notice given at trial after a finding of good cause.

A Committee member suggested replacing the verb "articulate" in the proposed amendment because, he suggested, the term usually refers to a spoken word rather than written material. He noted that the term is not used elsewhere in the Federal Rules. Professor Capra pointed out that the proposed amendment was an effort to get beyond merely stating a purpose. The terms "specify" or "state" were suggested as substitutions for "articulate." Judge Campbell stated that the use of the term "articulate" suggests both identifying the purpose and explaining the reasoning. Professor Capra noted that the word "articulate" is what the Advisory Committee agreed to, and it suggests more rigor. A DOJ representative noted that the language in the proposed amendment was the subject of painstaking negotiation, and that she preferred to retain

the negotiated language to avoid unintended consequences. The Committee determined to retain the term "articulate."

A judge member noted that the Committee Note still used the term "non-propensity" purpose even though that term had been removed from the text of the rule. Professor Capra explained that the use of the term was intentional and resulted from significant discussion at the Advisory Committee's meeting. Judge Campbell added that part of the reason for retaining the language in the Committee Note was to provide guidance to judges in applying the rule. Judge Livingston explained that the term propensity is embedded in caselaw and the Committee Note's use of that term would provide a good signal to readers to focus their caselaw research on that term.

Another judge member asked about the use of the term "relevant" in the Committee Note's statement that "[t]he prosecution must … articulate a non-propensity purpose … and the basis for concluding that the evidence is relevant in light of this purpose." Judge Livingston explained that this passage reflected a complex underlying discussion, and that the Committee was attempting to avoid undue specificity in the Committee Note.

Upon motion by a member, seconded by another, and on a voice vote: **The Committee decided to recommend the amendments to Rule 404(b) for approval by the Judicial Conference**.

Professor Capra thanked the DOJ for all its work on the rule. A DOJ representative noted the sensitivity of Rule 404(b) and thanked Professor Capra, Judge Livingston, and prior chair Judge Sessions for more than five years' work on the rule.

Information Items

Professor Capra summarized the Advisory Committee's ongoing consideration of possible amendments to Rule 106, sometimes known as the rule of completeness. The Advisory Committee is considering two kinds of potential amendments – one that would provide that a completing statement is admissible over a hearsay objection, and another that would provide that the rule covers oral as well as written or recorded statements. In an illustrative scenario, the defendant makes the statement "this is my gun, but I sold it two months ago," and the prosecution offers the first portion of the statement and objects to the admission of the latter portion on hearsay grounds. Some courts admit a completing oral statement into evidence over a hearsay objection, but other courts do not admit the completing statement. The Advisory Committee reached consensus on the desirability of acting to resolve the conflict but is carefully considering how such an amendment should be written and what limitations should govern when such a completing statement should be admitted over a hearsay objection. The Advisory Committee has received information about how completing oral statements are handled in other jurisdictions, including California and New Hampshire.

The next information item concerns Rule 615, the sequestration rule. The Advisory Committee is considering whether to propose an amendment addressing the scope of a Rule 615 order. The Rule text contemplates the exclusion of witnesses from the courtroom; one question is

whether a Rule 615 order can also bar access to trial testimony by witnesses when they are outside the courtroom. Most courts have answered this question in the affirmative, but others apply a more literal reading of the rule. The Advisory Committee is considering an amendment that would specifically allow courts discretion to extend a Rule 615 order beyond the courtroom. The rule would not be mandatory. One potentially challenging issue is how to treat trial counsel's preparation of excluded witnesses.

Professor Capra next reported on the Advisory Committee's ongoing work with regard to Rule 702. In September 2016 the President's Council of Advisors on Science and Technology issued a report which contained a host of recommendations for federal scientific agencies, the DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of possible changes to Rule 702. Judge Livingston appointed a Rule 702 Subcommittee to study what the Advisory Committee might do to address concerns relating to forensic evidence. In fall 2017 the Advisory Committee held a symposium on forensics and *Daubert* at Boston College School of Law.

Following discussion by the Advisory Committee, the main issue the subcommittee is considering concerns how to help courts to deal with overstatements by expert witnesses, including forensic expert witnesses. Professor Capra noted that the DOJ is currently reviewing its practices related to forensic evidence testimony, and some have suggested waiting to see the results of the DOJ's efforts. Judge Livingston stated that one threshold issue is whether the problems should be addressed by rule, or perhaps by judicial education. Judge Livingston thanked the DOJ and Professor Capra for putting together a presentation for the Second Circuit on forensic evidence that is available on video. Professor Capra noted that there will be a miniconference in the fall at Vanderbilt Law School to continue discussion of these issues and *Daubert*.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy presented the report of the Advisory Committee on Criminal Rules, which consisted of four information items.

Judge Molloy first reported on the Advisory Committee's decision not to move forward with suggestions that it amend Rule 43 to permit the court to sentence or take a guilty plea by videoconference. The Advisory Committee has considered suggestions to amend Rule 43 several times in recent years. The first suggestion came from a judge who assists in districts other than his own and who sought to conduct proceedings by videoconference as a matter of efficiency and convenience. The Advisory Committee concluded that an amendment to Rule 43 was not warranted to address that circumstance.

The second suggestion to amend Rule 43 came from the Seventh Circuit's opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), which included the specific statement that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. In *Bethea*, the defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to

broken bones, doing so might have been dangerous for him. After Bethea was permitted to appear by videoconference for his plea and sentencing as requested by his counsel, Bethea appealed and argued that the physical-presence requirement in Rule 43 was not waivable. The Seventh Circuit in *Bethea* concluded that even under the exceptional facts presented "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via videoconference." *Id.* at 867. Advisory Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment.

A subcommittee that was formed to consider the issue and chaired by Judge Denise Page Hood recommended against amending the rule to permit use of videoconferencing for plea and sentencing proceedings. The subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of videoconferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three reasons. First, and most important, the subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where videoconferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Finally, the subcommittee was concerned that there would inevitably be constant pressure from judges to expand any exception to the requirement of physical presence at plea or sentencing. The Advisory Committee unanimously agreed with the subcommittee's recommendation not to amend Rule 43.

Shortly after that determination, the Advisory Committee received a request for reconsideration of that determination. Judges who serve in border states asked for the ability to use videoconferencing for pleas and sentencing. These judges explained that their courts were dealing with thousands of cases brought under 8 U.S.C. § 1326 against defendants charged with illegal reentry. Their districts cover vast distances and, under existing rules, either the judge must travel, or the U.S. Marshals Service must transport defendants. While sympathetic to the issue, the Advisory Committee determined that it would be undesirable to open the door to videoconferencing for these critical procedures. There is a slippery slope and once exceptions are made to the physical presence requirement, exceptions could swallow the rule in the name of efficiency.

Professor King noted that several years ago when the rules were reviewed with an idea of updating them to account for technological advancements, including enhanced audio/visual capabilities, some rules were amended but Rule 43's physical-presence requirement was left unchanged.

Judge Molloy next addressed the Advisory Committee's consideration of a suggestion received from a magistrate judge to amend Rule 40 to clarify the procedures for arrest for violations of conditions of release set in another district. The issue arises from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3). Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily be heard by the judicial officer who ordered the release. After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Advisory Committee decided Rule 40 could benefit from clarification but agreed with an observation by Judge Campbell that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Advisory Committee decided to take no action at this time. Judge Bruce McGiverin greatly assisted the Advisory Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

Judge Molloy next introduced the Advisory Committee's consideration of Rule 16, an issue he noted ties in with the Evidence Rules Advisory Committee's report about expert testimony as well as Civil Rule 26's requirements for expert discovery. Judge Molloy noted that he has served on the Advisory Committee for eleven years and for most of that time Rule 16 has been on the agenda. Judge Kethledge chairs the Rule 16 Subcommittee that has been asked to review suggestions to amend Rule 16 so that it more closely follows Civil Rule 26's provisions for disclosures regarding expert witnesses. Back in the early 1990s, there was a suggestion that discovery rules on experts in criminal cases be made parallel to rules governing civil cases. The Criminal Rules did not change, although changes to Civil Rule 26 went forward.

To address the questions before the subcommittee, Judge Kethledge convened a miniconference to discuss possible amendments to Rule 16. There was a very strong group of participants, from various parts of the country, including six or seven defense practitioners, and five or six representatives from the DOJ. Most had significant personal experience with these issues and had worked with experts.

Judge Kethledge organized discussion at the miniconference into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule. Second, they were asked to provide suggestions to improve the rule.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures with sufficiently detailed information to allow them to prepare to cross examine the witness. In contrast, the DOJ representatives stated that they were unaware of problems with the rule and expressed opposition to making criminal discovery more akin to Rule 26.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, participants made significant progress in identifying some common ground. The DOJ representatives said that framing the problems in terms of timing and sufficiency of the

notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the DOJ personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The subcommittee came away from the miniconference with concrete suggestions for language that would address timing and completeness of expert discovery.

Judge Molloy stated that the subcommittee plans to present a proposal to amend Rule 16 at the Advisory Committee's September meeting.

A DOJ representative noted that the Department views this less as a need for a rule change and more as a need to train lawyers so that prosecutors and defense counsel alike understand what the rules are. Prosecutors need to understand what the concerns are and the Department needs to conduct training to ensure this understanding. The DOJ has worked with Federal Public Defender Donna Elm to highlight the problematic issues; a training course presented by the DOJ's National Advocacy Center will be shown to all prosecutors. Even if a rule change were to go forward, it would take years. Collaboration on training means that the Department can begin to address problems now.

Judge Molloy provided a brief update on progress in implementing the recommendations of the Task Force on Protecting Cooperators. Task Force member Judge St. Eve reported on the status of efforts by the Bureau of Prisons to implement certain recommendations. One recommendation is to adopt provisions for disciplining inmates who pressure other inmates to "show their papers."

Judge Campbell thanked the advisory committee chairs and reporters for all the work that goes into the consideration of every suggestion. He noted that even a five-minute report on a given issue may be the result of long and painstaking effort.

OTHER COMMITTEE BUSINESS

Proposal to Revise Electronic Filing Deadline. Judge Chagares explained his suggestion that the Advisory Committees study whether the rules should be amended to move the current midnight electronic-filing deadline to earlier in the day, such as when the clerk's office closes in the respective court's time zone. The Supreme Court of Delaware has adopted such a practice. Judge Campbell delegated to Judge Chagares the task of forming a subcommittee to study the issue and provide an initial report at the January meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019, and she described several bills that have been introduced or reintroduced that are of interest to the rules process or the courts generally. There has been no legislative activity to move these bills forward. Ms. Wilson reviewed several pieces of legislation of general interest to the courts. Scott Myers provided an overview of H.R. 3304, a bipartisan bill introduced the week before the Committee meeting that would extend for an additional four years the existing exemption from the means test for chapter seven filers who are certain National Guard reservists. The bill is expected to pass; absent passage, an amendment to the

Bankruptcy Rules would be required. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Judge Campbell discussed the Judiciary's strategic planning process and the Committee's involvement in that process. He solicited comments on the Committee's identified strategic initiatives and the extent to which those initiatives have achieved their desired outcomes. Judge Campbell also invited input on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020. Judge Campbell will correspond with the Judiciary's planning coordinator regarding these matters.

Procedure for Handling Public Input Outside the Established Public Comment Period. Judge Campbell summarized prior discussions by the Committee concerning how public submissions received outside the formal public comment period should be handled, including submissions addressed directly to the Standing Committee. Professor Struve explained the revised draft principles concerning public input during the Rules Enabling Act process and welcomed additional comments on the draft. These procedures are proposed to be posted on the website for the Judiciary. *See* Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process (agenda book, p. 495).

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the principles concerning public input.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Phoenix, Arizona on January 28, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 3

THIS PAGE INTENTIONALLY BLANK

Minutes of the Spring 2019 Meeting of the

Advisory Committee on the Appellate Rules

April 5, 2019

San Antonio, Texas

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 5, 2019, at 8:30 a.m., at the Hyatt Regency Riverwalk Hotel in San Antonio, Texas.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Judge Paul J. Watford. Solicitor General Noel Francisco was represented by Mark Freeman, Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, Advisory Committee on the Appellate Rules; Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules, and Liaison Member, Advisory Committee on the Appellate Rules; Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Ahmed Al Dajani, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

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

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Judge Paul Watford, a new member of the Committee. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the dinner the night before. He noted that while prior members of the Committee have gone on to become judges, a current member of the Committee, Chris Landau, has been

nominated to be ambassador to Mexico, an apparent first for the Committee. Mr. Landau stated that it has been a privilege to serve on this Committee and that he was happy that he was able to make this meeting. A judge member added that prior members of the Committee have also gone on to become Justices of the Supreme Court.

II. Report on Proposed Amendments Submitted to the Supreme Court

Judge Chagares reported that the proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 had been sent to the Supreme Court. These proposed amendments mostly reflect the move to electronic filing and the resulting reduced need for proof of service. In addition, the proposed amendment to Rule 26.1 changes the disclosure requirements of that Rule.

These proposed amendments appear to be on track to take effect on December 1, 2019. The agenda book (page 65) includes a list of pending legislation that would effectively amend the Federal Rules; none of the pending legislation targets a Federal Rule of Appellate Procedure.

III. Approval of the Minutes

The draft minutes of the October 26, 2018, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

Proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing, were published for public comment. There has been only one comment submitted; that comment agreed with the proposed amendment to Rule 40(a)(3). By contrast, the proposed amendment to Civil Rule 30(b)(6) drew over 2000 comments.

Judge Chagares observed that he has also heard informally from judges who approved of these proposed amendments.

The Committee unanimously gave final approval of these proposed amendments for submission to the Standing Committee.

V. Discussion of Matters Before Subcommittees

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

Professor Sachs presented the subcommittee's report regarding Rule 3. (Agenda Book page 99). The style consultants commented on the proposal since the

publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Professor Sachs noted that this issue regarding the content of the notice of appeal has been under consideration by the Committee for some time. The current rule calls for the designation of the judgment or order "being appealed," which is ambiguous: does it refer to the judgment or order which can be the basis for moving the case up to the appellate court—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—or to the substantive issues to be reviewed by the appellate court? For example, an evidentiary ruling might be made along the way to a final judgment; the appeal is from the final judgment, but it may be that the evidentiary issue is the one sought to be reviewed.

This ambiguity leads some to list in the notice of appeal the rulings sought to be reviewed. Some courts use an expressio unius rationale and treat a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that order, rather than reaching all the interlocutory orders that merged into the judgment. A memo by the Rules Law Clerk showed splits within and across circuits.

In addition, Civil Rule 58 requires that a judgment be set out in a separate document. If that doesn't happen (and it doesn't always happen), the judgment is considered entered once 150 days have run from an order that resolves all remaining claims. If a notice of appeal designates the final order, some courts construe the notice of appeal as limited to the claims disposed of in that order, rather than reaching earlier orders that merge into the final judgment.

The proposed amendment to Rule 3(c)(1)(B) would replace the phrase "being appealed" with the phrase "from which the appeal is taken." A new (c)(4) would refer to the merger rule and clarify that there is no need to include in the notice of appeal orders that merge into the designated judgment or order. A new (c)(6) would repudiate the expressio unius rationale. A new (c)(5)(A) would clarify that a notice of appeal that designates an order that disposes of all remaining claims in a case includes the final judgment.

The subcommittee decided to refer to the merger rule without describing it in the text of the Rule. The fear is getting something wrong in the description of the merger rule.

The subcommittee decided to delete the phrase "or part thereof" from Rule 3, because it is part of the problem. On the other hand, the subcommittee thought that it should be possible for an appellant to deliberately exclude some matters from the appeal.

The subcommittee left to the full Committee the question of whether to add the word "appealable" before the word "order" in proposed Rule 3(c)(1)(B)(ii). Is it confusing? How about the alternative—shown in option B—of adding the phrase "that supports appellate jurisdiction" after the word "order"?

When a party moves for reconsideration or for a new trial, that party can wait until that motion is decided and then appeal. But if the notice of appeal filed after the disposition of the motion designates only the order disposing of that motion, some courts will treat the notice of appeal as not including the underlying judgment. The proposed Rule 3(c)(5)(B) would avoid the accidental loss of appellate rights in these circumstances.

Option C shows a more significant restyling of Rule 3(c), reordering the provisions. There are advantages as well as disadvantages to this restructuring of the Rule.

Form 1 is replaced by Form 1A and Form 1B, in line with the changes to Rule 3(c)(1)(B).

A lawyer member asked if a pro se litigant who used Form 1B (which is designed for appeals from appealable orders) rather than Form 1A (which is designated for appeals from final judgments) when appealing from a final judgment would be okay. Professor Sachs said yes, if the litigant designated the final order.

Judge Chagares noted that the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), emphasized that filing a notice of appeal is a simple non-substantive act; this proposed amendment is designed to bring that back.

A judge member stated that the committee had done excellent work and that he preferred Option A because it is clearest and most straightforward. Another judge member echoed support for Option A, particularly coupled with the changes to the forms.

Judge Chagares asked about cross appeals. Professor Sachs stated that they would be left as-is. He added that the proposed amendment also did not change the requirement of Rule 4(a)(4)(A) that a party who intends to challenge an order disposing of certain post-judgment motions must file a notice of appeal or an amended notice of appeal.

The Reporter invited discussion of the question whether to delete the phrase "or part thereof." A judge member inquired about cross appeals and whether there were any rules about them. Professor Sachs responded that the circumstances in which a cross appeal is required are left to caselaw. The Reporter added that Rule 4(a)(3) does not specifically refer to cross appeals, but instead simply empowers any

party to file its own notice of appeal within 14 days after another party has filed a notice of appeal.

Mr. Freeman stated that the subcommittee had done fantastic work, but he was concerned whether the proposed subparagraph 6—which would enable a party to limit the appeal—would constrain a cross appeal. Professor Sachs responded that the current Rule permits a party to designate a "part thereof," so there would be no change in this regard.

Mr. Freeman voiced concern that the proposed subparagraph 6 would give rise to new fights about whether an issue was beyond the scope of the notice of appeal and give rise to more caselaw on this question. The Reporter echoed Professor Sachs' point about the existing Rule.

Mr. Freeman responded that he got the point in theory, but he was concerned how it would work in practice. He understood that the current Rule allows such a designation, and therefore parties could fight about the scope of the appeal. He nevertheless thought that the proposed subparagraph 6 would focus litigants' attention on the issue, and therefore invite these fights.

A judge member suggested that people should have the opportunity to limit their appeals if they want. A lawyer member stated that Mr. Freeman's point was well taken. While the existing Rule does allow for designation of a "part thereof," the proposed subparagraph 6 would be more prominent and litigants would use it strategically. Perhaps there shouldn't be any limiting done in the notice of appeal, leaving that to the briefs. A judge member wondered if the subparagraph was necessary, given the proposed deletion of the phrase "or part thereof."

Mr. Freeman said that litigants will use subparagraph 6 strategically, trying to limit what can be considered on appeal. He pointed to practice under section 1292(b), where parties have litigated all the way to the Supreme Court whether the appeal reaches the entire order or only the particular question certified.

Professor Sachs argued for retaining proposed subparagraph 6. He imagined a single piece of paper that does six things, some of which are immediately appealable, and some that are not, such as granting a preliminary injunction and disposing of various other matters. An unlimited notice of appeal would invite fights about whether the district court retained jurisdiction regarding those other matters. Both parties might want to limit the appeal; this has to be balanced against the concern that increased attention that might be brought by proposed subparagraph 6 could increase strategic behavior.

A lawyer member noted the mission creep in this project. We fixed the original expressio unius problem, and then fixed the Forms. His initial thought was to simply

delete "or part thereof," but came around to the view that we have a litigant-directed process, and why should we force people to appeal who don't want to?

Judge Chagares suggested that perhaps the notice of appeal should simply open the door, leaving any limitations to the briefs. A judge member suggested taking out subparagraph 6, but not "or part thereof." Judge Campbell observed that doing so might not really kill the expressio unius approach. A different judge member suggested perhaps moving the last clause of proposed subparagraph (6)—"additional designations do not limit the scope of the appeal"—to proposed subparagraph (4).

Professor Sachs reiterated his concern that without something like subparagraph 6 an appeal from a preliminary injunction that was contained in the same order as a decision on a motion in limine could raise the possibility of divesting the district court of jurisdiction over the issues involved in the motion in limine. Mr. Freeman responded that appeals from such orders happen all the time without a problem.

The Reporter pointed to the example of cases involving multiple claims and multiple parties; the proposed subparagraph (6) leaves parties with the ability to appeal only with regard to some claims or some parties.

A lawyer member suggested that the notice of appeal should not be a means to strategically limit the jurisdiction of the court of appeals. A different lawyer member responded that "strategically limit" is not necessarily a negative, and that an appellant is the master of the appeal. A judge member added that if a party chooses to accept a decision, it is not a bad thing that a court lacks jurisdiction over an issue that the party doesn't want the court to decide.

Mr. Freeman stated that, as the *Garza* decision explained, the notice of appeal is a simple document. Proposed subparagraph (6) risks giving it greater legal effect and building a body of law about what is within the scope of the appeal. Judge Chagares suggested that the Committee Note say that the briefs are the place to focus the issues and remove both proposed subparagraph (6) and "or part thereof."

Professor Sachs stated that there are three issues to consider. First, how much of a change in practice would be brought about by bringing attention to an option that litigants have today? Second, should litigants be able to limit the notice of appeal? Third, is estoppel enough to deal with the issue?

A lawyer member found himself on the fence. He doesn't especially like proposed subparagraph (6) and generally thinks simpler is better, but nevertheless thinks that it is important to have some mechanism to provide some assurance that a party can put something on the table without putting everything on the table. A judge member suggested that the briefs could do that, prompting the lawyer member to respond that the notice of appeal is jurisdictional while the brief is not. A different

judge member stated that jurisdiction cannot be created or destroyed by rule. Professor Sachs stated that the statute requires a notice of appeal, and the Rules can specify the content of the notice of appeal.

A lawyer member stated that the phrase "may limit the appeal" is the problem. Professor Sachs suggested rephrasing: "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited."

A judge member asked about cross appeals, and Professor Sachs responded that this would leave unchanged the principles governing cross appeals.

Discussion then turned to the issue of whether the text of the Rule should state the merger rule, with one judge member noting that the proposed Rule invites the question, "which orders merge?" Judge Campbell suggested a brief explanation of the merger rule in the Committee Note. Judge Chagares observed that one reason to not state the merger rule in the text of the Rule is to avoid stunting its growth. A lawyer member observed that while the basic rule is simple, it's never as simple as that. Professor Sachs pointed to two of the curlicues: 1) can a litigant throw a final judgment to secure an appeal? and 2) what merges into an interlocutory order?

Ms. Womeldorf suggested replacing the word "includes" in the proposed subparagraph 4 with the word "encompasses."

Professor Struve noted that there might be some impact on bankruptcy and tax appeals, and Professor Coquillette added that the proposed changes should not go out for publication prior to a cross-committee check. Judge Campbell instructed the Reporter to check with bankruptcy and tax before going to the Standing Committee and come back to this Committee only if needed.

Judge Chagares added that the Committee Note should state that the brief is the place to limit issues.

Mr. Freeman stated that the changes suggested in the discussion led to material improvement.

Judge Campbell added that the word "additional" in proposed subsection 6 should instead be "specific."

A judge member suggested some changes would be necessary to the Committee Note to reflect these changes to the text. Judge Campbell observed that it is never a good idea to draft Committee Notes by committee. The Reporter will draft a revised Note and circulate it to the Committee by email.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

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

Christopher Landau presented the subcommittee's report regarding a proposal to amend Rule 42(b). (Agenda Book page 119). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Mr. Landau recounted that this matter came up because sometimes clients want to settle, but cannot be assured that the court of appeals will dismiss the appeal. That's because the current Rule provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due," and some courts of appeals will refuse to dismiss. Prior to restyling, the "may" was "shall."

There are two options presented. The first works from the existing Federal Rule of Appellate Procedure. The second works from the existing Supreme Court Rule. The differences between the two have narrowed, especially after incorporating suggestions from the style consultants.

A judge member spoke in support of the first option. Judge Chagares agreed, noting that one advantage of the Supreme Court variant was that it might be the path of least resistance, but that advantage was lost with the styling changes. Mr. Landau explained that there was more detail in the Supreme Court variant, but that such detail was not necessary in this Rule, because the Rule dealing with motions covers that detail.

The key change being proposed is changing the word "may" in Rule 42(b) to "must." Second, the sentence dealing with a stipulated dismissal and the sentence dealing with an appellant's motion to dismiss would be broken out into two separate subsections with headings to make the distinction between the two clearer.

The third proposed change is a bit trickier. The current Rule includes the cryptic prohibition that "no mandate" may issue without a court order. The proposed amendment would unpack that prohibition, and add a provision to deal with situations, such as class actions and the Tunney Act, that require court approval of settlements.

Finally, a new subsection would be added to deal with appeals from agency orders.

Judge Campbell asked about interlocutory appeals: if an interlocutory appeal is dismissed, is some court action required to remand the case to the district court? Ms. Dodszuweit stated that no remand is necessary in that situation, and that the proposed language is okay from the perspective of Clerks. In some circumstances, Clerks have found it necessary to issue orders in lieu of mandates to make clear that jurisdiction is being returned to the district court. Mr. Freeman suggested that a mandate in the sense of returning a case to the district court would be necessary if an appeal from a preliminary injunction were dismissed. A lawyer member was not sure of this, because the appeal is simply being dismissed. An academic member pointed out that the proposal eliminates this problem by eliminating the phrase "no mandate."

Judge Chagares noted the style change in proposed Rule 42(b)(3) from "judicial" to "court." The Reporter explained that the Court of Appeals for the Ninth Circuit had some concerns about the proposed amendment because in that circuit mediators and the Appellate Commissioner are empowered to remand cases. Judge Campbell suggested that there was no distinction between court action and judicial action. An academic member voiced support for retaining the word "judicial" and leaving the Court of Appeals for the Ninth Circuit to rely on invoking Appellate Rule 2.

Mr. Freeman stated that the word "remand" was ambiguous; we usually think of appellate courts as affirming, reversing, or vacating. A lawyer member stated that we do not need any of the language after the dash, but a judge member spoke in favor of retaining the language after the dash. This judge member also suggested referring to "any relief beyond the mere dismissal of an appeal" rather than "any order . . . ."

A judge member asked about sanctions; a lawyer member responded that a court can impose sanctions even when it does not have jurisdiction over a case.

Judge Campbell suggested requiring "action by a judge" rather than "court action," but a judge member responded that "court action" was needed so that the court can delegate. An academic member stated that he just learned last night about the Appellate Commissioner in the Ninth Circuit and did not want to put it in this Rule.

A lawyer member voiced concern about the sentence dealing with court approval of a settlement, noting that it may not be accurate to say that a court of appeals may approve the settlement or remand for the district court to consider whether to approve it. For example, a bankruptcy court may need to approve a settlement.

A different lawyer member suggested deleting all of subsection (b)(3) after the dash. The Reporter stated that in light of *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), it was useful to specifically mention

that an order vacating a decision below required court action. The lawyer member suggested making that point in the Committee Note. An academic member thought that this was a helpful illustration and did not pose an expressio unius problem. Mr. Freeman suggested calling out *Bonner Mall* by referring to vacating, but not including any other example. A judge member liked including the reference to remand as an example of what is not a mere dismissal. This judge member also suggested adding "may consider whether to" before "approve the settlement or remand . . . ."

Mr. Freeman withdrew his suggestion about not including any other example, and suggested that the subtitle for subsection (b)(3) be changed from "Other Orders" to "Other Relief." Judge Campbell suggested a corresponding change to the opening language of subsection (3): "A court order is required for any relief beyond . . . . "

In response to a concern raised by a judge member about how this would affect practice in the Ninth Circuit, Judge Campbell stated that the Court of Appeals could authorize its delegate to act.

An academic member suggested adding a provision that this Rule does not affect any law that requires court approval of a settlement, noting, in response to a question by Judge Campbell, that without it someone could argue that such laws were superseded by this Rule. Judge Campbell noted that this could be stated in the Committee Note.

Mr. Freeman then raised a concern about redundancy in connection with proposed Rule 42(c), which states that, for purposes of Rule 42(b), the term "appeal" includes a petition for review or an application to enforce an agency order. The Reporter explained that extraordinary writs such as mandamus were not included in proposed Rule 42(c) because there is no equivalent in the section of the Rules dealing with extraordinary writs to Rule 20, which makes many Rules—including Rule 42—applicable to review and enforcement of agency orders. But while Rule 20 states that "appellant" includes a petitioner or applicant, and "appellee" includes a respondent, it does not state that "appeal" includes a petition for review or an application to enforce an agency order. Mr. Freeman did not think it necessary to add that provision and stated that some statutes style review of agency orders as appeals.

Judge Campbell suggested moving the proposed Rule 42(c) to the Committee Note, and a judge member suggested referring to Rule 20 in the Committee Note.

Mr. Freeman then raised a concern about the reference to "fees" in Rule 42(b)(1), noting that some litigants have taken the position that this includes attorney's fees under the Equal Access to Justice Act. He suggested that the phrase "to the clerk" be inserted after the word "pay," but agreed with another member's suggestion that the word "court" be inserted before the word "fees," instead.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

Judge Chagares thanked Mr. Landau for raising this issue, noting that it demonstrated the virtue of having lawyers—not just judges—on the Committee.

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

The Reporter presented the subcommittee's report regarding its ongoing review of Rules 35 and 40. (Agenda Book page 137). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

The subcommittee considered, but rejected, a number of options, including (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing; (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21; (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

Instead, the subcommittee recommended more modest changes. It recommended adding three provisions to Rule 35: (1) if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc; (2) a petition for rehearing en banc may be treated by the panel as a petition for panel rehearing; and (3) if the criteria for en banc review is not met, panel rehearing under Rule 40 may be available.

It also recommended adding to Rule 40 a provision echoing the first addition to Rule 35: if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

The Reporter then noted—speaking only for himself and not the subcommittee—that on further reflection, it might be appropriate to pare down the proposal still further and *not* provide that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc. The concern is with judges on the panel, such as senior judges and visiting judges, who are not eligible to vote for rehearing en banc.

A judge member suggested cutting the provision permitting a panel to treat a petition for rehearing en banc as a petition for panel rehearing, voicing a concern about a panel cutting off the full court. The Reporter responded that the idea was not to let the panel cut off the full court, but rather to allow the panel to fix something on

its own; he suggested adding the word "including" before the phrase "a petition for panel rehearing."

An academic member suggested that the same approach could be taken to proposed Rule 35(a)(2) and the word "including" added there as well, stating that maybe visiting judges should be able to flag an issue for en banc consideration. A judge member noted that this would create an obligation to circulate the petition to the full court, which the academic member thought may be desirable.

A lawyer member stated that he was glad that the Committee was addressing this issue, that panel rehearing is generally thought of as a lesser included petition when one petitions for rehearing en banc, and that it is good to make that explicit in the Rule. The concern is what happens when the panel does make a change in response to a petition. Can the panel side-step the full court? There should be clarity about what happens next. Is rehearing en banc foreclosed? Can a petition for rehearing en banc be filed again? Sometimes a panel will say that there can be no further en banc. Mr. Freeman stated that this has happened to the Department of Justice.

A judge member stated that every judge on the court receives what the panel has done, that what can happen next is put in the orders, and a panel can't hijack a petition. Mr. Freeman responded that not every circuit does that. The Reporter noted that there are varying local rules on handling the relationship between petitions for rehearing en banc and panel rehearing.

A different judge member stated that the Rule should make clear that full en banc review is available after a panel treats a petition for en banc rehearing as a petition for panel rehearing.

Mr. Freeman asked why the Rule shouldn't provide that a petition for rehearing en banc is always treated as including a petition for panel rehearing. A lawyer member stated that panel rehearing is always a lesser included request. The Reporter stated that there are situations in which a petition for rehearing en banc would be appropriate, but not a petition for panel rehearing, such as when existing circuit precedent is clear and the petition asks the full court to overrule that precedent.

The subcommittee will report back again, taking into account this discussion.

VI. Update on Matters Being Held Awaiting Supreme Court Decisions

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

This matter was tabled at the last meeting pending the Supreme Court's decision in *Nutraceutical v. Lambert*, 139 S. Ct. 710 (2019).

The Reporter presented a discussion of that decision. (Agenda Book page 151). The Supreme Court held that a mandatory claims-processing rule is not subject to equitable tolling. It left open the possibility that the "unique circumstances" doctrine—which applies when a judge misleads the litigant in a situation where the litigant could have and likely would have complied if not misled by the judge—might be available. It also left open "whether an insurmountable impediment to filing timely might compel a different result." *Id*. at 717, n.7.

A lawyer member stated that he had initially thought that we needed to fix the Rule, but he was convinced that there is no need to do so, and now thinks we should leave well enough alone. An academic member stated that there was no need to deal with this, and the Committee agreed.

B. Departed Judges (18-AP-D)

Judge Chagares presented an update on a proposal to prescribe how courts of appeals handle the vote of a judge who leaves the bench. (Agenda Book page 165).

At the last meeting, a subcommittee was formed to deal with this matter if the Supreme Court denied certiorari in a pending case that presented the issue.

Since then, the Supreme Court granted certiorari and summarily reversed, holding that a federal court cannot count the vote of a judge who dies before the decision was filed, noting that "federal judges are appointed for life, not for eternity." *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

The Committee agreed to remove this item from its docket.

VII. Discussion of Recent Suggestion

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

Judge Chagares stated that the General Counsel of the Railroad Retirement Board had proposed equivalent privacy protections for Railroad Retirement Act benefit cases as those provided in Social Security cases. (Agenda Book page 167). As the recent Supreme Court decision in *BNSF v. Loos*, 139 S. Ct. 893 (2019), emphasized, there is a real similarity between the two statutes.

Civil Rule 5.2—which Appellate Rule 25(a)(5) piggybacks on for Social Security cases—does not apply to Railroad Retirement Act benefit cases. One possibility would be to amend Civil Rule 5.2, but Railroad Retirement Act benefit cases do not come to the district court. It is appropriate for this Committee to act on this proposal.

But we should do so comprehensively. It might be appropriate to include benefit cases arising under other statutes, such as those dealing with Black Lung and Longshoremen.

A subcommittee consisting of Judge Watford and Tom Byron was created.

A judge member asked about privacy protection in Board of Immigration Appeals cases. Judge Chagares responded that it is handled by incorporation of the Civil Rule.

VIII. New Business and Updates on Other Matters

Judge Campbell noted major projects in other Advisory Committees:

The Civil Rules Committee approved a modest change to Civil Rule 30(b)(6). It is also considering MDL rules: MDL cases comprise some 30 to 40% of the entire civil docket. The question is whether to maximize discretion in handling these cases or create Rules. Special Rules governing appeals in Social Security cases are also under consideration.

The Evidence Rules Committee is working on forensic expert evidence and Evidence Rule 702.

The Criminal Rules Committee is considering requiring greater disclosure of expert reports.

The Bankruptcy Committee is working on restyling.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. None was immediately forthcoming.

Judge Chagares announced that his term was supposed to end, but that he had been asked to remain for another year and would do so.

IX. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team for organizing the dinner and the meeting, and the members of the Committee for their

participation. He announced that the next meeting would be held on October 30, 2019, in Washington, D.C.

The Committee adjourned at noon.

THIS PAGE INTENTIONALLY BLANK

TAB 4

THIS PAGE INTENTIONALLY BLANK

TAB 4A

THIS PAGE INTENTIONALLY BLANK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 31, 2019 (revised June 25, 2019)[1]

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio, Texas. * * * * *

The Committee also approved proposed amendments for which it seeks approval for publication. One group of proposed amendments relates to the contents of notices of appeal (Rules 3 and 6; Forms 1 and 2). Another proposed amendment deals with agreed dismissals (Rule 42). These are discussed in Part III of this report.

* * * * *

[1] Revisions incorporate edits to proposed Rules 3 and 42 made at the June 25, 2019 meeting of the Committee on Rules of Practice and Procedure.

III. Action Items for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 3 and 6, Forms 1 and 2, and Rule 42.

A. Rule 3(c)—Contents of Notices of Appeal

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

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an expressio unius rationale like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order.

Moreover, there have also been cases holding that an appeal that designates an order denying a motion for reconsideration does not bring up for review the underlying judgment sought to be reconsidered.

The Supreme Court has recently described filing a notice of appeal as "generally speaking, a simple, nonsubstantive act," and observed that filing requirements for notices of appeal "reflect that claims are . . . likely to be ill defined or unknown" at the time of filing. *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019).

The Committee's goal in proposing the amendments is fully in accord with *Garza*: to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. But some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various

orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight that the distinction between the ordinary case in which an appeal is taken from the final judgment from the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem.

Reflecting these changes to Rule 3(c)(1)(B), the Committee also proposes that Form 1 be replaced by Form 1A (dealing with an appeal from a final judgment) and Form 1B (dealing with an appeal from an appealable order), and that a conforming change be made to Form 2 (dealing with an appeal from the Tax Court).

The Committee considered an alternative that would have avoided adding the word "appealable" before the word "order," and instead would have added the phrase "that supports appellate jurisdiction," after the word "order." It concluded that "appealable order" was clearer and more straightforward than "order that supports appellate jurisdiction."

Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

The Committee considered writing the merger principle into the text of the Rule. But even though the general merger principle can be stated simply—an appeal from a final judgment permits review of all rulings that led up to the judgment—there are exceptions and complications to the general principle. Because of these exceptions and complications, as well as reluctance to stymie future developments, the Committee decided against attempting to codify the merger principle. Instead, the proposed amendment would call attention to the merger principle in the text of the Rule, by adding a new Rule 3(c)(4):

> (4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

The Committee Note, however, would state the general merger rule.

To avoid the inadvertent loss of appellate rights where an appellant designates (1) an order that disposes of all remaining claims in a case, or (2) an order denying a motion for reconsideration, the proposed amendment would add a new Rule 3(c)(5):

> (5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:
>
> > (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
> >
> > (B) an order described in Rule 4(a)(4)(A).

The phrasing of proposed subsection (A) draws on Civil Rule 54(b), while proposed subsection (B) relies on a cross-reference to the kinds of motions that restart the time for filing a notice of appeal.

The Committee wrestled with the question of whether to authorize an appellant to expressly limit the notice of appeal. On the one hand, in an adversary system, litigants shouldn't be required to appeal more than they choose, particularly in cases involving multiple claims and multiple parties. In addition, a single document may decide multiple motions, and include some decisions (such as granting a preliminary injunction) that are appealable and some decisions (such as setting a discovery schedule) that are not. On the other hand, any limiting work could be left to the briefs. Plus, more explicit attention in the Rules to the possibility of a limited notice of appeal might lead to strategic attempts to limit the jurisdiction of the court of appeals.

The Committee settled on language that did not speak of limiting the "appeal" or "scope of the appeal," but instead on the following, to be added as a new subsection (6):

> (6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

If these competing concerns were resolved the other way, the final clause—"specific designations do not limit the scope of the notice of appeal"—could be added as a separate sentence to proposed new subsection (4).

A conforming amendment to Rule 6, which governs appeals in bankruptcy cases, would replace the cross-reference to "Form 1" with a cross-reference to "Forms 1A and 1B." The Committee consulted with the Advisory Committee on the Bankruptcy Rules; no objection or other concern was raised.

The Committee also consulted with Chief Judge Maurice B. Foley of the Tax Court. He responded that neither the proposed amendments to Rule 3(c), nor the proposed amendments to Form 2 would create problems with appeals from the Tax Court.

Federal Rule of Appellate Procedure 3

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment,—or the appealable order—from which the appeal is taken~~, or part thereof being appe~~aled; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

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

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

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

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

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

* * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

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

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on

appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

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

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an

appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that

designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Federal Rule of Appellate Procedure 6

* * *

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

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

* * *

Committee Note

The amendment replaces "Form 1" with "Forms 1A and 1B" to conform to the amendment to Rule 3(c).

Form 1A

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

Form 1B

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal[2])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address:_____

B. Rule 42(b)—Agreed Dismissals

The Committee proposes amending Rule 42(b) to require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word "may." Prior to restyling, the word

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

"may" was "shall"; the Committee now proposes replacing the word "may" with the word "must." Mandatory dismissal is also the approach of Supreme Court Rule 46.

To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b) and add appropriate subheadings.

The current Rule provides that "no mandate or other process may issue without a court order." Modern readers find this phrasing cryptic, and it has produced some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. Members of the Committee debated whether a mandate is necessary when, for example, an appeal from a preliminary injunction is dismissed. These problems are avoided by replacing this language and instead stating directly in a new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

The Committee considered requiring a "judicial order" or "action by a judge" rather than a "court order," but opted for "court order" rather than upset the practice in the Ninth Circuit of delegating some dismissal power to mediators and the Appellate Commissioner.

The Committee also considered deleting the examples of orders beyond mere dismissals, but decided to include them because they were useful illustrations, particularly in light of the decision in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that "mootness by reason of settlement does not justify vacatur of a judgment").

* * * * *

The Committee considered adding a provision dealing with petitions for review and applications to enforce agency orders, but concluded that it was sufficient to state in the Committee Note that Rule 20 makes Rule 42(b) applicable to petitions for review and applications to enforce an agency order and that "appeal" should be understood to include a petition for review or application to enforce an agency order.

Federal Rule of Appellate Procedure 42

*** * ***

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

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

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

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

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

* * * * *

THIS PAGE INTENTIONALLY BLANK

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

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

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

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

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

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

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose

intent to appeal is otherwise clear from the notice.

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

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

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

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

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

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

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

from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment

before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Rule 6. Appeal in a Bankruptcy Case

* * * * *

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

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to ‘‘Forms 1A and 1B in the Appendix of Forms’’ must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as used in

any applicable rule, means ‘‘appellate panel’’; and

(D) in Rule 12.1, ‘‘district court’’ includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

Committee Note

The amendment replaces ‘‘Form 1” with ‘‘Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

THIS PAGE INTENTIONALLY BLANK

Form 1B

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

THIS PAGE INTENTIONALLY BLANK

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal[*])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address:_____

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

THIS PAGE INTENTIONALLY BLANK

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

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

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

TAB 4B

THIS PAGE INTENTIONALLY BLANK

September 15, 2019

Thomas A. Mayes
1510 32nd Street
Des Moines, IA 50311

Rules Committee Staff
Via e-mail at RulesCommittee_Secretary@ao.uscourts.gov

RE: Bankruptcy, Appellate, and Civil Rules - Amendments

Dear colleagues:

I am an attorney licensed to practice in Iowa and admitted to practice in the Northern District of Iowa and the Eighth Circuit. I have some background in federal court (*Jones v. Barnhart*, 335 F.3d 697 (8th Cir.2003)) and a scholarly interest in appellate practice (Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)).

I write to offer my full support to the rules proposals. Filing a notice of appeal ought to be straightforward and ministerial, unless clearly required otherwise. The cases which would impose a different or higher requirement are judge-made rules and are, simply put, a solution in search of a non-existent problem. These judge-made rules are traps for the unwary and undermine confidence in the fairness and openness of the appellate process.

Please adopt these rules as written without delay. Thank you for your attention to these brief comments.

Sincerely,

/s/Thomas A. Mayes

Thomas A. Mayes, CWLS
Attorney
thomas.a.mayes@gmail.com

Comments to Proposed Rules

I have the following comments to the proposed changes to Federal Rules of Appellate Procedure 3.

1. Final Judgments And Proposed Rule 3(c)(5)

My first concern is that the proposed modification to Rule 3(c), and specifically proposed new Rule 3(c)(5), is inconsistent with the Federal Rules of Civil Procedure.

I begin with the text that best helps understand what a "final judgment" is under those rules, and the system that they seem to have set up. The second sentence of Fed. R. Civ. P. 54(b) states:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The key feature that I wish to point out from this sentence is that the word "remaining" does not appear. Rule 54(b) does *not* state that an order or other decision "that adjudicates fewer than all the *remaining* claims . . . does not end the action . . ." and it does *not* state that any order that adjudicates fewer than all the claims "may be revised at any time before the entry of a judgment adjudicating all the *remaining* claims . . ." Nor can it be reasonably so interpreted. The fact that an early order adjudicating claims can be revised at any time – that is, any prior adjudication of a claim is tentative – demonstrates that any adjudication of "remaining" claims is not an adjudication of "all" claims.

Thus, the system Rule 54(b) was intended to implement seems fairly straightforward: it

requires a judge who dismissed some claims in Order A and all of the remaining claims one year later in Order B – or, alternatively, who granted relief to plaintiff with a complete set of remedies in Order B on the remaining claims at summary judgment or after a trial – to *also* issue a separate document, preferably called "Judgment," *in addition to* these orders. Under Rule 54(b), this "Judgment" should then list *all* the claims in the action (or at least those on which a judgment has not already been entered pursuant to the first sentence of Rule 54(b)) – and the counterclaims, cross-claims, and intervenors' claims, if any – and identify what has become of all of them. And this requirement is in *addition to* the requirement that a judgment be placed on a "separate document." A "separate document" that only refers to "remaining" claims and not "all" claims may meet the requirements of Rule 58, but it does not meet the requirement of the second sentence of Rule 54(b).

Rule 54(b), then, has consequences for what is a "final decision" for purposes of Section 1291 of the Judiciary Code. If each of separate orders dismissing an individual claim "does not end the action as to any of the claims," and "may be revised at any time," then it would be hard to argue that any of the orders – even the last of them – is a final decision. And, again, this is true regardless of whether the last of these order is on a "separate document" that otherwise would meet the requirements of Fed. R. Civ. P. 58.

To be sure, and despite seemingly obvious language, it has not always worked the way it should. District Court judges have not been trained to file judgments adjudicating all of the claims of all of the parties, they frequently fail to do so (even in documents called "judgments"), parties tend not to raise this failure, and Courts of Appeals tend not to call them on it. This has not been good for the clarity of practice. The Report of the Advisory Committee on Appellate

Rules points out that there are "numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order." (p. 8)[1] The Advisory Committee seems to think that the problem there is that these courts do not treat the order as a final judgment in which prior interlocutory orders are merged. But the real problem is that the order, because it does not adjudicate all the claims in the case, is not a final judgment under Rule 54(b) at all, and not a "final decision" for Section 1291 purposes. If a notice of appeal is nonetheless filed under these circumstances, the Committee believes the appellant should be able to raise any issue it chooses. Perhaps under the principle of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the appeal should nonetheless be heard on the ground that the parties have waived *both* the requirement of a final decision *and* a separate document in a context where the issuance of one or the other seems to be a formality. But if finality is a prerequisite to subject matter jurisdiction, then the appeal should be dismissed for want of jurisdiction. An amendment to FRAP 12.1 might be useful to permit the court of appeals to remand solely for the purpose of entering a final decision that meets the requirements of Rule 54(b).

What does this mean for the proposed modification to Rule 3? First, the foregoing requires a serious reconsideration of the language of proposed Rule 3(c)(5). The proposed rule states that "a notice of appeal encompasses the final judgment" if it designates "an order that adjudicates all the remaining claims and the rights and liabilities of all remaining parties." Initially, I think "encompasses" is probably a poor choice of word. I take it that the Committee

---

[1] Page references are to the Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankrutcy, and Civil Procedure, Request for Comment (Aug. 2019) prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

means that a notice of appeal that designates such an order should be deemed to include an appeal from the final judgment. In any event, if that is correct, the proposed rule requires a court of appeals to deem a notice of appeal designating an order adjudicating all remaining claims to include an appeal from the final judgment. And judging from the example in the Committee Notes, discussed in the next paragraph, the court should so deem the notice *even if there has not been a final judgment entered at all*. Thus, the notice of appeal so described may be in a case where there has been no appealable judgment entered.

Second, I believe that the example given in the ninth paragraph of the Committee Notes (pp. 15-16, 32) is just wrong and bound to confuse. In the example given, some claims are dismissed for failure to state a claim and summary judgment is granted to the defendant on the remaining ones sometime later. The Notes say "[t]hat second order, because it resolved all of the *remaining* claims, is a final judgment . . ." (Pp. 15, 32) (emphasis added). But, as noted at the outset of this section, the word "remaining" does not appear in the second sentence of Rule 54(b) and, for the reasons I have given, is not a final judgment under *that* rule. The example, then, is inconsistent with the language of Rule 54(b) and should be changed. (The example given later in the paragraph, where the judge correctly issues a separate final judgment that "denies all relief," and thus presumably disposes of all of the claims, is better.)

In addition, even taken on its own terms, the example is either very confusing or inconsistent with the proposed text of Rule 3(c)(5). If the second order (dismissing the remaining claims) *is* a final judgment (as the Notes say), then why is there a need for a rule that says that a notice that designates that order "encompasses *the* final judgment"? Is it not obvious that a notice "encompasses" the very document that it designates? Did the Committee mean that

the notice "encompasses" a *second* "final judgment"? (Can there be more than one "final" judgment?) Or the "separate document" entered pursuant to Fed. R. Civ. P. 58? If so, it should make that clearer.

Alternatively, the Committee on Rules should consider (or have the Advisory Committee on Civil Rules consider) a change in the language of Fed. R. Civ. P. 54(b) (so that it refers to "all the remaining claims" instead of "all the claims"). This would (1) harmonize the language of proposed FRAP Rule 3(c)(5) and FRCP 54(b) and (2) probably conform with the practice of many courts who ignore the language of the rules. (To be clear: in my opinion, this is inferior to the system that Rule 54(b) currently establishes and which is described in the second paragraph of this section. But it is better than leaving the rules in conflict with one another.)

2. <u>"Appealable Orders" And Proposed Rule 3(c)(1)(B)</u>

The proposed amendment to Rule 3(c)(1)(B) would change the language slightly so that (1) the word "appealable" appears before the word "order" and (2) a phrase referring to a part of the judgment or order is eliminated. It deserves mention that Fed. R. Civ. P. 54(a) defines "judgment" to include "any order from which an appeal lies," so the term "appealable order" appears to be redundant of the word "judgment." Arguably, the current version of the rule is also redundant since it also refers to an "order," but that reference might be to orders merged into the final judgment that are not independently appealable. (That is, reviewable, but not appealable, orders.) Given the other provisions being suggested, it is probably sufficient for this rule to refer only to the "judgment" from which the appeal is taken. (So, too, with Proposed Rule 3(c)(4) – the phrase "appealable order" is unnecessary.) Alternatively, the word "appealable" could be placed before "judgment," since the mere labelling of a document as a "judgment" does not make

it so. Fed. R. Civ. P. 54(b) ("any order or other decision, *however designated* . . .") (emphasis added).

3. Does The Amendment Accomplish Its Goal?

The impetus for the rule, according to the Report of the Advisory Committee on Appellate Rules (p. 8) was to deal with lines of cases that limited the issues that could be raised on appeal when the notice of appeal mentioned an order (either an interlocutory order or an order resolving the remaining claims in a case). A worthy goal, this is presumably accomplished, in part, through proposed Rule 3(c)(4), which states that a notice of appeal "encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order" and that "[i]t is not necessary to designate those orders in the notice of appeal." But the second sentence does not really address the problem that the Committee identifies. It is more in the nature of advice ("You don't need to do this.") than a protection ("Nothing bad will happen if you do."). I would suggest that the second sentence of proposed Rule 3(c)(4) be changed to something like: "The designation of any such order does not limit the scope of the previous sentence." Or perhaps the entire subsection should read: "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment [or appealable order], regardless of whether any specific merged order is mentioned in the notice." (As noted in the last section, the words in brackets are probably unnecessary.) This would better clarify that the designation of interlocutory orders is not only not necessary, but also has no effect.

This still leaves the problem of the "remaining claims" order – the one that resolves only claims that were not previously resolved and resolves all of those remaining claims. Proposed Rule 3(c)(4) will not help achieve the Committee's goal if courts do not perceive such orders as

final judgments into which prior interlocutory orders are merged. The ideal solution, of course, would be to have district court judges issue final judgments resolving all claims but, as noted, this seems to be wishful thinking. As a second best solution, the amendment of Rule 54(b) discussed previously could transform such an order into a final decision in which interlocutory orders are merged, or perhaps a separate rule can be promulgated that interlocutory orders should be deemed merged into any such "remaining claims" orders.

TAB 4C

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: Public comment on proposed amendments to Rules 3, 6, 42, and Forms 1 & 2 (16-AP-D and 17-AP-G)

Rules 3 and 6; Forms 1 & 2 (16-AP-D)

These proposed amendments are designed to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal. They are described in detail on pages 8 through 22, and pages 27 through 42 of the published Request for Comment.

To date, two comments have been received.

The first was submitted by Thomas Mayes of Iowa, who has litigated in the Court of Appeals for the Eighth Circuit and has published in the area of appellate practice. He offers his "full support" and urges that these amendments be adopted "as written without delay" in order to overcome "traps for the unwary" that "undermine confidence in the fairness and openness of the appellate process."

The second, submitted by Michael Rosman, is far more critical. He contends that the proposal is inconsistent with Civil Rule 54(b), is redundant in light of Civil Rule 54(a), and may not accomplish its goal.

Civil Rule 54(b). Mr. Rosman contends that Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists "all the claims in the action . . . and the counterclaims, cross-claims, and intervenors' claims, if any—and identify what has become of all of them." On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6),

and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction. He observes that Civil Rule 54(b) provides that an order "that adjudicates fewer than *all* the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating *all* the claims." (emphasis added). He emphasizes that Civil Rule 54(b) does not—as the proposed amendment to Appellate Rule 3 does—refer to all *remaining* claims, and contends that it may not reasonably be interpreted as if it did.

Mr. Rosman concedes that "it has not always worked" this way and that "District Court judges have not been trained to file judgments adjudicating all of the claims of all of the parties, they frequently fail to do so, . . . parties tend not to raise this failure, and Courts of Appeals tend not to call them on it." In his view, "[t]his has not been good for the clarity of practice."

What Mr. Rosman views as an unreasonable interpretation of Civil Rule 54(b) is not only consistent with the actual practice he acknowledges, but is also precisely how a leading treatise interprets Civil Rule 54(b).

> Any order that did not contain both the required determination and direction, even though it adjudicated one or more of the claims, is subject to revision anytime before a judgment is entered adjudicating the *remaining* claims.

10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2653 (4th ed.) (emphasis added); cf. Moore's Federal Practice § 54.259[3] ("If an order is not certified under Rule 54(b), but a notice of appeal is nevertheless filed, any subsequent order of the district court that completely adjudicates the remaining claims is sufficient to validate the otherwise premature notice of appeal.").

Mr. Rosman also suggests what he views as an inferior change that would harmonize the language of proposed Appellate Rule 3(c)(5) and Civil Rule 54(b) and "probably conform with the practice of many courts who ignore the language of the rules": amend Civil Rule 54(b) so that it refers to "all the remaining claims" instead of "all the claims."

In light of the widespread understanding of Civil Rule 54(b), no change seems necessary.

Civil Rule 54(a). Mr. Rosman notes that Civil Rule 54(a) defines "judgment" to include "any order from which an appeal lies." From this perspective, there is no need to have any provision in the Appellate Rules for appeals from "orders" or "appealable orders," because all appeals are from "judgments."

However, Civil Rule 54(a) defines the term judgment "as used in these rules"—that is, in the Civil Rules themselves. That definition does not apply to the Appellate Rules.

Alternatively, he suggests adding the word "appealable" before the word "judgment," pointing out that labelling a document a judgment doesn't make it so.

But the risk of confusion is high if the Appellate Rule, by referring to "appealable judgments," suggests that there are judgments that are not appealable.

Achieving its goal. To the extent that this aspect of Mr. Rosman's critique is based on his approach to Civil Rule 54, the prior discussion is sufficient and need not be repeated.

He also suggests that the proposed Appellate Rule 3(c)(4)—which states that "it is not necessary to designate" orders that merge into the designated judgment or appealable order—is "more in the nature of advice ('You don't need to do this.') than a protection ('Nothing bad will happen if you do.')."

Stating that no such designation is necessary, at least when coupled with the proposed prior sentence—"The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order."—should

be sufficient protection of those who make such unnecessary designations, while also discouraging such unnecessary designations.

Rule 42 (17-AP-G)

These proposed amendments are designed to restore the requirement that the circuit clerk dismiss an appeal if all parties so agree. They are described in detail on pages 22 through 25, and pages 42 through 44 of the published Request for Comment.

To date, no comments have been received.

TAB 5

THIS PAGE INTENTIONALLY BLANK

TAB 5A

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on Federal Rules of Appellate Procedure

From: Subcommittee on Rules 35 and 40

Date: October 3, 2019

Re: Possible Amendments to Rules 35 and 40 (18-AP-A)

Earlier this year, the subcommittee considered, but rejected, a number of options, including (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing; (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21; (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

Instead, the subcommittee recommended more modest changes. It recommended adding three provisions to Rule 35: (1) if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc; (2) a petition for rehearing en banc may be treated by the panel as a petition for panel rehearing; and (3) if the criteria for en banc review are not met, panel rehearing under Rule 40 may be available.

It also recommended adding to Rule 40 a provision echoing the first addition to Rule 35: if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

At the last meeting of the Advisory Committee, there did not appear to be any concern about calling attention to the different standards for panel rehearing and rehearing en banc by noting that if the criteria for en banc review are not met, panel rehearing under Rule 40 may be available. However, three major concerns were raised.

First, perhaps we should not propose that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc. Some panel judges—senior judges and visiting judges—are not eligible to vote for rehearing en banc. Should they be able to cause a petition for panel rehearing to be treated as a petition for rehearing en banc? Maybe they should be able to flag the issue for the active judges, but this would cause the petition to be circulated to all those judges. Is that a good thing?

Second, perhaps a petition for rehearing en banc should always be treated as including a petition for panel rehearing. Some view panel rehearing as a lesser included request. On the other hand, there are situations where the only relief sought—overruling circuit precedent—can be provided by the full court but not by the panel.

Finally, the most significant concern was to make clear that, if the panel makes some change in response to a petition for rehearing en banc, the panel is not able to block access to the full court.

After considering these concerns, we recommend (1) *not* proposing that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc; (2) proposing that the panel may treat a petition for rehearing en banc as a petition for panel rehearing; and (3) proposing that if the panel makes a substantive change in the decision, a party may file a new petition for rehearing en banc.

The subcommittee has examined local circuit rules, internal operating procedures, and the like to see how the various courts of appeals handle these issues. Note that not every court of appeals has a specific published provision dealing with all these issues.

1) May a senior judge or visiting judge initiate the en banc process?

Five circuits—the Fourth, Fifth, Sixth, Seventh, and D.C.— allow senior and visiting judges to initiate the en banc process.

Fourth Circuit. "A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court, or by a senior or visiting judge who sat on the panel that decided the case originally." Fourth Circuit Local Rule 35(b).

Fifth Circuit. If a petition for rehearing en banc is filed, "any active judge of the court or any member of the panel rendering the decision, who desires that the case be reheard en banc, may notify the writing judge . . . to this effect . . . . If the panel decides not to grant rehearing after such notice, it notifies the chief judge, who then polls the court by written ballot on whether en banc rehearing should be granted." "[A]ny member of the panel rendering the decision may request a poll of the active members of the court whether rehearing en banc should be granted, whether or not a party filed a petition for rehearing en banc." Fifth Circuit IOP following Local Rule 35.

Sixth Circuit. "[A]ny member of the panel whose decision is the subject of the rehearing may request a poll." Sixth Circuit IOP 35(d).

Seventh Circuit. A request for an answer to a petition for rehearing en banc "may be made . . . by any member of the panel that rendered the decision sought to be reheard," and a request for a vote on the petition "may be made by any judge entitled to request an answer." Seventh Circuit IOP 5.

D.C. Circuit. "A vote may be requested by an active judge of the Court, or by any member of the panel," and "In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case be reheard en banc." D.C. Circuit IOP XIII B(2).

Three circuits—the Second, Eighth, and Federal—appear to allow such participation, but in limited ways. In the Second and Eighth Circuits, senior judges (but apparently not visiting judges) may request a poll. And in the Federal Circuit, it seems that senior and visiting judges may request a poll in response to a petition for rehearing en banc, but not sua sponte.

Second Circuit. "Only an active judge of the court or a senior judge who sat on the three-judge panel is eligible to request a poll of the active judges to determine whether a case should be heard or re-heard en banc." Second Circuit IOP 35.1(a).

Eighth Circuit. "On their own motion, active judges or any senior judge who sat on the three-judge panel may also request a poll for rehearing en banc." Eighth Circuit IOP IV D.

Federal Circuit. If a petition for rehearing en banc is filed, "any judge who was a member of the panel . . . but is not an active judge of the court" may request a response and "any active or panel judge" may "initiate a poll . . . to determine whether the appeal . . . should be reheard en banc." Federal Circuit IOP 14(2). But IOP 14(3) and (4) appear to limit sua sponte initiation of en banc polls to "any active judge."

Two circuits—the Ninth and the Eleventh—seem to permit only active judges to call for a poll, but the provision in the Ninth Circuit is less clear.

Eleventh Circuit. "Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party." Eleventh Circuit IOP 5 following Local Rule 35.

Ninth Circuit. "Any judge may call for a vote to rehear a case en banc." Ninth Circuit General Order 5.1(c)(1). The term "judge" is not defined, while "judge eligible to vote" is defined as "any active judge who is not recused or disqualified." 5.1(a)(3).

Discussion.

A majority of circuits that address the issue permit visiting and senior judges on a panel to initiate the en banc process. The subcommittee considered, but rejected, recommending that this practice be generalized.

The relationship between visiting judges and active judges, and between senior judges and active judges, may be a matter of circuit culture that varies from circuit

to circuit. It's not clear that uniform practice in this area is important. Plus, given that they are all (at least temporarily) members of the same court, nothing stops a visiting or senior judge from contacting an active judge to suggest rehearing en banc. Nor is there anything that stops a visiting or senior judge from making such a suggestion in an opinion filed in the case.

For this reason, the subcommittee does not recommend amending Rule 35 or Rule 40 to provide that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

2) Are petitions for rehearing en banc treated as including panel rehearing?

In five circuits—the First, Third, Fifth, Sixth, and Eleventh—there is language treating a petition for rehearing en banc as including a request for panel rehearing.

First Circuit. "A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel." First Circuit IOP X(C).

Third Circuit. "It is presumed that a petition for rehearing before the panel or suggestion for en banc rehearing filed by a party . . . requests both panel rehearing and rehearing en banc, unless the petition . . . states explicitly that it does not request en banc rehearing." Third Circuit IOP 9.5.1.

Fifth Circuit. "A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed." Fifth Circuit IOP after Local Rule 35.

Sixth Circuit. "The court will treat a petition for rehearing en banc as a petition for rehearing before the original panel." Sixth Circuit IOP 35(d)(1).

Eleventh Circuit. "A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel." Eleventh Circuit IOP 2 following Local Rule 35. (It also states that a petition for panel rehearing "will not be treated as a petition for rehearing en banc," but as noted above, any active judge may request an en banc poll whether or not a petition for rehearing en banc has been filed.)

In three circuits—the Eighth, D.C., and Federal—there is language that either implies or assumes treating a petition for rehearing en banc this way.

Eighth Circuit. "When a petition for rehearing en banc is filed, a copy is distributed . . . . The panel may grant rehearing without action by the full court." Eighth Circuit IOP IV D.

D.C. Circuit. "Prior to . . . a decision by the court to grant rehearing en banc . . . a panel may reconsider or amend its decision sua sponte, or on consideration of a petition for panel rehearing, or upon consideration of a petition for rehearing en banc." D.C. Circuit IOP XIII B(1).

Federal Circuit. "A petition for rehearing en banc that is not combined with a petition for panel rehearing will be presumed to request relief that can be granted by the panel that heard the appeal." Federal Circuit IOP 14(2).

The same appears to be true in the Ninth Circuit, although the language is in an Advisory Committee Note.

Ninth Circuit. "When the clerk receives a timely petition for rehearing en banc, copies are sent to all active judges. If the panel grants rehearing it so advises the other members of the Court . . . ." Ninth Circuit Advisory Committee Note to Local Rule 35.

Discussion.

In a majority of circuits, petitions for rehearing en banc are understood, in one way or another, to include requests for panel rehearing. This practice supports the idea that panel rehearing can be considered as a lesser included request.

Nevertheless, there are situations where the only relief sought—overruling circuit precedent—can be provided by the full court but not by the panel. It might, therefore, be appropriate to draw on language used in the Federal Circuit, "A petition for rehearing en banc . . . will be presumed to request relief that can be granted by the panel that heard the appeal." The subcommittee considered this possibility: "A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing seeking relief that can be granted by the panel." But we concluded that this was wordier and more complex than necessary because a panel will not grant relief it knows it cannot grant. Instead, we propose simply, "A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing."

3) Preventing the panel from blocking access to the full court.

The most significant concern expressed at the last meeting was to make sure that, if a panel responds to a petition for rehearing en banc by making some changes to its prior decision, it not be able to block access to the full court.

To the extent that the local rules, internal operating procedures, and the like explain it, the various courts of appeals are all over the place in how they handle the

interaction between panels and the full court in response to petitions for rehearing en banc.

In three circuits—the Fifth, the Sixth, and the Federal—petitions are processed first as petitions for panel rehearing and then (if necessary) as petitions for rehearing en banc.

Fifth Circuit.

"**Panel Has Control**. Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

"**Requesting a Poll.** Within 10 days of the filing of the petition, any active judge of the court or any member of the panel rendering the decision, who desires that the case be reheard en banc, may notify the writing judge . . . to this effect . . . This notification is also notice that if the panel declines to grant rehearing, an en banc poll is desired.

"If the panel decides not to grant the rehearing after such notice, it notifies the chief judge, who then polls the court . . . on whether en banc hearing should be granted." Fifth Circuit IOP after Local Rule 35.

Sixth Circuit.

"General Procedure — Petition for Rehearing En Banc.

(1) The court will treat a petition for rehearing en banc as a petition for rehearing before the original panel.

(2) The clerk will circulate the petition to the original panel. The panel has 14 days to comment on the petition to the en banc coordinator in the clerk's office.

> (A) If the panel changes the substance of its decision, it will provide its modified decision to the en banc coordinator. The modified decision will be filed and counsel notified. Counsel will then have 14 days to withdraw, modify, or maintain the pending petition for rehearing en banc or to file a new petition.
>
> (B) If the panel does not substantially modify its decision, the coordinator will then circulate the petition and the panel's comments to the en banc court. . . . "

Sixth Circuit IOP 35(d).

Federal Circuit.

"Petitions for rehearing en banc and combined petitions for panel rehearing and rehearing en banc are first processed as petitions under this IOP [dealing with petitions for panel rehearing] and thereafter may be processed under IOP #14. [dealing with petitions for rehearing en banc]." Federal Circuit IOP 12(1)(a).

"Action on a petition for rehearing en banc that is part of a combined petition for panel rehearing and rehearing en banc will be deferred until the panel has acted on the petition for rehearing. A petition for rehearing en banc that is not combined with a petition for panel rehearing will be presumed to request relief that can be granted by the panel that heard the appeal; consequently, the clerk will send the petition for rehearing en banc promptly upon filing first to the panel in accordance with IOP #12 [dealing with panel rehearing], and action on the petition for rehearing en banc will be deferred until the panel has had the opportunity to grant the relief requested. If the panel either takes no action or grants less than all of the relief requested, the clerk shall send both the combined petition and any response considered by the panel to the active judges of the court . . . .

"At any time before a majority of the active judges who are eligible to participate vote to grant a petition for rehearing en banc, a majority of the panel members may inform the en banc court that the panel wishes to take the petition back for action. The panel shall inform the full court of any action on the petition, and if the panel grants less than all of the relief requested, any judge may request a response to the petition for rehearing en banc or a poll within 10 business days of the panel's notification to the full court." Federal Circuit IOP 14(2).

In three circuits—the Fifth, Eighth, and Eleventh—it is emphasized that the panel has control.

Fifth Circuit.

"**Panel Has Control**. Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court." Fifth Circuit IOP following Local Rule 35.

Eighth Circuit.

"When a petition for rehearing en banc is filed, a copy is distributed to each judge on the panel and to every active judge on the court who is not disqualified . . . . A petition for rehearing en banc does not remove the case from the plenary control of

the panel deciding the case. The panel may grant rehearing without action by the full court." Eighth Circuit IOP IV.D.

Eleventh Circuit.

"*Panel Has Control.* A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel. Although a copy of the petition for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the appeal. The panel may, on its own, grant rehearing by the panel and may do so without action by the full court. . . .

"*No Poll Request.* If after expiration of the specified time for requesting a poll, the notify judge had not received a poll request from any active member of the court, the panel, without further notice, may take such action as it deems appropriate on the petition for rehearing en banc. In its order disposing of the appeal . . . the panel must note that no poll was requested by any judge of the court in regular active service." Eleventh Circuit IOP 2 following Local Rule 35.

In four circuits—the Second, Sixth, Ninth, and D.C.—there is some statement regarding what happens if a panel amends its decision.

Second Circuit.

"If the court substantively amends its opinion or summary order, a petition (or an amended petition) for rehearing en banc may be filed within the time specified by FRAP 35(c), counted from the day of filing of the amended opinion or order. A petition for rehearing en banc filed before amendment of the court's ruling may, but need not, be amended." Second Circuit Local Rule 35.1(d). "If the court substantively amends its opinion or summary order, a petition (or an amended petition) for panel rehearing may be filed within the time specified by FRAP 40(a), counted from the day of filing of the amended opinion or order. A petition for panel rehearing filed before amendment of the court's ruling may, but need not, be amended." Second Circuit Local Rule 40.1(c).

Sixth Circuit.

"If the panel changes the substance of its decision, . . . [t]he modified decision will be filed and counsel notified. Counsel will then have 14 days to withdraw, modify, or maintain the pending petition for rehearing en banc or to file a new petition." Sixth Circuit IOP 35(d).

Ninth Circuit.

"If the panel grants rehearing it so advises the other members of the Court, and the petition for rehearing en banc is deemed rejected without prejudice to its

renewal after the panel completes action on the rehearing." Ninth Circuit Advisory Committee Note to Local Rule 35.

"If a panel amends its disposition, the panel shall set forth in its amended disposition or separate order: (1) the ruling on the petition for rehearing or petition for rehearing en banc; (2) whether subsequent petitions for rehearing or rehearing en banc may be filed; and (3) the status of any pending petitions for rehearing or rehearing en banc not ruled on." Ninth Circuit General Order 5.3(a).

"An off-panel judge may request notice of the panel's vote on a petition for panel rehearing and petition for rehearing en banc." Ninth Circuit General Order 5.4(b)(1).

"If a judge timely requests notice . . . the panel shall circulate to all judges notice of its vote on the petitions for panel rehearing and rehearing en banc. If the panel decides to amend its opinion the panel shall notify all judges of its proposed amendments." Ninth Circuit General Order 5.4(b)(2).

D.C. Circuit.

"A petition for panel rehearing will not be acted upon until action is ready to be taken on any timely petition for rehearing en banc." D.C. Circuit Local Rule 35(d).

"If a petition for rehearing en banc also has been filed, the Clerk will withhold entry of an order denying rehearing by the panel until the en banc question has been resolved. If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, is vacated, but the panel may act on the petition for rehearing without waiting for final termination of the en banc proceeding. . . .

"Prior to either a decision by the court to grant rehearing en banc or issuance of the court's mandate, a panel may reconsider or amend its decision sua sponte, or on consideration of a petition for panel rehearing, or upon consideration of a petition for rehearing en banc. If a panel decides to reconsider or amend its decision, voting may be deferred on any pending petition for rehearing en banc or the en banc petition may be dismissed as moot with notice to the parties that a new period for seeking rehearing en banc will begin to run after the panel concludes its reconsideration of its decision. . . . " D.C. Circuit IOP XIII B(1).

Discussion.

Trying to create uniformity in processing petitions for rehearing seems far more costly than it is worth, at least absent some real complaints. Different processes may well be appropriate for different size courts of appeals.

However, there are cases where a panel will state in an order that no subsequent petitions for rehearing en banc may be filed. We suspect that this happens when the members of the panel, based on confidential communication between the

panel and the non-panel members of the court, know that other members of the court are satisfied with the changes made by the panel. But the parties do not know what has been said by off-panel members of the court, and the court does not know what the parties might have to say in response to the changes made by the panel. For this reason, we recommend making clear that parties have a right to seek review by the full court.

Examples from the Second, Sixth, Ninth, and D.C. Circuits offer ways to try to achieve the major goal of making sure that, if a panel responds to a petition for rehearing en banc by making some changes to its prior decision, it is not be able to block access to the full court.

The language from the Ninth Circuit's Advisory Committee has some potential. "If the panel grants rehearing it so advises the other members of the Court, and the petition for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing." But it is not cleanly addressed to the situation where the panel simultaneously grants rehearing and issues a modified decision. Nor does it explain how a petition for rehearing en banc is renewed.

The language from the D.C. Circuit is better, but the option to defer voting on a pending petition for rehearing en banc does not necessarily give the parties an opportunity to respond.

The language from the Sixth Circuit—"If the panel changes the substance of its decision . . . counsel [will be] notified. Counsel will then have 14 days to withdraw, modify, or maintain the pending petition for rehearing en banc or to file a new petition,"—seems to get at the core idea and promote efficiency by giving counsel a range of options. However, it ignores the possibility of pro se litigants, and does not give the government the extra time provided by FRAP 40(a)(1). And there is some risk of uncertainty about how one modifies or maintains a petition for rehearing en banc.

The language from the Second Circuit is helpful in using a cross-reference rather than creating a new time for filing.

For these reasons, we suggest a combination of the Second and Sixth Circuit language: "If the panel changes the substance of its decision, a party may—within the time specified by Rule 40(a), counted from the day of filing of the amended decision—file a new petition."

Rule 35. En Banc Determination

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

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

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

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

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

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

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

* * * *

(4) If neither of the criteria in (b)(1) is met, panel rehearing pursuant to Rule 40 may be available.

(5) A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing. If the panel changes the substance of its decision, a party may—within the time specified by Rule 40(a), counted from the day of filing of the amended decision—file a new petition.

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment calls attention to the different standards for the two kinds of rehearing.

The amendment also explicitly provides for the common practice of treating a petition for rehearing en banc as including a petition for panel rehearing, so that the panel can address issues raised by the petition for rehearing en banc and grant relief that is within its power as a panel. It also provides that if the panel changes the substance of its decision, a party is given time to file a new petition.

TAB 5B

THIS PAGE INTENTIONALLY BLANK

18-CV-EE
18-AP-E

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

GENERAL COUNSEL

MEMORANDUM

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

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

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

DATE: December 18, 2018

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

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

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

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

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

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

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

---

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

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

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

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

cc: Committee on Court Administration and Case Management

THIS PAGE INTENTIONALLY BLANK

TAB 5C

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on Privacy in Benefit Cases

Date: October 3, 2019

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

The Committee has been considering a suggestion from Ana Kocur, General Counsel of the Railroad Retirement Board, that the privacy protections afforded in Social Security benefit cases be extended to Railroad Retirement Act benefit cases. In her memo, she suggested that Civil Rule 5.2(c) be amended to include actions for benefits under the Railroad Retirement Act. (A copy of that memo is included.)

Section 205 of the E–Government Act of 2002, Pub. L. 107–347, December 17, 2002, 116 Stat 2899, called upon the Supreme Court to prescribe rules, in accordance with the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

In 2007, Federal Rule of Civil Procedure 5.2 was adopted. Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. (It also applies to various immigration cases.) Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. The Advisory Committee explained:

> Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): "An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal."

This piggyback approach works fine for categories of cases that can be heard in both the district courts and the courts of appeals. But unlike Social Security benefit cases, Railroad Retirement benefit cases go directly to the courts of appeals. The Railroad Retirement Board does not generally litigate cases in the federal district courts. For that reason, this Committee took up this matter.

There is little doubt that there are close parallels between Social Security and Railroad Retirement. See *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 898 (2019) ("Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other."). Accordingly, it makes sense to accord the same kind of privacy protection to both kinds of cases. Both Social Security and Railroad Retirement provide for retirement benefits and survivor benefits as well as disability benefits. Civil Rule 5.2(c) does not distinguish among different kinds of benefits, and it does not seem necessary to do so with regard to Railroad Retirement either.

The Committee was reluctant to move forward without checking with the Committee on Court Administration and Case Management. Bridget Healy reports that CACM stated that it had not done anything on the issue in the past and was not planning to at the current time. Judge Chagares also spoke to Judge Audry Fleissig, the Chair of CACM, and she had no objection to this Committee proceeding.

The Committee was also reluctant to make a proposal without first ascertaining whether there are other kinds of cases that, like Railroad Retirement benefit cases, go directly to the courts of appeals and implicate similar privacy concerns. Research has revealed only two statutory schemes that may possibly

warrant similar privacy treatment: the Longshore and Harbor Workers' Compensation Act, see 33 U.S.C. § 921, and the Black Lung Act, see 30 U.S.C. § 932. Under both Acts, claimants seek recovery for death or disability.

However, the Department of Labor has raised some concerns about categorically treating those cases the same as Social Security cases, noting that the administrative process in those cases differs in important respects from the process in Social Security cases. For this reason, the subcommittee recommends extending the same privacy protections currently given to Social Security cases to the Railroad Retirement Act, but not—at least at this point—to the Longshore and Harbor Workers' Compensation Act, and the Black Lung Benefits Act.

Rule 25. Filing and Service

(a) **Filing**

* * * *

(5) **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The limitations on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

TAB 6

THIS PAGE INTENTIONALLY BLANK

TAB 6A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.

TAB 6B

THIS PAGE INTENTIONALLY BLANK

6. Appeal Finality After Consolidation Joint Subcommittee

In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court ruled that no matter how complete a Rule 42(a) consolidation of cases initially filed as separate actions may be, final disposition of all claims among all parties to any component that began as a separate action is a final judgment. A final judgment appeal therefore may be taken under 28 U.S.C. § 1291. And to all appearances, the opportunity to appeal is forfeited if an appeal is not taken within the mandatory and jurisdictional time set by Appellate Rule 4.

The Court rested its decision on a line of cases describing the effects of "consolidation" that stretched back more than a century before the original version of Rule 42(a) was adopted in 1938. At the same time, it suggested that the Rules Enabling Act process is the proper place to address any problems that might result from its decision.

The Joint Subcommittee, composed of members from both the Appellate Rules Committee and the Civil Rules Committee, has met twice by conference calls. It has also participated in several exchanges with Dr. Emery Lee to shape a Federal Judicial Center study to see what relevant data may be gleaned from court records.

Dr. Lee has begun work with docket searches in four districts, examining cases filed in 2015, 2016, and 2017. He believes that court records will support identification of the frequency of Rule 42(a) orders; how many cases seem to have been consolidated "for all purposes," merging into a single case; how often it happens that, as in *Hall v. Hall*, a court reaches a complete and final disposition of all parts of what began as a separately filed action, while something remains to be done in other parts of the consolidated actions; and what appeal patterns unfold after that — whether appeals are timely taken after the final disposition of the originally separate action, whether belated attempts are made to appeal after the entire proceeding is wrapped up by final judgment, and whether the belated attempts are flagged for dismissal or instead are accepted for decision with the rest of the appeal.

The next step will be to expand the initial survey to include a total of 12 districts. The results may be available in time for this meeting. They will help provide guidance for the next steps. Some time will be required. The four districts sampled for the first round yielded more than 500 consolidated cases, rather more than expected. For all district courts the total is likely to run in a range between 8,500 and 25,000 consolidated cases over the period from 2015 to 2018. If that number proves out, it may be necessary to rely on sampling for manual data selection. The project can easily extend into next spring.

Cases filed from 2015 through 2017 are not likely to yield many relevant examples of one-component-case final dispositions made after *Hall v. Hall* was decided. If the results for the earlier cases seem useful, the study is likely to expand to include cases filed in 2018, 2019, and 2020.

MDL proceedings add further complications that may resist any reasonable effort to sort through docket data. An MDL transfer consolidates the transferred actions only for pretrial purposes. The Supreme Court has ruled that each transferred action remains a separate action, so that final disposition in the MDL proceeding is a final decision appealable under § 1291. The Joint Subcommittee does not plan to reconsider that ruling. But related actions may be consolidated in the court where they were filed before they are transferred. A *Hall v. Hall* issue could arise if an originally independent action is finally decided by the MDL court while other actions in the pre-transfer consolidation remain pending. Similar problems could arise if the MDL court itself consolidates originally independent actions, for example actions originally filed in the MDL court. These variations may resist even determined efforts to unravel docket data. If work goes ahead to draft rules amendments, however, it may prove possible to resolve these ambiguities by rules that extend Rule 54(b) to allocate to the district court full control over the entry of a final judgment.

It is too early to know whether the data generated by the FJC study will be sufficiently precise. But even the most precise data may not answer the most important questions about the effect of *Hall v. Hall*.

The best response to appeals after Rule 42(a) consolidations will be a system that achieves two goals. One is a bright-line rule that tells parties when they may appeal and also protects against forfeiture for failure to recognize that appeal time has started to run. Apart from forfeiture, the parties to the once-separate action also may prefer to delay any appeal until it can be joined by other parties to the proceedings.

The other goal is a rule that best meets the needs of the trial court and the appellate court. The trial court is interested in the efficient management of the matters that remain before it, free from concern about the prospect that an immediate appeal will involve issues that bear on the parties and claims that remain. The appellate court is interested in avoiding multiple appeals that may force wasteful reconsideration of essentially the same record, and also may worry that completion of the trial record may shed a new and different light on the issues presented by an early appeal. The parties that remain in the trial court also may have an interest in participating in an appeal that involves issues common to them.

Experience after *Hall v. Hall* may not provide particularly clear lessons on the shape of the best rules. The trial judge

will not have the opportunity to defer an appeal, except by failing to enter judgment on a separate document — an uncertain ploy, given Rule 58(c)(2)(B) — or, worse, by forgoing the efficient path of disposition to avoid a complete decision of any originally separate action. The court of appeals remains vulnerable to multiple appeals, and perhaps to appeals that are compelled by Appellate Rule 4 but are premature from the perspective of appellate court efficiency. All parties may be caught up in a cycle of appeals they would prefer to avoid.

The Subcommittee will continue to consider the possibility of developing illustrative draft rules while the FJC study is progressing.

THIS PAGE INTENTIONALLY BLANK

TAB 7

TAB 7A

From: Nico Ratkowski <nico@contrerasmetelska.com>
Sent: Wednesday, March 13, 2019 8:11 PM
To: RulesCommittee Secretary
Subject: Suggestion for Change to Rules

Ms. Womeldorf:

I recently encountered a situation in which the 8th Circuit Court of Appeals impermissibly violated the Federal Rules of Appellate Procedure. While I understand that FRAP 2 allows for suspension of the federal rules of appellate procedure, Rule 2 also explicitly states that suspension of FRAP is limited by Rule 26(b). Rule 26(b) starts of by stating "For good cause" before describing different sets of possible actions a court may take with regard to extending time. The way Rule 26(b) is written seems to explicitly, plainly, and clearly disallow a Federal Circuit Judge to grant a briefing extension if good cause has not been established by the moving party. Despite this, in my conversation today with the court clerk for the Eighth Circuit Court of Appeals, I learned that motions for briefing extensions are granted in nearly 100% of cases so long as it is a first request (even if an opposition motion is filed by the non-moving party). This hardly seems like good cause.

Although one would think that a judge should not need to issue a written or oral order establishing that good cause has been established, the case I am referring to presents an interesting scenario in that I am 99% certain the US government (opposing party) did not and could not have established good cause for delay. Because Rule 26(b) cannot be waived, due to Rule 2, it seems highly improper to allow the Circuit Courts to operate in this manner. However, there is no real right to review or oversight. While I can file a Rule 40 petition for rehearing, doing so is only going to annoy the same judges who I need to rule in favor of my client. It's unlikely any cause of action exists to get this reviewed by a district court, and even if I could, the district court would not be able to be neutral because they'd be bound by their Circuit's precedent. Allowing inferior courts to flaunt rules promulgated by the Supreme Court, in this 'one brick at a time' manner is dangerous and unnecessary.

With all of that said, I propose providing a bright line definition (or a multi-factor test) for establishing 'good cause.' I also suggest creating a meaningful mechanism for review of whether good cause has actually been established. Allowing the status quo to continue simply provides litigants' attorneys with incentives to delay their case unnecessarily (even if the litigant would prefer prompt resolution). Moreover, because private attorneys are more sensitive to their clients needs than is the government, it seems like allowing for such broad extensions of time provides disproportionate benefits for the government and harm to private litigants in need of speedy resolution. While I would file a FOIA to seek data to confirm or refute this supposition, I am disallowed from doing so because federal courts are not agencies. I believe, however, if this committee decided it was proper, it could seek empirical research assistance from the Federal Judicial Center to determine the total amount of cases in which the US government is involved and then filter such cases by: (1) the number of requests for briefing extensions granted by the US gov't; (2) the number of requests for briefing extensions granted by private parties engaged in litigation against the US gov't; (3) the number of requests for briefing extensions granted/denied when made by the US gov't; and (4) the number of requests for briefing extensions granted/denied when made by a private party engaged in litigation against the US gov't. Once this data is collected, it could be easily sifted by Circuit and party to see if the current practice of various circuit courts is creating an institutional and systemic advantage for government litigants.

Finally, I also strongly urge this body to create a rule that clearly states a motion for a briefing extension may not, under any circumstances, be granted after time has elapsed for the briefing (the correct way to address this would be to satisfy the exacting equitable tolling standard). This also happened in the case I am referring to. There is no basis in law or in equity capable of supporting such a casual use (or lowering the standard) of equitable tolling in this specific set of circumstances. I know that this sounds petty, but if the small rules don't matter, why bother making them? Why should

anyone rely on them? If the rules can be waived on a whim, even when they are stated to be non-waivable, how can lawyers or litigants be asked to comply? Based on how the 8th Circuit is operating, it seems that litigants should request a briefing extension in 100% of cases just because they can, which hardly seems to serve judicial economy.

I appreciate your thoughtful consideration on this matter and remain available to answer any questions or refine any of the issues addressed above should doing so be helpful to your or the Rules of Practice and Procedure Committee.

Nico Ratkowski
Contreras & Metelska l Attorney
651.771.0019 (main) l 651.772.4300 (fax)
200 University Ave. W., STE 200, St. Paul, Minnesota 55103
nico@contrerasmetelska.com
https://www.contrerasmetelska.com/

TAB 7B

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: Good Cause for Extension (19-AP-A)

Nico Ratkowski, an attorney in Minnesota, suggests rulemaking to define or establish a test for "good cause" for an extension of time. He states that the United States Court of Appeals for the Eighth Circuit routinely grants a first request for an extension of time to file a brief. He points to a particular case in which he was involved where the government was granted an extension even though he is "99% certain" that good cause was lacking.

"Good cause" is a common term in the Federal Rules. It appears more than two dozen times in the Federal Rules of Civil Procedure, and nearly a dozen times in the Federal Rules of Appellate Procedure.

Blacks' Law Dictionary defines "good cause" as "A legally sufficient reason," noting that "Good cause is often the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused." CAUSE, Black's Law Dictionary (11th ed. 2019).

It would seem that the very purpose of a "good cause" standard is to enable the evaluation of the particular circumstance rather than specify a more detailed rule in advance. I suggest that no greater specificity is needed or desirable.

THIS PAGE INTENTIONALLY BLANK

TAB 7C

THIS PAGE INTENTIONALLY BLANK

American Academy
of Appellate Lawyers

TO: THE HONORABLE MICHAEL CHAGARES, CHAIR
FEDERAL ADVISORY COMMITTEE ON APPELLATE RULES

FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS

DATE: APRIL 26, 2019

RE: PROPOSED RULE REGARDING DECISIONS BASED ON UNBRIEFED GROUNDS

The American Academy of Appellate Lawyers proposes that the Federal Rules of Appellate Procedure be amended to address appeals that are decided on legal issues or theories not raised by the parties.[1] The proposed rule provides that, before a court decides an appeal on a ground not raised by parties, the court shall give notice that it is considering a previously unaddressed ground and provide an opportunity to brief it.

The proposed amendment addresses a practice that harms the integrity of the appellate process. To avoid limiting what appellate courts may consider in deciding cases, the proposed amendment merely requires that, before an appeal is decided on a ground the parties framing the appeal have not raised or addressed, the court must give parties notice and an opportunity to be heard on the unbriefed issue or theory.

Proposed Rule 32.2

Rule 32.2
Decisions on Unbriefed Grounds

Before a decision is issued based on a ground not briefed or argued by any party, the court shall provide a notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that ground.

[1] Positions taken in this recommendation state views determined by the Academy's internal process and should not be attributed to individual Fellows, their places of work, or their clients.

1300 Piccard Drive, Suite LL 14 • Rockville, MD 20850 • (240) 404-6498 • Fax: (301) 990-9771 • Email: aaal@appellateacademy.org • Web: www.appellateacademy.org

The problem addressed by the proposed rule

An appellate decision based on a ground not raised by the parties may not be a common occurrence, but it happens.[2] The vast majority of members attending the Academy's Fall 2017 meeting indicated they have received decisions based on issues not presented in the briefs.

Many appellate courts invite supplemental briefs when a court's own research indicates potential grounds for decision other than those raised by the parties.3 But the consequences are severe when courts decide appeals based upon grounds the parties did not have an opportunity to brief. Issues and theories considered without notice and briefing may deprive the appellate court of the reasons those matters were not developed at trial or on appeal.

In addition to being necessary for integrity and quality in appellate decision-making, the opportunity to be heard before decisions are made is fundamental to the American adversary system of justice and due process of law. Notice and opportunity to be heard are also critical to the public perception of justice under law.

Established procedure is necessary

Rule-making provides the procedural mechanism to ensure that litigants can be heard before the court renders decisions in their cases based upon grounds the parties did not have an opportunity to develop or contest. Court rules set forth explicit procedures for providing notice to parties before courts determine facts relevant to the legal issues that determine the outcome of their cases. For example, the Federal Rules of Civil Procedure explicitly require notice and a reasonable time to respond before the court may grant summary judgment either *sua sponte* or on grounds not raised by a party.[4] A court is required to give notice to the parties before appointment of a special master,[5] and also must give notice and an opportunity to respond before

---

[2] *See* E. King Poor & James E. Goldschmidt, Sua Sponte *Decisions on Appeal*, FOR THE DEFENSE, Oct. 2015, at 62.

[3] *See, e.g. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (Gorsuch, J.) (discussing supplemental briefing by the parties in response to the court's request in light of authority discussing a different statutory basis for the relief sought by the appellant).

[4] Fed. R. Civ. P. 56(f): *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:
(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or

[5] Fed. R. Civ. P. 53(b)(1): *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

imposing sanctions for a violation of Federal Rule of Civil Procedure 11.[6]

The Academy's proposed Rule of Appellate Procedure is thus consistent with other rules designed to ensure due process.

[6] Fed. R. Civ. P. 11(c)(1): *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on recommendation.

THIS PAGE INTENTIONALLY BLANK

TAB 7D

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: Decision on Unbriefed Grounds (19-AP-B)

The American Academy of Appellate Lawyers suggests rulemaking to require a court to give notice and an opportunity to submit briefs whenever a court decides an appeal on grounds not raised by the parties. It states that the vast majority of members attending the Academy's Fall 2017 meeting indicated that they have received decisions based on issues not presented in the briefs. It points to other Federal Rules that require notice before certain judicial actions. And it notes that notice and opportunity to be heard are central to due process.

Nonetheless, it might be difficult to determine precisely what constitutes "grounds" not raised by the parties—as opposed to different authorities, different approaches, or different reasoning about those grounds. Courts and losing litigants might have different perspectives on this characterization.

Yet this same objection could be raised against the existing Federal Rule of Civil Procedure 56(f), which provides:

> **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:
>
> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

There are at least two important (and related) distinctions between the district courts and the courts of appeals that might counsel caution before extending the principle of Civil Rule 56(f) to the courts of appeals.

First, there are far more filings and repeated interactions in a district court than in a court of appeals. As a result, a notice requirement may be more disruptive in a court of appeals than in a district court.

Second, if a district court denies a motion for summary judgment rather than granting it on un-argued grounds, those grounds can be raised in later stages of the case in district court. That is, a district court that perceives an un-argued ground for decision could decide the motion as presented and wait until the later stages of the case where the issue might be raised by the parties, perhaps with prompting by the court. By contrast, the court of appeals will dispose of the appeal one way or another. A circuit judge cannot simply wait for the issue to be raised later in the case.

It might be thought that the rehearing process is such a later stage. But it would be rare for a party to successfully obtain rehearing on a ground that has not been previously argued.

Rehearing, however, would seem to be appropriate if the court decided a case on a ground not raised by the parties and, in so doing, "overlooked or misapprehended" something.

TAB 7E

THIS PAGE INTENTIONALLY BLANK

19-AP-C
19-CR-A
19-CV-Q

Dear AOUSC Committees on Civil, Criminal, and Appellate Rules —

There are four major problems with the current civil, criminal, and appellate IFP[1] rules and forms:

1. There is no publicly known definition of what financial standards qualify a person for IFP status.
2. There is no clear rule as to when an IFP litigant needs to update the court about a change in their financial conditions.
3. The IFP forms use ambiguous terms, for which the courts have not given clear definitions.
4. The IFP forms ask for information outside the legitimate scope of 28 U.S.C. § 1915.

All poor litigants deserve to know the rules for IFP qualification, definitions of terms used in forms, and when they must update a court about a change in their financial circumstances; to have uniformity in IFP determinations, know, and to be free of invasive questions that are unnecessary to making IFP determinations. Third parties also have rights to not have their information disclosed without consent; making an IFP application does not convey any right to violate others' privacy.

Pursuant to the Rules Enabling Act and APA, I hereby petition the Committees for rulemaking to cure each of the above, as detailed below. I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[2]
legal@s.ai
+1 510 394 4724

[1] For the purposes of the criminal rules, I use "IFP" synonymously with "CJA".
[2] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

1. **Financial qualification rules for IFP status**

Not one court in the country has given a clear statement of the rules for IFP qualification, such as an objective standard of counted assets or income, qualifying thresholds, or discretionary elements.

This is despite the fact that two appellate courts — the Third Circuit[3] and Fifth Circuit[4] — permit *clerks* to grant IFP applications (and in the Fifth, to *deny* them as well). Since clerks have no Article III authority, and it would be improper for them to be vested to exercise discretion, we can infer that both courts have a policy dictating the qualifying standards. Neither court has published it.[5]

Certainly, courts have a duty to guard the public purse from improper claims of poverty. That duty extends to IFP applicants as well, to not *make* an IFP claim unless it is justified — but with no clear standard, it is impossible for potential IFP applicants to make an informed decision.

Contrast the Legal Services Corporation regulations, 45 C.F.R. Part 1611, which implement an identical duty and for an identical purpose. The LSC is a Federal 501(c)(3) corporation, which grants Federal funds to pay for legal aid for millions of poor people throughout the United States. It has promulgated regulations to determine financial eligibility including multiple discretionary factors, excluded assets, etc. It delegates to local LSC organizations determinations such as asset thresholds, costs of living, and assistance programs (e.g. SSI, SNAP, TANF, or Medicaid) whose recipients automatically qualify. *See* e.g. Utah Legal Services' Financial Eligibility Guidelines.[6]

---

[3] 3rd Cir. standing order of January 22, 1987
[4] 5th Cir. R. 27.1.17
[5] Courts must publish all "rules for the conduct of the business", "order[s] relating to practice and procedure", and "operating procedures". 28 U.S. Code §§ 332(d)(1), 2071(b), & 2077(a). *See In re Sai*, No. 19-5039 (1st Cir. *filed* May 15, 2019).
[6] https://www.utahlegalservices.org/sites/utahlegalservices.org/files/Financial%20Eligibility%20Guidelines%202.19.pdf

The LSC's regulations for financial qualification for government-funded free legal services are reasonable, well-tested, regularly updated[7], and Congressionally approved. They set out clear asset and income thresholds, asset carve-outs for e.g. work supplies and homes, etc. They were thoroughly debated with low-income legal aid advocates, and were promulgated through notice and comment rulemaking.[8] They therefore make for a very easy and clear reference by which the judiciary can craft a fair and uncontroversial rule, already well familiar to the judiciary, which needs little to no further elaboration: "if you qualify for LSC, you qualify for IFP".

Adopting these standards would protect IFP litigants' privacy, while simultaneously making decisions more transparent than they are now. Court orders granting IFP status could simply say "[litigant] has demonstrated IFP qualification under the standards set forth in 45 C.F.R. § 1611.3(c)(1) + (d)(1)". No further detail of the applicant's finances is needed, and this names a clear standard.

I therefore petition that the Rules Committees promulgate rules stating that a § 1915 IFP applicant shows sufficient[9] basis for qualification if they meet any of the Legal Services Corporation's standards[10] of financial qualification, 45 C.F.R. Part 1611, as elaborated by the applicant's local[11] LSC recipient(s) per § 1611.3(a).

---

[7] https://www.federalregister.gov/documents/2019/02/04/2019-00889/income-level-for-individuals-eligible-for-assistance (84 FR 1408 (2019), adjusting for 2019 federal poverty guidelines)

[8] https://www.federalregister.gov/documents/2005/08/08/05-15553/financial-eligibility (70 FR 45545 (2005), revising 45 C.F.R. Part 1611 in entirety)

[9] This is deliberately phrased as "sufficient" — not "necessary". Courts would retain discretion to grant IFP status under circumstances not covered by LSC's standards — so long as they state the standard that they have applied with enough clarity to enable IFP litigants to comply with their obligation to update the court (*see* below).

[10] Part 1611 has *multiple* distinct standards: (1611.3(c)(1) or 1611.5(a)(1–4)) plus (1611.3(d)(1) or (d)(2)); or 1611.4(c).

[11] For applicants living outside the United States, the court should substitute the LSC recipient in the court's jurisdiction with a population most socioeconomically analogous to the applicant's.

2. Requirements to update the courts on change in circumstances

It is neither feasible, nor desirable to anyone, that IFP litigants update courts of *every* change in financial status. Nobody cares if an IFP litigant receives a Christmas gift of $100, or if their expenses in a given month vary a bit from what they set out in their IFP application. Filing updates about minor changes would risk sanctions for "multipl[ying] the proceedings in any case", 28 U.S.C. § 1927, burden courts with immaterial filings, and expose litigants to unnecessary invasion of privacy..

Yet if an IFP applicant were to unexpectedly win a million dollars one month after they receive IFP status, they surely must update the court, withdraw from IFP status, and pay the fee. Failure to do so would subject the previously-IFP litigant to the severe sanction of dismissal "at any time" if "the allegation of poverty is untrue", 28 U.S.C. § 1915(e)(2).

Somewhere between these two extremes lies a threshold triggering obligation. The obvious place for this trigger is at the qualifying threshold. This is the rule used by the LSC, 45 C.F.R. § 1611.8.

I therefore petition that the Rules Committees promulgate rules stating that a person with IFP status

A. need not update the court so long as they remain within the standard under which they qualified, but
B. must update the court when they become aware that they no longer meet that standard.[12]

[12] This does not mean automatic disqualification — the litigant may still qualify under a different standard, e.g. one which requires a discretionary exemption, under 45 C.F.R. § 1611.5(a)(4) — but it does create a clear point at which the court should reëxamine financial qualification.

This necessarily also implies that a court granting IFP status must *clearly state* the standard under which it granted IFP status. It is impossible for a litigant to comply with their obligation to update about a change that might alter their qualification unless they know the standard that was applied.

3. Ambiguous terminology in IFP forms

The courts have given no precise definition of the specific terms in the standard IFP affidavits..

Certainly the terms in the IFP affidavits, such as "income", *can* have clear, specific meanings.

The problem is that they don't have any specified meanings in *this* context — and they are amenable to multiple reasonable interpretations.[13] In fact, many of them *do* have specific meanings in other contexts, such as under IRS or Social Security regulations — and those meanings differ between agencies, proving that they are facially vague.

IFP applicants have a due process right to know the precise meaning of terms to which they are expected to swear under penalty of perjury. They risk an unjust accusation of perjury — and dismissal — if their interpretation differs from a court's (thus far secret) interpretation. Without clarification, the IFP forms are unconstitutionally vague.

---

[13] For example: Is an unmarried, unregistered partner a "spouse" or "family"? What about common-law spouses (and by which jurisdiction's definition)? Do Patreon donations constitute "self-employment income"? Does Bitcoin constitute "cash" or "other financial instrument", and how does one treat its appreciation or depreciation? Is a Bitcoin exchange, or PayPal, a "financial institution"? Are outgoing donations "support paid to others"? Are domain names, software, inventions, etc. "assets"? Is "value" the original price, currently obtainable resale price, cost to re-acquire, depreciated value by some formula, hypothetical market value, velc.? Is PACER research "expenses … in conjunction with this lawsuit"? Are art, disability-related modifications, musical instruments, appliances, printers, etc. "ordinary household furnishings"? Is an expense occurring once every few years, such as purchase or repair of a computer, a "regular" expense? Does a UOCAVA "voting residence" count as a "legal residence"? Are sales taxes, VAT, or the NHS healthcare surcharge "taxes"? Are visa costs "expenses"? What of joint property? Are litigation settlements or fee/cost awards "income"? What is a large enough change to be "major"?

All of the above are actual questions that I personally must know the answer to in order to correctly fill out FRAP Form 4, but for which there is no available answer in the context of an IFP application.

This clarification can be very readily provided, by simply adopting the definitions of dedicated regulatory bodies as defining the terms used in IFP forms.

The LSC defines "assets" and "income", 45 C.F.R. 1611.2. Crucially, both are limited to what is "currently and actually available to the applicant". This rule was adopted in preference to making a distinction between "liquid" and "non-liquid" assets, and focus on the practical requirements that apply to poor people seeking legal aid. 70 FR 45545, 45547 (2005).

The IRS defines virtually all other financial terms that could be relevant to an IFP application, including e.g. "household" (26 C.F.R. § 1.2-2), "self-employment" (26 C.F.R. § 1.1402(a)-1), "spouse" (26 C.F.R. § 301.7701-18), "gifts" (26 C.F.R. § 25.2503-1), etc. It has also issued guidance for evolving issues such as Bitcoin (IRS Notice 2014-21).[14]

I therefore petition that the Rules Committees:

A. promulgate rules stating that every term used in FRAP Form 4, AO 239, AO 240, and CJA 23 is defined to be identical to those terms' definitions in regulations that the Committees identify;
B. give preference to LSC and then IRS regulations; and
C. amend FRAP Form 4, AO 239, AO 240, and CJA 23 to add an appendix listing the regulatory definition for each term used, by citation.

[14] https://www.irs.gov/pub/irs-drop/n-14-21.pdf

4. Courts' IFP forms request information not authorized by 28 U.S.C. § 1915.

The IFP statute contemplates that courts will assess a prisoner's assets and income, and all IFP affiants' general poverty. However, the IFP forms go much further than the statute permits. *See*[15] e.g.:

A. spouse's income, assets, or debts (unless the affiant has a legal right to expend them for litigation, e.g. if jointly owned), or employment history
B. identities of third parties (spouse, debtor, creditor, financial institution, credit card company, department store, supporter or supportee, etc.)
C. employment & employment history (rather than just current income)
D. sources that can't be used to pay litigation costs (e.g. non-fungible/unavailable[16] or exempt[17])
E. expense breakdowns more detailed than broad categories (e.g. "mandatory costs", "costs of living / working", "exempt", or "discretionary / luxury")
F. make, model, year, and registration # of vehicles
G. legal residence (except as relevant to cost of living & poverty guidelines[18])
H. phone number
I. age
J. years of schooling

---

[15] *See also* FRAP Form 4 question re SSN last 4 digits, removed pursuant to my proposal to AOUSC, suggestion 15-AP-E, and promulgated by Supreme Court order of April 26, 2018.
[16] 45 C.F.R. § 1611.2(d): ""Assets" means cash or other resources of the applicant or members of the applicant's household that are *readily convertible to cash*, which are *currently and actually available to the applicant*." (emphasis added)
[17] § 1611.2(i): "… [Income] do[es] not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute."
[18] Only Alaska & Hawaii are distinguished. https://aspe.hhs.gov/poverty-guidelines

These questions are not limited to assessing the affiant's actual, current poverty. Many serve only to pass judgment on the affiant's lifestyle, assess the affiant's ability to earn money (which is not the standard), or otherwise exercise a paternalistic inquiry into the affiant's finances. These are not authorized objectives under 28 U.S.C. § 1915.

By requiring such questions of IFP applicants, courts violate applicants' privacy and dissuade qualified litigants from filing for IFP status.

Furthermore, it is often illegal to answer questions identifying third parties, let alone stating anything about their finances.[19] As a US citizen residing in the UK, obligated to obey UK and EU law, I am subject to very strict legal restrictions under the EU GDPR and UK Data Protection Act 2018. Courts must not demand information that is illegal to give. Here, there is no valid statutory basis for requesting third-party information at all. § 1915 only talks about the *applicant's* poverty; it says nothing about their spouse, creditors, debtors, supporters, etc.

I therefore petition that the Rules Committees amend FRAP Form 4, AO 239, AO 240, and CJA 23 to remove or amend all questions requesting information listed above.

---

[19] Under 12 U.S.C. § 3403 (Right to Financial Privacy Act), 5 U.S.C. § 552a(g) (Privacy Act), 18 U.S.C. § 1030(g) (Computer Fraud and Abuse Act), 15 U.S.C. § 1681b *et seq* (Fair Credit Reporting Act), 15 U.S.C. § 1692c *et seq* (Fair Debt Collection Practices Act), and 47 U.S.C. § 227(b)(3) (Telephone Consumer Protection Act), disclosure of such information without consent is unlawful.

Third parties' information disclosed on an IFP affidavit, as with affiant's spouse, creditors, and debtors, also implicate independent privacy rights. *See Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). An IFP affiant publicly disclosing creditor or debtor information may violate the FDCPA, §§ 1692b, 1692c, & 1692k. This information is also a "consumer credit report", for which public disclosure would likely be actionable under the FCRA. *See* 15 U.S.C. §§ 1681b, 1681n, & 16810.

TAB 7F

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: IFP Status (19-AP-C; 19-CR-A; 19-CR-Q)

Sai has submitted a suggestion to the Civil, Criminal, and Appellate Committees regarding how courts decide whether to grant IFP status. Some preliminary discussion of this matter at each Advisory Committee seems appropriate before deciding how to proceed.

IFP status is governed by statute. 28 U.S.C. § 1915 provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

Prior to the Prison Litigation Reform Act of 1996, this provision required that a person "make affidavit that he is unable to pay costs or give security therefor." The PLRA added the requirement that the affidavit include "a statement of all assets such prisoner possesses." Omnibus Consolidated Rescissions and Appropriations Act of 1996, PL 104–134, April 26, 1996, 110 Stat 1321.

In 1948, the Supreme Court explained that the statute "provides language appropriate for incorporation in an affidavit," and that "where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 338–40 (1948). This would appear to make a barebones affidavit

that merely recited that the person is unable to pay fees or give security generally acceptable.

Nevertheless, when the Federal Rules of Appellate Procedure were promulgated in 1967, Rule 24 required a party seeking to proceed IFP on appeal to file a motion in the district court "together with an affidavit showing, in the detail prescribed in Form 4 . . . his inability to pay . . . . " 389 U.S. 1065, 1093 (1967). *See*, *e.g.*, *United States v. Scharf*, 354 F. Supp. 450, 451 (E.D. Pa.), *aff'd*, 480 F.2d 919 (3d Cir. 1973). Form 4, in turn, called for information about income (including employment, salary, self-employment, rent, interest, and dividend), assets (including cash and bank accounts, real estate, stocks, bonds, and car, but excluding ordinary household furnishings and clothing) and dependents. See attached Form 4 as originally promulgated. The Supreme Court itself had largely accepted barebones affidavits as sufficient until 1980, when it amended its Rules itself—perhaps after seeing a case where a doctor sought IFP status, and a case where hunters seeking big game licenses sought IFP status—to require the submission of the information called for by Form 4 of the Federal Rules of Appellate Procedure. Armed with that additional information, the Supreme Court began to regularly deny IFP status. And the cross-reference to Form 4 in the Supreme Court Rules continues to this day. Supreme Court Rule 39.1. That means that any change to Form 4 will also affect the Supreme Court.

As amended by the PLRA, the statute now requires "a statement of all assets such prisoner possesses," which has been understood to require all persons seeking IFP status—not just prisoners— to provide a statement of all assets. Current Form 4 is considerably more extensive than the original Form 4.

Thus while the statute now requires a statement of all assets, there is a history of using the rulemaking process to require more information than the statute itself was understood to require, and thereby influence the application of the statutory standard.

The *Adkins* decision also established that the standard of poverty required for IFP status is not absolute destitution. It held:

> We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs * * * and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one. See cases collected in 6 A.L.R. 1281—1287 for a discussion as to whether a showing of complete destitution should be made under this and similar statutes.

Adkins, 335 U.S. at 338–40. *Adkins* "has not been overruled or in any way disapproved or restricted in a subsequent decision." Shapiro, et al., SUPREME COURT PRACTICE 8-18 (11th ed. 2019). There are some decisions that reflect a "stringent application of the Adkins standard." *Id*. at 8-20. *See Wrenn v. Benson*, 490 U.S. 89, 91 n.4 (1989) ($1,390.20 per month in salary, $72 in cash, $72,000 home, $250 savings bond, four dependents); *In re McDonald*, 489 U.S. 180, 182 n.6 (1989) (self-employment income of about $300 per month, no dependents, less than $25 in checking or savings account).

A recent article in the Yale Law Journal, which focuses on IFP practice in the district courts, contends that "there is a dizzying degree of variation across and within the ninety-four U.S. district courts." Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478, 1482 (2019). Hammond proposes eligibility for IFP status

based on any one of the following 1) net income at or below 150% of federal poverty level and assets less than $10,000, excluding home and vehicle; 2) eligibility for public assistance; 3) representation by pro bono attorney including one funded by Legal Services; 4) judicial discretion to determine that fees and costs cannot be paid without substantial hardship. *Id*. at 1522. He provides a proposed IFP form as well. Id. at 1565.

The second category may be the most promising, at least from the rulemaking perspective: One reason *Adkins* gave for not insisting on complete destitution as a standard was that the "public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." 335 U.S. at 339. If someone who is not eligible for public support can be eligible for IFP status lest paying fees and costs make them eligible for public support, someone who is already on public support would seem to qualify for IFP status. As for the third category, there is a big jump from what it takes to pay a filing fee to what it takes to pay a lawyer, making pro bono counsel a more difficult proxy to justify.

TAB 7G

THIS PAGE INTENTIONALLY BLANK

Dear AOUSC —

Frequently, parties run into difficulties with filing deadlines. This can be due to inattention; failure to consider applicable holidays; lack of clarity as to the triggering event (such as what constitutes a "judgment"); misinformation by a clerk; etc.[1] This is especially true for *pro se* parties, who are held strictly to deadlines that are often confusing even to lawyers.[2] The consequences can be fatal[3].

The current rules require every party to personally calculate all applicable times anew every time. This is a waste of energy for all parties, clerks, and judges.[4] It is also totally avoidable. The court knows what the times are, has the authority to define them conclusively. The court could keep a single regularly updated document listing all deadlines by computed time, noticed to all parties upon any update — including optional events such as appeals or motions to extend.[5]

Clerks already have to calculate deadlines regularly, in order to enter "set/reset deadlines" entries in CM/ECF. Many (but not all) versions of CM/ECF itself provide such calculations as part of docket entries. Clerks sometimes make errors, however, and courts have ruled that parties may not rely on a clerk's erroneous docket entry or advice by phone — even if done entirely in good faith. Deadline calculations should therefore be issued as a simple clerk's order.

---

[1] *See e.g.* W. Kelly Stewart & Jeffrey L. Mills (Jones Day), *E-Filing or E-Failure: New Risks Every Litigator Should Know*, For The Defense p. 28 (June 2011)

[2] *See e.g. Woodford v. Ngo*, 548 US 81, 103 (2006) (5-3; "prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines").

[3] *See e.g. Jackson v. Crosby*, 375 F. 3d 1291 (11th Cir. 2004) (denying appeal of capital murder case as untimely; majority of panel, C.JJ. Black and Carnes, concurring specially that result is compelled but unjust).

[4] Time computation arises not just when there are disputes about timeliness, but also for drafting opinions & orders, determining timeliness of an appeal, and everyday matters like calendaring.

[5] Rather than ordering e.g. "the deadline for an opposition is extended by 7 days", a court could — with only trivial extra upfront effort — add "the opposition is now due January 1, 2020, at 11:59 pm EST; the reply is now due January 8, 2020 at 11:59 EST; and both deadlines may be modified by motion under [rule] before the deadline (requiring conferral with opposing counsel), or by *post hoc* motion under [rule]."

Therefore, I hereby petition for rulemaking to add the following rule at the end of each rule on computing time, i.e. at FRCP 6(e), FRCrP 45(d), FRBP 9006(h), FRAP 26(d), and Sup. Ct. R. 30(5):

1. For every applicable date or time specified under these Rules, or in any order, the court shall give immediate notice, by order, to all appeared filers, of
    a. the calculated time[6] certain, including time zone, of every[7] event not completed or adjudicated;
    b. whether and how the time may be modified[8], and any conditions for such a modification under all applicable rules and orders[9]; and
    c. whether the event is optional[10] or expired.
2. All filers[11] shall be entitled to rely on the court's computed times.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[12]
legal@s.ai / +1 510 394 4724

---

[6] This includes deadlines expressed in days, e.g. to explicitly differentiate filings due by the close of court from those due by midnight.

[7] This is deliberately cumulative. The most recent calculation order should be the full calendar of a case, listing all available, pending, or missed events, and their respective deadlines. This includes expiration dates of court orders, deadlines to request or correct transcripts, deadlines under internal operating procedures (such as *en banc* calls), etc. This would also serve as a comprehensive list of all events pending adjudication, and all missed deadlines.
Generally, the clerk should be able to copy the previous calculation order, add new or amended deadlines, mark expired deadlines, and delete completed or adjudicated deadlines — resulting in the new and complete calculation order.

[8] Modification includes, e.g., extension, acceptance out of time, or *nunc pro tunc* motion.

[9] Applicable orders include, e.g., any standing orders of the court or judge, or any standing orders in a given case. Conditions include, e.g., a requirement to confer with opposing counsel or with chambers, a deadline for filing for extension that is earlier than the deadline of the filing, or the required showing for an extension to be granted.

[10] Optional events include, e.g., a response or appeal. By implication, such orders shall give notice of whether an appeal may be taken (or requested) — either under the final judgment rule or as a collateral appeal, e.g. under *Cohen*.

[11] Filers includes not just current parties, but also e.g. amici who have not yet filed an appearance,

[12] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

TAB 7H

THIS PAGE INTENTIONALLY BLANK

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: Filing deadlines (19-AP-D; 19-BK-G; 19-CR-B; 19-CV-R)

Sai has submitted a suggestion to the Bankruptcy, Civil, Criminal, and Appellate Committees regarding deadlines. In particular, Sai suggests that courts save litigants a lot of time and headaches by calculating and giving notice of all deadlines in a particular case. Some preliminary discussion of this matter at each Advisory Committee seems appropriate before deciding how to proceed.

There might be great value in such a centralized list of deadlines. There might also be great expense in generating it. Plus, there are some deadlines that court orders cannot change.

In addition, it is not clear that this is a matter for rulemaking, as opposed to court administration.