COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

January 4, 2022

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JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2022

AGENDA

1. Opening Business

A. Welcome and opening remarks by the Chair

B. **ACTION:** The Committee will be asked to approve the minutes of the June 22, 2021 Committee meeting.

C. Status of proposed rules amendments

- Report on proposed rules amendments approved by the Judicial Conference and transmitted to the Supreme Court on October 18, 2021 (potential effective date of December 1, 2022).

2. Joint Committee Business

A. Update on the publication of proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

B. Report on the consideration of several suggestions regarding electronic filing by pro se litigants.

C. Report on the consideration of amendments to add Juneteenth National Independence Day to the definition of "legal holiday."

3. Report of the Advisory Committee on Appellate Rules

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

- Rule 32 (Form of Briefs, Appendices, and Other Papers)
- Rule 35 (En Banc Determination)
- Rule 40 (Petition for Panel Rehearing)
- Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure

B. Information items

- Report on the work of a subcommittee considering several suggestions related to the filing of amicus briefs.
- Report on the work of a subcommittee considering a suggestion to permit the relation forward of notices of appeal.

- Report on the work of a subcommittee considering several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4.
- Report on a new suggestion regarding costs on appeal.
- Report on the work of a joint subcommittee in conjunction with the Civil Rules Committee concerning possible amendments to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018).

4. Report of the Advisory Committee on Bankruptcy Rules

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

- Proposed amendment to Rule 7001 to exclude certain demands to recover estate property from the list of adversary proceedings.

B. Information items

- Report on consideration of possible amendments to Rule 5005 concerning certain electronic signatures.
- Update on progress of the Restyling Subcommittee.

5. Report of the Advisory Committee on Civil Rules

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

- Rule 12 – proposed amendments would recognize statutes that set a time to file a responsive pleading different than the 60-day period in the present rule.

B. Information items

- Report on the work of the MDL Subcommittee.
- Report on the work of the Discovery Subcommittee.
- Report on items currently on the Advisory Committee's agenda.
    - Report on the continued consideration of an amendment to Rule 12(a)(4) in light of feedback received from the Standing Committee.
    - Report on the consideration of issues regarding in forma pauperis standards and procedures.
    - Report on the decision to appoint a subcommittee to consider a suggestion to amend Rule 9(b).
    - Report on the consideration of suggestions to amend Rule 4.
- Report on new items considered and determined to remain on the Advisory Committee's agenda for further study.
    - Suggestion raising issue of differing interpretations of dismissals under Rule 41(a)(1)(A)(i).

    - Consideration of possible amendments to Rule 4 in light of comments received on proposed new Rule 87.
    - Decision to ask the Federal Judicial Center to conduct research regarding the application of Rule 55.
    - Decision to study reported decisions interpreting Rule 63.
    - Suggestion to adopt uniform standards and procedures for filing amicus briefs in the district courts.
- Report on items considered and removed from the Advisory Committee's agenda.

6. Report of the Advisory Committee on Criminal Rules

- Information items

    - Report on the consideration of suggestions to amend Rule 6, including the Advisory Committee's decision not to amend Rule 6(e)(3) to create an exception that would allow disclosure in cases of exceptional historical or public interest.
    - Report on the decision to appoint a subcommittee to consider a suggestion to amend Rule 49.1.
    - Report on items considered and removed from the committee's agenda.

7. Report of the Advisory Committee on Evidence Rules

- Information items

    - Proposed amendments to Rules 106, 615, and 702, currently out for public comment.
    - Possible amendment to Rule 611 to regulate the use of illustrative aids.
    - Possible amendment to Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries of voluminous admissible evidence.
    - Possible amendment to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses.
    - Possible amendment to Rule 801(d)(2) to provide admissibility against a declarant's successor in interest.
    - Possible amendment to Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted.
    - Possible amendment to Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.
    - Decision to table consideration of possible amendments to Rule 407.
    - Rejecting a possible amendment to Rule 806.

8. Other Committee Business

A. Legislative update

B. Strategic planning

- **ACTION:** The Committee is asked to provide suggestions to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (First Circuit), regarding issues or lessons learned, since March 2020, that might be addressed through the judiciary's strategic planning process. Specifically, the Committee is asked to:

    1. Identify issues on the attached list that are already being addressed by the Committee; and
    2. Identify issues that the Committee recommends for further exploration and discussion through the judiciary's strategic planning process.

C. 2022 Judicial Conference committee self-evaluation questionnaire

- **ACTION:** The Committee will discuss and complete the five-year committee evaluation questionnaire at the request of the Executive Committee of the Judicial Conference.

D. Update on the Judiciary's response to the COVID-19 pandemic.

E. Date of next meeting: June 7, 2022 (Washington, DC)

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

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

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC
	Associate Reporter
	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of Law San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

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

Members

Elizabeth J. Cabraser, Esq. Lieff Cabraser Heimann & Bernstein, LLP San Francisco, CA	Honorable Jesse M. Furman United States District Court New York, NY
Robert J. Giuffra, Jr., Esq. Sullivan & Cromwell LLP New York, NY	Honorable Frank M. Hull United States Court of Appeals Atlanta, GA
Honorable William J. Kayatta, Jr. United States Court of Appeals Portland, ME	Peter D. Keisler, Esq. Sidley Austin, LLP Washington DC
Honorable Carolyn B. Kuhl Superior Court of the State of California Los Angeles, CA	Professor Troy A. McKenzie New York University School of Law New York, NY
Honorable Patricia A. Millett United States Court of Appeals Washington, DC	Honorable Lisa O. Monaco Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Gene E.K. Pratter United States District Court Philadelphia, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
Honorable Jennifer G. Zipps United States District Court Tucson, AZ	

Consultants

Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX

Consultants (continued)

Professor Joseph Kimble
Thomas M. Cooley Law School
Lansing, MI

Joseph F. Spaniol, Jr., Esq.
Bethesda, MD

Committee on Rules of Practice and Procedure

Members	Position	District/Circuit	Start Date		End Date
John D. Bates			Member:	2020	----
Chair	D	District of Columbia	Chair:	2020	2023
Elizabeth J. Cabraser	ESQ	California		2021	2024
Jesse M. Furman	D	New York (Southern)		2016	2022
Robert J. Giuffra, Jr.	ESQ	New York		2017	2023
Frank M. Hull	C	Eleventh Circuit		2016	2022
William J. Kayatta, Jr.	C	First Circuit		2018	2024
Peter D. Keisler	ESQ	Washington, DC		2016	2022
Carolyn B. Kuhl	JUST	California		2017	2023
Troy A. McKenzie	ACAD	New York		2021	2024
Patricia A. Millett	C	DC Circuit		2020	2022
Lisa O. Monaco*	DOJ	Washington, DC		----	Open
Gene E.K. Pratter	D	Pennsylvania (Eastern)		2019	2022
Kosta Stojilkovic	ESQ	Washington, DC		2019	2022
Jennifer G. Zipps	D	Arizona		2019	2022
Catherine T. Struve					
Reporter	ACAD	Pennsylvania		2019	2023

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(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. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

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.
Acting Chief Counsel
(Appellate, Bankruptcy, Evidence)

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

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

Brittany Bunting
Administrative Analyst

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

Carly E. Giffin
Research Associate
(Bankruptcy)

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

Marie Leary, Esq.
Senior Research Associate
(Appellate)

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

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

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

Item 1A will be an oral report.

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

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

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

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

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

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

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

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates's thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee's feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees' proposals now use the same definitional language. The proposals all state that a rules emergency may be declared when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to" a court, "substantially impair the court's ability to perform its functions in compliance with these rules." The proposed emergency Criminal Rule adds a requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this "no feasible alternative" language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a "soft landing" provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the "soft landing" issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." Professor Capra described this as a "half-full / half-empty" distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The "no feasible alternative measures" requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)'s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee's spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book's version, Rule 62(e)(3)'s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)'s requirement, because Rule 62(e)(3)(A)'s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read "the requirement in (2)(B)," eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62's "soft landing" provision. As noted previously, the "soft landing" provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but "does not terminate … the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment." This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note's discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when "conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access" which should be "contemporaneous if feasible." The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public "if access to the video transmission is not feasible." This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note's suggestion that video access should be provided to the public if "feasible" seemed to raise an undue barrier for courts—such as this member's court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not "feasible"—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note's language about "feasibility" should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with "reasonable alternative access." The first judge endorsed the Rule's feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in "heroics" to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)'s provision that a noncapital defendant who has pleaded guilty "waives the right to be present … when the defendant is voluntarily absent during sentencing." In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*'s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless "the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing." The phrase "requests in writing" had replaced "consents in writing" in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the "requirements in (2)(B) and (C)" on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words "and consents" after "in writing" in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant's lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule's requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King's, that lines 110-11 might require that a defendant "consent by requesting in writing." But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant "consents after consulting with counsel"—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that "the court may sign for" a pro se defendant "if the defendant consents on the record," but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that "an adequate opportunity to consult"—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than "consulting."

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said "the defendant consents." This might resolve the pro se defendant issue. In (e)(3)(B) the word "consent" could be added somewhere. And (e)(4)(C) simply requires that "the defendant consents." This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say "after the opportunity to consult." A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting "consent in writing" for "request in writing." Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee's policy choice, "consent in writing" would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase "after consulting with counsel" be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant's consent "after consultation with counsel." So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the "opportunity" to consult, Professor King suggested, would not be inconsistent with the Advisory Committee's intent.

Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member's drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King's point that "request" was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court's use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an "opportunity to consult," it should use the "adequate opportunity" language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the "opportunity" or "consultation" language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant's ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through "a method that is reasonably calculated to give notice." The Rule states that "[t]he court may order" such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a "soft landing" provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own "soft landing" provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that re-start civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a "soft landing" provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

"[a]n act authorized by an order under" Rule 87(c)(2) "may be completed under the order after the emergency declaration ends."

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration "state any restrictions on the authority" granted in subsequent portions of Criminal Rule 62. The Criminal Rule's formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court's discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra's suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: "[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days." Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a "court may order service" through an alternative method instead of saying that a "court may authorize service?" Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used "order" rather than "authorization" because an "order" guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the "order" would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say "[t]he court may by order authorize." Professor Cooper and Judge Dow approved of this change.

The member's second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word "plaintiff" because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read "unless the court, after notice and an opportunity to be heard, modifies or rescinds the order."

A third change agreed upon was to delete (for style reasons) "authorized by the order" from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.") Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) ("a timely motion … under Rule 54(d)(2)") was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of "bankruptcy court" instead of "court" throughout the proposed rule. Bankruptcy Rule 9001 defines "court" as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use "bankruptcy court" when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates's question concerned (c)(4)'s provision on "Further Extensions or Shortenings." He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge's extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur "only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee." Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, "notice and a hearing" is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act sua sponte. Professor Hartnett asked about the significance of saying that "only" these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words "and only" could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words "and only" on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules' proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee's suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed "within the time allowed by" the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed "within the time allowed by" the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only "if the motion is filed no later than 28 days after the judgment is entered." This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed "within the time allowed for filing a motion under Rule 59." That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)'s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

Action Items

Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that "as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended." Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 "brings all rule of completeness questions under one rule." He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that "[t]he court may

admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together"). Professor Capra responded that Judge Bates's question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

Publication of Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz introduced the proposed amendment to Rule 615, a "deceptively simple" rule providing, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge's order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member's comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom "includes exclusion of witnesses from a virtual trial."

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word "one" was missing from "only <u>one</u> witness-agent is exempt at any one time"). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not "bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness," but then goes on to say that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis." The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note's drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court's discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude "a person authorized by statute to be present," was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party's request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, "must" be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee's work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses). Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993), which directs that "the trial judge must determine at the outset, pursuant to Rule 104(a)," whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

Action Items

Final Approval of Restyled Rules Parts I and II. Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act). Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre–CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest). Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court's electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word "Agent" to "Agent for Receiving Service of Process."

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal). The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income). Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that "an individual . . . filing for bankruptcy under Chapter 11" must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added "(other than under subchapter V)" to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series). Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim). Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than $10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

Action Items

Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g). Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,

there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow's district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead "any identifying designation provided by the Commissioner with the final decision"; a conforming change was made to the committee note. Supplemental Rule 6's language was clarified. The committee note now observes that the rules' scope encompasses instances where multiple people will share in an award from a claim based on one person's wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4's provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney's Office for the relevant district and "to the appropriate office within the Social Security Administrations' Office of General Counsel." The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the "appropriate office."

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from "after the court disposes of all motions" to "after entry of an order disposing of the last remaining motion"). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges' ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 ("Notice to the Commissioner is sent to the appropriate regional office") should mirror the language in Supplemental Rule 3 itself (referencing notice being sent "to the appropriate office within the Social Security Administration's Office of General Counsel"). Judge Bates asked if deleting the word "regional" would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what "any identifying designation provided by the Commissioner" referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like "including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier." This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was "provided by the Commissioner." Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund "identifying" in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

(1) The complaint must:
  (A) state that the action is brought under § 405(g);
  (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  (C) state the name and the county of residence of the person for whom benefits are claimed;
  (D) name the person on whose wage record benefits are claimed; and
  (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word "regional" on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,[†] decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings. The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee's April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

[†] Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

Information Items

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

Action Item

Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection). Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference**, with the sole change of the removal of the committee-note sentence identified by Professor Beale.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

Action Items

Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act. Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment[‡] might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling requirement that the court of appeals "must" dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at https://www.law.cornell.edu/rules/frcp/rule_84). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.

Judge Bates asked whether the new, combined Rule 40 could not be titled simply "Petitions for Panel or En Banc Review" rather than (as in the current proposal) "Petition for Panel Rehearing; En Banc Determination." Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested "Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc."

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying "transferred" rather than "abrogated." This judge had two other comments. First, this judge thought it would be better to change "or" to "and" on page 218 (subdivision (c)(1)) to accord with the "and" on page 217 (subdivision (b)(2)(A)); the "and" in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)'s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words "hear[] or" before "rehear[]" at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the "and" versus "or" discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using "or" in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a "petition [for initial hearing en banc] must be filed no later than the date when the appellee's brief is due." The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the "legacy" rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that "the full court's consideration is therefore necessary to secure and maintain

uniformity of the court's decisions" must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules' substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

Information Item

Amicus Disclosures. Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

OTHER COMMITTEE BUSINESS

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee's strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference's Strategic Plan for the Federal Judiciary, a list of the Standing Committee's initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.

TAB 1C

Effective December 1, 2021

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2021)
- Approved by Judicial Conference (Sept 2020) and transmitted to Supreme Court (Oct 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Amendment conforms the rule to amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Amendments conform the forms to amended 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	Subdivision (c) amended to replace 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	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	Amendment conforms the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	Amendment requires high-volume paper notice recipients (initially 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.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
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. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating 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 a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021 – Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021 – Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
	not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Agenda E-19 (Summary)
Rules
September 2021

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 25 and 42, 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. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, 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 .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, 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. 23-25

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, 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 Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

Information Items

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting);
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status);
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11);
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement);
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

<u>SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)</u>

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, 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, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Official Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition

defaults that may have occurred. The amended rule includes proposed stylistic changes throughout.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

Information Items

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

Information Items

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, 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.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 would fix two problems with Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended to address two issues. The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702, such testimony must be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

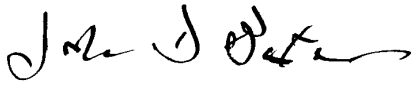
Information Items

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

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

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

Appendix C – Federal Rules of Civil Procedure (proposed new supplemental rules and supporting report excerpt)

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

TAB 2

Item 2 will be an oral report.

TAB 3

TAB 3A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 8, 2021

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 7, 2021, via Teams. The draft minutes from the meeting are attached to this report.

The Committee seeks approval for publication of a consolidation of Rule 35 and Rule 40, dealing with rehearing, along with confirming amendments to Rule 32 and the Appendix of Length Limits. (Part II of this report.)

Other matters under consideration (Part III of this report) are:

- amendments to Rule 2 and Rule 4 that have been published for public comment;
- expanding disclosures by amici curiae;
- specifying standards for recusals based on amicus filings;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, expanding electronic filing by pro se litigants;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight;
- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal; and
- a new suggestion regarding costs on appeal.

The Committee also considered two items and removed them from its agenda (Part IV of this report):

- a proposed amendment to Rule 4 to permit the relation forward of notices of appeal; and
- a new suggestion that rules be adopted imposing a time frame for the courts of appeals to decide habeas matters.

II. Action Item for Approval for Publication

Consolidation of Rules 35 and 40—Rehearing (18-AP-A)

For several years, the Advisory Committee has been considering a comprehensive revision of Rules 35 and 40. (June 2018 Standing Committee Agenda Book starting at page 84). Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

At the June 2021 meeting of the Standing Committee, the Advisory Committee sought permission to publish a proposed amendment that abrogates Rule 35 and unites the two rules under Rule 40. The Committee sought to achieve the clarity and user-friendliness of unification while avoiding unnecessary changes. Members of the Standing Committee expressed support but raised concerns about some of the provisions. In many instances, the only defense offered was that the provision at issue already appeared in the existing rules and that the Advisory Committee was trying to minimize changes. The Standing Committee decided to remand the matter to the Advisory Committee with instructions to take a freer hand in clarifying and simplifying the language of the existing rules. Having done so, the Advisory Committee now seeks publication of a revised version of the proposal. (See Appendix for the full text.)

The fundamental feature of the proposed amendment remains the same. It revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc), but in keeping with a suggestion at the June Standing Committee meeting, Rule 35 is described as transferred to Rule 40 rather than abrogated. So, too, the fundamental structure remains the same.

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both. It also states the general requirement of filing a single document.

- Rule 40(b) sets forth the required content for each kind of petition for rehearing, drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

- Rule 40(c) describes when rehearing en banc may be ordered and the applicable voting protocols, drawn from existing Rule 35(a) and (f). It also reiterates clearly that a court may act sua sponte.

- Rule 40(d) brings together in one place uniform provisions governing matters such as the time to file, form, and length, drawn from existing Rule 35(b), (c), (d), and existing Rule 40(a), (b), and (d). It adds that any amendment to a decision restarts the clock for seeking rehearing.

- Rule 40(e) clarifies for litigants some of the actions a court that grants rehearing might take by clarifying the language of existing Rule 40(a)(4) and extending these provisions to rehearing en banc.

- Rule 40(f) provides that a petition for rehearing en banc does not limit a panel's authority to take action described in Rule 40(e).

- Rule 40(g) deals with initial hearing en banc, drawn from existing Rule 35.

The Standing Committee raised several particular concerns about language in the current rule that was carried over in the proposed amendment presented in June.

One concern was that the provision governing the required content of a petition for rehearing en banc lumps together (1) conflict with a Supreme Court decision and (2) conflict with a decision of the court to which the petition is addressed, while leaving ambiguous whether the required statement that "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions" applies to both situations. Some thought that the only sensible reading is that the uniformity statement applies only to the intra-circuit conflict situation. *See* current Rule 35(b)(1)(A).

The provision governing the required content of a petition for rehearing en banc also lumps together (1) questions of exceptional importance and (2) inter-circuit conflict, treating the latter as an example of the former. *See* current Rule 35(b)(1)(B).

Another concern was a mismatch between the statements required in a petition for rehearing en banc and the circumstances which justify rehearing en banc. While the former specifically includes conflict with the Supreme Court, the latter does not—unless one treats conflict with the Supreme Court as a situation requiring consideration by the en banc court to secure and maintain uniformity of the court's decisions. *See* current Rule 35(a).

In addition, a member of the Standing Committee suggested that the time to seek initial hearing en banc should be earlier than the due date of the appellee's brief. *See* current Rule 35(c).

The Advisory Committee changed the proposed amendment to address these concerns.

First, four separate grounds for seeking rehearing en banc are now listed separately, so that a petition for rehearing en banc would have to begin with a statement that:

> (A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
>
> (B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);
>
> (C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or
>
> (D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

Proposed Rule 40(b)(2). That is, intra-circuit conflicts, conflicts with the Supreme Court, inter-circuit conflicts, and questions of exceptional importance are treated as separate grounds for seeking rehearing en banc.

Second, to align the grounds for granting rehearing en banc with the grounds for seeking rehearing en banc, the provision governing when rehearing en banc may be ordered simply cross-references the provision governing the grounds on which it may be sought: "Ordinarily, rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met."

Freed from a perceived imperative to minimize changes, the current proposal has also been more extensively polished by the style consultants.

In addition, the proposal includes conforming amendments to Rule 32(g) and the Appendix of Length Limits.

III. Other Matters Under Consideration

A. Proposed Amendments to Rules 2 and 4—CARES Act

Proposed amendments to Rule 2 and Rule 4, developed in close coordination with other Advisory Committee and input from the Standing Committee, were published for public comment. The Advisory Committee considered all comments that were received prior to its meeting and did not think that any of those comments warranted further discussion by the Advisory Committee. It will review any additional comments at its spring meeting.

B. Amicus Disclosures—FRAP 29 (21-AP-C)

In May of 2019, a bill was introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists. Senator Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act (the AMICUS Act). An identical bill, H.R. 3993, sponsored by Representative Henry Johnson, Jr., was introduced in the House. Under the bill, the registration and disclosure requirements would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. Fines would be imposed on those who knowingly fail to comply.

In October 2019, the Advisory Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

At the June meeting of the Standing Committee, the Advisory Committee reported that it had begun careful exploration of whether additional disclosures should be required. It noted then and still believes that changes to the disclosure requirements of Rule 29 are within the purview of the rulemaking process under the Rules Enabling Act, but public registration and fines are not, and that any change to Rule 29 should not be limited to those who file multiple amicus briefs. It also continues to resist treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

The question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent

of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of "dark money" on the amicus process. Any disclosure requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2372 (2021); *McIntyre v. Ohio Elections Comm'n*, 514 U.S 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The Advisory Committee is considering disclosure regarding the relationship of an amicus to a *party* separately from disclosure regarding the relationship of an amicus to a *nonparty*.

Regarding parties, one thing is easy. It is possible to construe the phrase "preparing or submitting" in Rule 29(a)(4)(E) so narrowly as to encompass only the costs of formatting, printing, and delivering the specific brief. To clarify what is generally if not universally understood, Rule 29(a)(4)(E)(ii) [and (iii)] could be amended to apply to money intended to "fund drafting, preparing, or submitting the brief." In addition, Rule 29(a)(4)(E)(iii) could be amended to make clear that this disclosure requirement regarding the relationship between an amicus and a party applies even where a party is a member of an amicus. That could be done by adding a proviso in Rule 29(a)(4)(E)(iii) to the exception to disclosure for members of an amicus: "except for the amicus, its counsel, and its members who are not parties or counsel to parties."

The current disclosure requirement is limited to contributions earmarked for a particular brief. Recognizing the fungibility of money, Rule 29 might also be amended to cover contributions by parties to an amicus that are not earmarked for a particular amicus brief. The Advisory Committee considered two ways of doing so, one formulated as a rule, the other formulated as a standard.

One way would be to require disclosure of whether a party (or its counsel) has an ownership interest in the amicus curiae exceeding a certain percentage or made contributions exceeding a certain percentage of the annual revenue of the amicus curiae. An amendment along these lines might add a provision requiring disclosure if a party (or its counsel):

> has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae;

The 10% figure is borrowed from Rule 26.1 dealing with corporate disclosures. The Advisory Committee acknowledges that the purpose of Rule 26.1 is quite different. The Advisory Committee is by no means committed to the idea that this is the right percentage; it simply offers a convenient place to start.

A second way would be to articulate a standard that requires disclosure if a party (or its counsel) possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would conclude that a party (or its counsel) had a significant influence over the amicus curiae with respect to the brief.

While the Advisory Committee has not yet decided whether to recommend additional disclosures regarding the relationship between an amicus and a party, it does think that a rule-based approach is preferable to a standard-based approach.

Disclosures regarding the relationship between an amicus and a nonparty present more difficult issues. While the relationship between an amicus and a party might lead a judge to discount an amicus brief, that concern is much more attenuated when the relationship between an amicus and a nonparty is involved. But it is not non-existent. If Mark Zuckerberg is giving 15% of the revenue of an amicus in a case involving section 230 of the Communications Decency Act, that might be worth knowing.

It is important to note that existing Rule 29 already requires some disclosure of the relationship between an amicus and a nonparty. Rule 29(a)(4)(E)(iii) requires the disclosure of any person who contributed money that was intended to fund preparing or submitting the brief—except for the amicus curiae itself, its members, or its counsel.

The reason for this existing required disclosure is not entirely clear. The Advisory Committee at the time explained that it "may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." One way to understand this required disclosure—particularly considering its exception for members of the amicus—is that it is targeted at revealing when an amicus is simply the puppet or paid mouthpiece of someone else rather than truly speaking for itself and its members.

But again, money is fungible, so a nonparty may have considerable influence on an amicus without earmarking money for a particular brief. For that reason, it might be appropriate to have a similar disclosure requirement, and amend Rule 29(a)(4)(E)(iii) to require the disclosure of any person who:

> has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that are received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae.

If the disclosure requirements were increased in this way, it would also be necessary to consider whether to retain the exception for members of the amicus. On the one hand, there are important privacy interests in protecting membership lists and an amicus can be viewed as properly speaking for its members. On the other hand, only members who contribute a sufficiently high percentage of the revenue of the amicus would be disclosed—not the entire membership list—and an exception for members could make for easy evasion of any contribution disclosure requirement: the contribution need only be characterized as a membership fee.

The Advisory Committee has not decided whether to recommend any amendment of the amicus disclosure requirements, regarding either the relationship of the amicus to a party or the relationship of the amicus to a nonparty.

Nor has it reached any conclusion regarding the constitutionality of the amendments under consideration. The following summary of the Supreme Court's decision in *Americans for Prosperity Foundation*, 141 S. Ct. 2372, may be useful:

> *Americans for Prosperity* held California's charitable disclosure requirement to be facially unconstitutional. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.
>
> To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." 141 S. Ct. at 2383 (opinion of Roberts, C.J.) (cleaned up).[1] "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of

[1] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

> achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 2383 (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 2385.
>
> The Court then found that California's disclosure regime did not satisfy the narrow tailoring requirement. *Id.* It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 2385-86. But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 2386. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. *Id.* Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* The Court rejected arguments that the disclosure was not in fact particularly burdensome, finding that the disclosure requirement created "an unnecessary risk of chilling," "indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." *Id.* at 2388.

There are at least four significant differences between the possible amendments to Rule 29 discussed above and the California statute involved in *Americans for Prosperity*.

First, Rule 29 applies only to those seeking to influence a court by submitting an amicus brief, while the California statute applied broadly to charities soliciting funds in California. There can be little doubt that more disclosure requirements can be imposed on those who file briefs with a court than on charitable organizations generally.

Second, both Rule 29 and the Supreme Court Rules already require both parties and non-parties who make contributions "intended to fund the preparation or submission" of an amicus brief to have their identities publicly disclosed in the brief. Presumably the Court viewed those requirements as constitutional when it imposed them.

Third, disclosures required by Rule 29 appear in a publicly available brief, while the disclosures mandated by California law were supposed to be treated confidentially. The Court observed that "disclosure requirements can chill association even if there is no disclosure to the general public," and "while assurances of

confidentiality may reduce the burden of disclosure to the State, they do not eliminate it." 141 S. Ct. at 2388 (cleaned up).

Fourth, a 10% ownership or contribution threshold is higher than the 2% threshold involved (at least in some cases) in the California statute and will often be higher than the $5000 threshold in the California statute.

Any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. The analysis of required disclosure concerning the relationship between an amicus and a party may well be different than the analysis of required disclosure concerning the relationship between an amicus and a nonparty.

C. Amicus Briefs and Recusal—Rule 29 (20-AP-G)

In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Alan Morrison has suggested that the Advisory Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption.

The matter was referred to the subcommittee dealing with the AMICUS Act and Rule 29, but the subcommittee's focus thus far has been on the issue of disclosure.

D. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. It is gathering information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful. Results from a survey were received immediately before the October meeting and will be reviewed by the relevant subcommittee.

E. Electronic Filing by Pro Se Litigants (20- AP-C; 21-AP-E)

The issue of electronic filing by pro se litigants has come up repeatedly. The last time the Advisory Committee considered the issue, it decided to await consideration by the Civil Rules Committee. Because Bankruptcy, Civil, and now Appellate are confronting this question, Judge Bates has convened the reporters to discuss the way to proceed. The reporters will coordinate and welcome feedback.

F. Deadline For Electronic Filing (with other Advisory Committees) (19-AP-E)

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey remains on hold due to the pandemic.

G. Finality in Consolidated Cases after *Hall* (with Civil Rules Committee)

The joint subcommittee dealing with finality in consolidated cases continues its work. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and it creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

Research by the Federal Judicial Center did not reveal significant problems. However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it. The joint subcommittee will continue to monitor the situation and consider whether to propose any amendments.

H. Costs on Appeal—Rule 39 (21-AP-D)

This past term, the Supreme Court held that Federal Rule of Appellate Procedure 39 does not permit a district court to alter a court of appeals' allocation of costs. *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). Those costs are usually modest, but Rule 39(e)(3) includes as taxable costs the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond), and the cost of securing such a bond can be high.

The Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring their arguments about costs to the court of appeals. Accordingly, the Advisory Committee created a subcommittee to explore the issue. The subcommittee might also consider whether a district court, in deciding

whether to approve a bond, is concerned with the premium paid for the bond, and whether the premium for the bond should be a taxable cost at all.

IV. Items Removed from the Advisory Committee Agenda

A. Relation Forward of Notices of Appeal (20-AP-A)

The Advisory Committee continued to consider a suggestion to deal with premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. The Advisory Committee considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

At the June 2021 meeting of the Standing Committee, the Advisory Committee reported that it had not been able to come up with a good solution. It did not (and does not) want to allow any premature notice of appeal to become effective once a judgment or appealable order is filed because it fears that this would cause more problems than it solves by inviting premature notices of appeal. Nevertheless, the Advisory Committee was not ready to take the matter off the agenda.

The Advisory Committee looked more closely at conflicting decisions in the courts of appeals regarding relation forward of notices of appeal taken from orders that could have been, but were not, certified under Civil Rule 54(b).

It explored the possibility of resolving the conflict by an amendment. But there is not only a split regarding whether relation forward is allowed, but also a split among the courts that permit relation forward regarding whether that result is based on an interpretation of Rule 4(a)(2) or is instead based on earlier case law. An amendment resolving the split would also face the difficulty of dealing with that underlying question. Plus, the problem is in considerable measure one of the parties' own making: one party files a premature notice of appeal and the other party does nothing about it but continues to litigate the case in the district court.

The Advisory Committee also considered the possibility of (1) limiting Rule 4(a)(2) to its classic, core situation where an appealable decision is announced but, before it is entered on the docket, a notice of appeal is filed, while (2) permitting a court the discretion in other situations to allow relation forward, looking to factors such as whether allowing relation back would prejudice the appellee, how obviously premature the notice of appeal was, and whether the appellee did anything to put the

appellant on notice of the problem. But this approach would override a lot of case law and subject parties to the court's discretion.

The Advisory Committee also looked more closely at the current rule's different treatment of post-trial motions in civil and criminal cases. While there may or may not be a persuasive reason for the different treatment, there does not appear to be a problem calling for a solution.

The Advisory Committee therefore reached the same conclusion it had reached in the past and removed the item from its agenda.

B. Time Frame to Rule on Habeas Corpus (21-AP-F)

The Advisory Committee considered a suggestion that rules be adopted imposing a time frame for the courts of appeals to decide habeas matters. The Committee agreed to remove the item from the agenda.

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

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), ~~35(b)(2)(A),~~ or ~~40(b)(1)~~ 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely

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

on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Changes to subdivision (g) reflect the consolidation of Rules 35 and 40.

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

Rule 35. ~~**En Banc Determination**~~
(Transferred to Rule 40.)

~~**(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.~~

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

~~**(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.~~

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

~~(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and~~

~~(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.~~

~~(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.~~

~~**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be~~

~~filed within the time prescribed by Rule 40 for filing a petition for rehearing.~~

~~**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.~~

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

~~**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.~~

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule

40, which is expanded to address both panel rehearing and en banc determination.

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

Rule 40. ~~Petition for Panel~~ Rehearing~~;~~ En Banc Determination

(a) ~~Time to File; Contents; Response; Action by the Court if Granted.~~ A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

~~(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days~~

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

~~after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:~~

~~(A) the United States;~~

~~(B) a United States agency;~~

~~(C) a United States officer or employee sued in an official capacity; or~~

~~(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf including all instances in which the United States represents that person when the court~~

~~of appeals' judgment is entered or files the petition for that person.~~

~~(2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.~~

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

~~(4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following:~~

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

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

~~(C) issue any other appropriate order.~~

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

(1) ~~a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~ **Petition for Panel Rehearing.** A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) ~~a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.~~ **Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that:

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

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another

United States courts of appeals (with citation to the conflicting case; or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, 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 reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Ordinarily, rehearing en banc will be ordered only if one of the criteria in Rule 40(b)(2)(A)–(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing or rehearing en banc may be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) **Form of the Petition.** The petition must comply in form with Rule 32.

Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) **Length.** Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:

(A) 3,900 words if produced using a computer; or

(B) 15 pages if handwritten or typewritten.

(4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition

will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.

(e) If a Petition is Granted. If a petition for panel rehearing or rehearing en banc is granted, the court may:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a petition for rehearing en banc does not limit the

panel's authority to take action described in Rule 40(e).

(g) Initial Hearing En Banc. On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that

rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the

same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the

court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Oral argument. The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

Subdivision (e). The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Subdivision (f). The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (g). The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

		* * *			
Rehearing and en banc filings	~~35(b)(2) & 40(b)~~ 40(d)(3)	• Petition for initial hearing en banc • Petition for panel rehearing; petition for rehearing en banc • Response if requested by the court	3,900	15	Not applicable

TAB 3B

Minutes of the Fall 2021 Meeting of the

Advisory Committee on the Appellate Rules

October 7, 2021

Via Microsoft Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 7, 2021, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Leondra R. Kruger, Judge Carl J. Nichols, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Brian H. Fletcher was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, 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 to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Bridget M. Healy, Acting Chief Counsel, Rules Committee Staff (RCS); Scott Myers, Counsel, RCS; Julie Wilson, Counsel, RCS; Brittany Bunting, Administrative Analyst, RCS; Shelly Cox, Management Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; 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.

I. Introduction

Judge Bybee opened the meeting and welcomed guests and observers. He welcomed two new members of the Committee, Judge Carl J. Nichols who is replacing Judge Stephen Murphy, and Justice Leondra Kruger who is replacing Justice Judith French. He thanked Judge Murphy and Justice French for their service. He also thanked those who put everything together for the meeting.

II. Report on Meeting of the Standing Committee

The draft minutes of the January Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

III. Approval of the Minutes

The draft minutes of the April 7, 2021, Advisory Committee meeting were approved.

IV. Discussion of Matter Published for Public Comment

Proposed Amendments to Rules 2 and 4—CARES Act

The Reporter stated that Rule 2 and Rule 4, which had been developed in close coordination with other Advisory Committees and input from the Standing Committee, was published for public comment. Prior to publication of the agenda book, two comments were received and appear in the agenda book (page 123). Since then, another comment has been received. The Reporter did not think that any the comments warranted further discussion by the Committee. No member of the Committee disagreed, nor did any member have anything else to add at this point. The comment period is open until February, so the Committee can review any additional comments at the spring meeting.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to FRAP 35 and 40—Rehearing (18-AP-A)

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 137). He noted that the Committee has been considering amendments to these rules for some time and had sought the Standing Committee's permission to publish a draft for public comment, but the Standing Committee remanded for the Committee to take a freer hand in combining and clarifying Rules 35 and 40.

A redline of the subcommittee's proposal is in the agenda book (page 138). Rather than describe Rule 30 as abrogated, the proposal describes it as transferred to Rule 40. Rule 40(a) is designed to tell a party exactly what to do, front-loading the general requirement of filing a single document. Rule 40(b)(2) states clearly four grounds for petitioning for rehearing en banc, and Rule 40(c) incorporates those by reference in stating when rehearing en banc is ordinarily granted. It also reiterates clearly that a court may act sua sponte. The time to seek initial en banc hearing is

changed in Rule 40(g) to the date when a party's principal brief is due. Corresponding changes are made to the Committee Note.

Judge Bybee thanked Professor Sachs, noting how much time he and the subcommittee had put into this project.

The Reporter added that Professor Struve had noticed that the reference in the conforming amendment to Rule 32(g)(1) should be to Rule 40(d)(3)(A), not simply Rule 40(d)(3). He initially referred to the Appendix regarding length limits, but Professor Struve and Mr. Byron clarified that the text of Rule 32—which governs certificates of compliance—is where the conforming amendment needs to be changed.

A judge member thought that Rule 40(a) should include a reference to "both," not simply a reference to a petition for rehearing or a petition for rehearing en banc. A lawyer member noted that the subcommittee had debated whether it was better to refer to two petitions or a single petition seeking two forms of relief. The judge member asked for more information about the nature of the problem.

Mr. Byron stated that in clarifying and combining Rule 35 and Rule 40, an issue arose about how to talk about the situation where a party seeks both panel rehearing and rehearing en banc. He is a little disappointed with where the subcommittee landed. It could be done more simply if it were not for the desire to allow for local rules providing for separate documents. His recollection is that only the Court of Appeals for the Fifth Circuit has such a local rule, and that inquiry was being made about its attachment to that rule.

Judge Bybee stated that he had reached out to the Chief Judge and not received a response, which he took as standing by the existing local rule, but he will follow up.

The judge member who has asked for more information said that he now understood the nature of the problem, that he had not been aware of the practice in the Fifth Circuit and did not resist adding "or both."

A liaison member provided some background, explaining that the proposed amendment would combine Rule 35 and 40, thereby eliminating lots of redundant material. Her court allows petitions to be joined but receives lots of separate petitions. She always liked including "or both," noting that half of the cases are pro se cases.

Professor Sachs was comfortable with adding "or both," but not "or for both." Consensus was reached that the first sentence of Rule 40(a) should read, "A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both."

A lawyer member praised the revision but asked why Rule 40(c) says that "ordinarily" rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met. Professor Sachs responded that it is in existing Rule 35(a) and is designed to reflect the court's discretion, discretion that there is no need to restrict. Judge Bybee added that there can be infighting in a court of appeals over whether it is permissible to use en banc procedures to engage in error correction; leave in "ordinarily." A judge member agreed.

A lawyer member noted that in some places Rule 40 refers to "the petition" while in others it refers to "a petition." Professor Sachs suggested that dealing with the apparent discrepancy could be left to the style consultants. A judge member suggested changing all instances of "the petition" to "a petition"; Professor Struve noted that the Rules contemplate other kinds of petitions as well. Working on a shared screen, the Reporter changed "the petition" to "a petition" in Rule 40(d)(1)(D), (d)(4), and (d)(5), noting that he can raise the issue with the style consultants.

A judge member suggested referring to a "petition under this Rule." Professor Sachs responded that the Rule also governs petitions for initial hearing en banc. A lawyer member suggested being explicit: "a petition for panel rehearing or rehearing en banc." A liaison member agreed that this adds clarity for the unsophisticated lawyers and pro se litigants. Judge Bybee stated that the phrase should be the same in 40(d) and 40 (e). The Committee agreed that both Rule 40(d) and Rule 40(e) should use the phrase "a petition for panel rehearing or rehearing en banc."

The Reporter noted that Rule 40(b)(2)(C) refers to a decision that has addressed "the issue," while Rule 40(b)(2)(D) refers to "one or more questions" of exceptional importance and that when the style consultants had reviewed an earlier version of this proposal, they had asked about the difference between an "issue" and a "question." Apologizing that he had not raised this with the subcommittee, he suggested that the phrase "that has addressed the issue" be deleted from Rule 40(b)(2)(C). A judge member agreed, observing that for decisions to conflict they must involve the same issue, so the phrase is redundant.

Judge Bybee stated that if there were no further comment, he would invite a motion to approve the draft, with the changes made during this conversation, and ask the Standing Committee for permission to publish the proposal for public comment. The motion was made and approved without dissent.

B. Amicus Disclosures—FRAP 29 (21-AP-C)

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 153). She explained that the subcommittee has been discussing possible modifications to Rule 29's disclosure requirements. The AMICUS Act would institute a registration and disclosure system like the one that applies to lobbyists and apply

to those who filed three or more amicus briefs per year. What is within our bailiwick are the disclosure requirements of Rule 29.

The underlying concern is transparency. There may be no way to know who exactly is speaking if an amicus is funded by a party or a single entity funds numerous amici. The primary focus of the AMICUS Act is the Supreme Court, but this Committee and the Standing Committee have been asked to consider the issue in the context of the courts of appeals.

The current rule is reproduced on page 153 of the Agenda book. Subsection (i)—which deals with authorship of an amicus brief by a party's counsel—is not at issue. But subsection (ii)—which deals with contributions by a party or its counsel intended to fund an amicus brief—and subsection (iii)—which deals with such contributions by any person other than the amicus itself, its members, or its counsel—are at issue. Subsection (ii) gets at whether a party is really behind an amicus brief. Subsection (iii) gets at whether a non-party is really behind an amicus brief. It is important to note that the existing rule already reaches funding by non-parties. The question is whether the existing rule should be made stronger and less easy to evade.

The subcommittee report addresses the issues involving parties separately from the issues involving non-parties.

It is possible to construe the existing requirement of disclosure regarding contributions "intended to fund preparing or submitting the brief" so narrowly that it covers only the printing and filing of the amicus brief. That problem is easy to fix.

A more complicated issue to deal with involves contributions that are not earmarked for a particular brief but instead are made to the general funds of an amicus with the tacit or implicit understanding that the amicus will advance a party's agenda.

The drafts in the agenda book are not even suggestions. They are thought exercises about what could be done, if the Committee decides to do it, to make the current rule less easily evaded.

The simpler issue can be handled by adding the word "drafting" to the second bullet point on page 158 of the agenda book.

The draft sketches out two possible ways in which the more complicated issue might be addressed. One way is with a rule that requires disclosure if a party has a 10% or greater ownership interest in the amicus curiae, or if a party contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. This is similar to, but is by no means identical to, the AMICUS Act. For example, the AMICUS Act sets the level lower, at 3%. A second way would be with a standard that would call for disclosure if a party

had sufficient ownership of or made sufficient contributions to an amicus that a reasonable person would attribute significant influence regarding the filing or content of the brief. The Committee might choose one, both, or neither. Either approach would call for disclosure, if otherwise appropriate, even if the party were a member of the amicus. Again, the purpose of these drafts is to help the Committee think through the issues.

Issues involving non-parties are more complex, raising arguable constitutional concerns. The subcommittee draft is designed for discussion. It essentially makes the same kinds of changes just discussed to provisions governing non-parties.

The subcommittee seeks further direction from the Committee on how to proceed.

Mr. Byron noted the complexity of the issues and asked whether there is a lot of pressure to address through rulemaking what the proposed legislation is concerned about or whether the issue is just left to the Committee's own judgment whether it is a good idea.

Judge Bates responded that there isn't pressure, but the letter was addressed to the Supreme Court and the Court, rather than doing anything with its own rules, sent it to this process. Ultimately, the issue is perhaps for the Supreme Court, and this Committee should not feel that it has to do something or feel constrained in addressing the issue. Judge Bybee agreed, noting that the issues involving amici are ones that mostly arise in the Supreme Court.

Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules. Ms. Spinelli responded that the subcommittee sees legitimate concerns, and that while amicus practice is much more significant at the Supreme Court, we have been asked by the Supreme Court to consider the issue. We should be reluctant to say that it is not a problem in the court of appeals so we are not going to do it. There are legitimate concerns about evasion and transparency, but the solution may be too onerous or infringe on constitutional rights. The subcommittee is teeing up these issues for the Committee.

A judge member observed that there does not seem to be a problem in the courts of appeals, but putting that aside, he is not troubled with a percentage rule. It is easy to understand, and the rules already require corporate disclosure. He would be troubled by a standard. That would be a nightmare to police, raising all kinds of factual issues. Ms. Spinelli noted that her preference was also for a rule over a standard, but there was disagreement on the subcommittee so both approaches were presented to the Committee. The judge member responded that some litigation goes for years with the parties fighting over everything, including $500 in costs. The bar

understands the current 10% rule regarding corporate disclosure; the right percentage is open to debate.

The Committee took a short break. When the meeting resumed, the Reporter reminded the Committee that it had begun to discuss rules vs. standards. Ms. Spinelli stated that there are broader concerns to be addressed to provide guidance to the subcommittee.

Professor Coquillette stated that, historically, the committees have favored rules over standards. A judge member observed that a standard would lead to an enormous amount of litigation without extensive guidance. An academic member pointed out that a rule could be overinclusive or underinclusive. Mr. Byron stated that he was not a huge advocate for standards, but that a standard might lead an amicus to err on the side of disclosure. However, if it could lead to motions for sanctions for failure to disclose, that would be problematic. A standard captures the purpose better; he worries that a rule might not do a good job. The 10% threshold, borrowed from Rule 26.1, serves a very different purpose.

Another judge member agreed that rules are preferable to standards. More generally, changes are not necessary for the courts of appeals. The subcommittee memo was helpful in distinguishing between party and non-party. He might be interested in knowing if an amicus is a close affiliate of a party because it could affect the weight judges give to the filing. The issue isn't public appearances; the issue is what weight judges give to an amicus brief. With a non-party, the concerns are way more attenuated, as the memo puts it, whether the amicus is serving as a paid mouthpiece for some other person. Where an amicus has a track record, judges know how much weight to give its brief. The concern that there will be a large number of amicus briefs giving the illusion of broad support is remote at the court of appeals. Maybe there is no real problem calling for any change; alternatively, maybe any amendments should be limited to parties.

Mr. Byron noted that the concerns articulated in the Committee Notes for the existing rule are different than those addressed by the AMICUS Act. Ms. Spinelli agreed, adding that the current rule does reach non-parties, although the rationale for that is harder to see. Concerns regarding parties are clearer and less problematic.

Professor Struve did not recall that there was any deep discussion of parties vs. non-parties at the time the current rule was adopted. It was modeled on Supreme Court Rule 37.6, which included both.

An academic member stated that the existing rule deals with the one-off case where an amicus is acting as a sock puppet. In such a case, where someone funds one brief, it is likely to mislead about who is speaking while unlikely to affect an amicus' ability to function. There is a much greater worry if an amicus must reveal a non-party who provides 10% of the funding of an amicus. CERCLA disclosures can lead

people to decline to enter transaction. In a trade association, it may be controversial who is paying—or not paying. There will be some chilling of amici, and the benefit to the court is lower. For example, if the Cato Institute submits a brief, we know who they are and learning who funds them does not tell us anything new.

Judge Bybee stated that this is largely a Supreme Court problem, but if this Committee decline to act, then legislation might be enacted, or the Supreme Court might act on its own so that we wind up with it anyway. It's better if we get our first shot at it. We have to take the constitutional question seriously, perhaps with an internal opinion. Judge Bates added that the Supreme Court will get a crack at anything that the rulemaking process produces.

A judge member added that in addition to the Supreme Court, the Standing Committee will look at it. He stated that he's not sure that there's a constitutional problem: the scope is limited to filing a brief in a judicial proceeding. Some kinds of cases in the courts of appeals do draw amici, and sometimes the judges know who an amicus is (the ACLU, the Sierra Club) but sometimes they judges have no idea who they are. Judges don't look to see which way the amicus wind is blowing, but industry information and prognostications about the results of a decision can be useful.

Professor Struve noted that, pursuant to the policy of the Judicial Conference, any memo that went to the full Committee would be part of the public record.

An academic member stated that the need for a constitutional memo should make the Committee hesitate. Even if an amendment would not violate the Constitution, constitutional interests counsel against getting within shouting distance of a constitutional violation. Yes, it would be nice to know who is behind an amicus brief, but we often don't know who is behind speech. If Citizen for Goodness and Wellness file an amicus brief, the danger caused by not knowing who they are is lower than the danger of chilling speech by requiring disclosure.

A judge member stated that we are not talking about all donors, just those who contribute 10% or more. If Mark Zuckerberg is giving 15% of the revenue of an amicus in a case involving section 230 of the Communications Decency Act, that might be worth knowing. Ms. Spinelli reminded the Committee that the existing rule already reaches non-parties. An academic member noted that the current rule reaches one-off amicus briefs while the Committee is considering taking a much more aggressive stance. Rule 26.1 is limited to public companies because it is designed to facilitate recusal. Extending disclosure to non-public companies is a vast expansion. There are dangers from this loss of privacy that have to be compared to the benefits.

The Reporter added that while it is common for this Committee to decline to propose an amendment if it does not see a sufficient problem in the courts of appeals, that approach may not be appropriate in this case. The Supreme Court does not have an Advisory Committee like this one.

A liaison member stated that in her court there are frequently three or four amici on each side, often with acronyms, leaving the judges to not know who they are. A lot of the concern is with the public perception that judges might be influenced by people and not know who they are. A rule would be better than a standard.

Judge Bybee stated that the discussion has been very helpful, that he did not want to cut it off, but asked if the subcommittee had enough guidance.

Ms. Spinelli responded that the discussion was extremely helpful, and that she is happy to hear from judges what they want to know. It seems that the Committee is interested in taking a hard look at more disclosure regarding parties, prefers a rule to a standard, and agrees that a constitutional analysis is needed, while some members are interested in more disclosure regarding non-parties as well.

A lawyer member asked about the exclusion for members, noting that an amicus can switch from calling something a donation to calling it a membership fee. Should this membership loophole be eliminated?

Ms. Spinelli responded that if the disclosure requirements are made more stringent it would make sense to keep the exclusion for members, noting that the letter from Scott Harris indicated that the Supreme Court rule deliberately excluded members in response to a concern about protecting membership lists. An academic member said that the membership provision should not be viewed as a loophole because an amicus is speaking for itself; the concern under the existing rule is that if non-members are funding a particular brief, then it is not that group speaking for itself. The exclusion of members from this provision usefully signals its purpose. He is concerned that if an amicus has nine members, all must be disclosed. PETA and the Sierra Club would have to disclose which members gave more than 10%; he thinks that the number of front groups is much lower than the number of established groups with a donor who gives greater than 10%.

In response to a question from Judge Bates, Ms. Spinelli stated that the subcommittee had not yet addressed issues regarding recusal but that it intends to do so. The Reporter added that the subcommittee might conclude that the issue of recusal is outside the Committee's bailiwick.

Returning to the issue of excluding members from disclosure, Ms. Spinelli indicated her inclination to continue to exclude them. The Reporter noted that there is some tension between expanding the disclosure requirements regarding non-parties while keeping the membership exclusion because an amicus could change donations into membership fees. To use the Mark Zuckerberg example, instead of simply making a large contribution to an amicus, he could become a member of that amicus.

A judge member stated that the devil is in the details. What is a member?

An academic member flagged an additional issue: Does an amicus have to have the capacity to sue and be sued? What kind of entity can be an amicus? As a matter of professional responsibility, it must at least be capable of hiring and firing a lawyer.

The Committee took a lunch break and resumed at 1:45.

C. Relation Forward of Notices of Appeal—Rule 4 (20-AP-A)

Mr. Byron presented the report of the subcommittee (Agenda book page 175). He explained that the Committee had previously decided not to recommend a suggestion that would broadly permit premature notices of appeal to ripen upon entry of a final judgment, fearing that such a rule would create more problems than it would solve and invite premature notices of appeal.

At its last meeting, the subcommittee then focused on two issues.

The first issue involved a circuit split regarding relation forward of notices of appeal taken from orders that could have been, but were not, certified under Civil Rule 54(b). The subcommittee concluded that there is a fairly clean circuit split with the Eighth Circuit not permitting relation forward and most others permitting it. (The Federal Circuit is harder to classify.)

But it is not clear whether it is worth trying to resolve the circuit split. For one thing, the problem is in considerable measure one of the parties' own making: one party files a premature notice of appeal and the other party does nothing about it but continues to litigate the case in the district court. In addition, the Supreme Court might ultimately side with the Eighth Circuit; its approach may be better reasoned if not the better policy. Moreover, among the courts that permit relation forward, there is another split regarding whether that result is based on an interpretation of Rule 4(a)(2) or instead is based on earlier case law. Any amendment would also need to deal with this underlying question. There is also an issue about the scope of the appeal: does it reach decisions made after the notice of appeal but before final judgment? An argument that the pending amendment to Rule 3 might be construed to allow the scope of appeal to reach such decisions is sketched in footnote 1 of the subcommittee report. (Agenda book page 177). It is unlikely that courts will adopt that construction, but we can't be certain.

One possible approach would be to limit Rule 4(a)(2) to its classic, core situation where an appealable decision is announced but, before it is entered on the docket, a notice of appeal is filed, while permitting a court the discretion in other situations to allow relation forward, looking to factors such as whether allowing relation back would prejudice the appellee, how obviously premature the notice of appeal was, and whether the appellee did anything to put the appellant on notice of the problem.

The Reporter added that the subcommittee had considered a more detailed rule but rejected that approach as too complicated. A lawyer member stated that the idea of the approach in the subcommittee report was to capture in a rule what was being done even though not within the plain language of the rule, thereby allowing courts to continue existing practice.

An academic member noted that he appreciated the memo and thought it made a good case for doing something. He did not think the Committee should wait for the Supreme Court to resolve the conflict; it's not the kind of problem that the Supreme Court really has to care about. It's perfectly appropriate for the Court as a rule maker to write a better rule rather than act as an interpreter and shoehorn good policy into the existing rule.

Professor Struve pointed out that this issue is a hardy perennial. About a decade ago the Supreme Court denied a cert. petition and this Committee took up the issue. It declined to act, in part because of the complexities in trying to address the issue and in part because the circuit splits seemed too narrow. The current discussion is a thoughtful one, but the language in the subcommittee report would narrow the grounds for relation forward even as to some situations that the Supreme Court has seemed to have already endorsed (by citing lower court decisions with apparent approval). In particular, the Court seems to have endorsed allowing relation forward when a district court renders a decision that is not final—because contingent on a future event—once the contingency occurs. Perhaps the Committee is now willing to go where it previously feared to tread.

Judge Bybee observed that maybe we are brave or maybe just naïve.

Professor Coquillette recalled some history: He and Judge Lee Rosenthal had been invited to meet with several Justices and received the clear message that the Court does not like to resolve circuit splits regarding procedure. He is not sure that this is the best example, but in general it is appropriate for the Committee to seek to resolve a circuit split rather than wait for the Supreme Court.

Judge Bybee pointed to the open-ended grant of discretion that would be provided by the word "may" without any other qualifications. An academic member noted that "may" could lead to different litigants being treated differently and offered "good cause" as an alternative.

Mr. Byron noted that the subcommittee had not tried to resolve the merger question discussed in footnote one of the memo. Professor Struve agreed that it would be surprising if a court were to buy the argument suggested in that footnote. Plus, no one is likely to rely on that argument: anyone who dug deeply enough to figure out that argument would also have figured out that the better thing to do would be to amend the notice of appeal.

Judge Bybee asked Professor Struve for her reaction to a good cause standard. She replied that it would override a lot of case law and subject parties to the slings and arrows of discretion. She also noted that it would clash in spirit with the pending amendment to Rule 3, which is designed to reduce the loss of appellate rights. There might be pain in the transition, but litigants can adjust.

The Reporter stated that the language in the agenda book is just a sketch designed to get the Committee's feedback on whether something along those lines is worth pursuing. Further refinement would be necessary to deal with the contingency situations noted by Professor Struve as well as situations involving belated Rule 54(b) certifications.

Mr. Byron clarified that these concerns apply not only to a "good cause" standard but also the text as written in the subcommittee report. Perhaps it is better to leave a lopsided circuit split than to risk unknown mischief. Ms. Dwyer stated that pro se litigants—which are involved in half the cases—fall into this trap. The Court of Appeals for the Ninth Circuit liberally construes pro se submissions; there are ugly things under these rocks. The status quo is just fine.

An academic member stated that the reason for the first sentence in the subcommittee language is to narrow existing case law as to when relation forward is mandatory, but a court could rely on its existing case law to determine when it is appropriate to exercise its discretion, under both the "good cause" and "may" standard. Alternatively, a rule could spell out when relation forward is allowed, permitting it if the other party doesn't object and the court didn't notice.

He also asked what happens if the district court wants to reconsider while an appeal is pending. Professor Struve noted that case law allows a district court to proceed if a party notices an appeal from a clearly non-appealable order. The Reporter noted that the subcommittee had considered but decided against codifying that process.

Mr. Byron stated that Rule 4(a)(2) hides some chaos, but that he is not as worried about that as he is about making things more complex and creating more opportunities for motion practice. Existing practice is not perfect and may be rough justice, but an amendment is not necessary; the problem doesn't warrant it.

Judge Bybee asked Mr. Byron and the Reporter whether the subcommittee had enough guidance from the Committee. Both answered no.

A lawyer member stated that she was persuaded by the discussion today to not pursue the amendment. A judge member said it was time to pull the plug. An academic member concluded that if others aren't interested, he will give up. Mr. Byron favored taking it off the agenda.

Mr. Byron then turned to the second issue addressed by the subcommittee, noting that it was more straightforward (Agenda book page 179). Rule 4 treats the need to file a new or amended notice of appeal after disposition of a motion that resets appeal time differently in civil and criminal cases. A new or amended notice is needed in civil cases, but not in criminal cases.

The subcommittee was not satisfied that there was a good reason for this difference in treatment, although it considered some speculation that might be thought to justify it. But either way of making them uniform was not great. If criminal were aligned with civil, there would be a real risk of loss of appellate rights and claims of ineffective assistance of counsel. So, any change would be in the other direction, making civil like criminal. But there does not appear to be a problem calling for a solution.

Ms. Dwyer said that she was unaware of any problem; leave it alone. An academic member agreed.

Mr Byron moved to have the entire item removed from the agenda. There was no objection to the motion. The matter was removed from the agenda and the subcommittee discharged with thanks.

D. IFP Standards—Form 4 (19-AP-C; 20-AP-D)

Judge Bybee stated that the subcommittee had been waiting for the results of a survey done by Lisa Fitzgerald. Those results have now been received and should be very useful. The subcommittee will review them and report to the Committee. (Agenda book page 182).

VI. Discussion of Matters Before Joint Subcommittees

The Reporter provided a brief update on the status of two matters before joint subcommittees.

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. (Agenda book page 185). A judge member noted that he had received lots of calls about this saying that how late associates have to work is none of our business.

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems, but problems may remain hidden. (Agenda book page 187).

VII. Discussion of Recent Suggestions

A. Costs on Appeal—Rule 39 (21-AP-D)

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 190). Dean Morrison brought to the Committee's attention a then-pending Supreme Court case that led him to believe that Rule 39 is unclear. The Supreme Court has now decided that case and held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs. *City of San Antonio v. Hotels.com*, 141 S.Ct. 1628 (2021).

That result seems untroubling. But while typical costs on appeal are modest, such as the appellate docket fee and the costs of printing, Rule 39(e)(3) includes as taxable costs the premium paid for a bond to preserve rights pending appeal, traditionally known as a supersedeas bond. Such a bond is posted by a defendant so that a money judgment is not enforceable pending appeal; the bond protects the ability of a plaintiff to collect if the plaintiff prevails on appeal. The cost of securing such a bond can be high. Under Rule 39, the district court taxes these costs because they were incurred in the district court, but the court of appeals (not the district court) has discretion to apportion those costs.

The Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring their arguments to the court of appeals. It suggested a motion, but there might be difficulties with a post-mandate motion.

In light of the Supreme Court's comment about the current rules, the Reporter suggested the appointment of a subcommittee. Another aspect that the subcommittee might consider is that when a district court is deciding whether to approve a bond it may be concerned with whether the bond is adequate to cover the judgment and whether the surety can pay the bond, but it may not be concerned with the premium paid for the bond. There may also be a question whether the premium for the bond should be a taxable cost at all.

Judge Bybee called for volunteers and appointed a subcommittee. Judge Nichols is the chair of the subcommittee. Judge Wesley and Mr. Byron are members.

B. Electronic Filing by Pro Se Litigants (21-AP-E)

The Reporter introduced the suggestion by Sai to permit electronic filing by pro se litigants. (Agenda book page 213). He noted that this issue has come up repeatedly and that the last time the Committee considered the issue, it decided to await consideration by the Civil Rule Committee. It appears that the various Committees are doing an Alphonse and Gaston routine, waiting for the others to go first. This Committee might decide to continue to wait for Civil, might seek a joint subcommittee or because traditionally Circuit Clerks have been more open to

electronic filing by pro se litigants than District Clerks (perhaps because of the greater number of filings in a case in a district court) this Committee might choose to go first.

Judge Bates stated that with Bankruptcy, Civil, and now Appellate confronting this question, he has decided to convene the reporters to discuss the way to proceed. Professor Coquillette noted that the Committee on Court Administration and Case Management (CACM) has a role as well. An academic member noted that this Committee could also allow pro se electronic filing in any case where it was permitted in the district court. Professor Struve added that each Committee has its own issues to address. There are lots of events in bankruptcy. Some district courts allowed pro se electronic filing because of COVID and did okay. Civil has to deal with case initiating filings, which is not as much of an issue for Appellate. The different committees may recommend different rules. The reporters will coordinate and welcome feedback.

C. Time Frame to Rule on Habeas Corpus (21-AP-F)

Judge Bybee introduced Gary Peel's suggestion that we put into the rules a time frame for the courts of appeals to decide habeas matters. He predicted considerable resistance if we were to attempt to do so.

A lawyer member moved to remove the item from the agenda, and this was done without objection.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it still happens on occasion in various circuits, but the only one where it continues to be a regular practice is in the Fifth Circuit. He did not ask the Committee to take any action, noting that perhaps the best thing to do would be to bring it to the attention of a local rules advisory committee if one exists in the Fifth Circuit. Ms. Dwyer offered to contact her counterpart in the Fifth Circuit.

IX. New Business

No member of the Committee presented any new business.

X. Adjournment

Judge Bybee thanked the participants, stating that it is a pleasure to work with everyone involved.

The next meeting will be held on March 30, 2022. The hope is that it will be in person. The spring meeting is traditionally in some location other than Washington D.C.

The Committee adjourned at approximately 3:10.

TAB 4

TAB 4A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 6, 2021

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on September 14, 2021. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek publication for comment of an amendment to Rule 7001 to exclude certain demands to recover estate property from the list of adversary proceedings. Part II of this report presents that action item.

Part III of the report presents three information items. The first concerns the Advisory Committee's approval of the addition of the Juneteenth holiday to the list of legal holidays in Rule 9006(a)(6). The second information item discusses the Advisory Committee's continuing

consideration of the use of electronic signatures by debtors and others who are not registered users of CM/ECF. The final item provides an update on the restyling of the Bankruptcy Rules.

II. Action Item

Item for Publication

The Advisory Committee recommends that an amendment to Rule 7001 (Scope of Rules of Part VII) be published for public comment in August 2022. The text of the proposed rule amendment appears in the appendix to this report.

As we reported at the June 2021 meeting, the Supreme Court decided in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021), that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She addressed the importance to a chapter 13 debtor of promptly regaining possession of a seized car so that the debtor can travel to work and continue to earn money to fund his or her plan, and she stated that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned."

Acting on Justice Sotomayor's comment, 45 law professors submitted a suggestion (21-BK-B) for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding. They offered specific language for the amendment of several rules. The National Bankruptcy Conference submitted a suggestion (21-BK-J) that is generally supportive of the law professors' suggestion. The law professors suggested "an expansion beyond chapter 13 to allow turnover actions by motion in all circumstances," but members of the Advisory Committee at the spring 2021 meeting expressed support for a narrower approach than was suggested. Among the comments were those of the Department of Justice representatives, who said that the government would be concerned with a broad rule applicable to all types of property, including funds held by the government, especially if the government had only seven days to respond.

Rule 7001(1) provides that, subject to a few listed exceptions, "a proceeding to recover money or property" is an adversary proceeding, governed by the Part VII rules. Despite this provision, it was reported that some bankruptcy courts allow turnover of money or property to be sought by motion, rather than by the filing of a complaint initiating an adversary proceeding. The Advisory Committee was interested in determining the content and scope of any such local rules as part of its consideration of the appropriate scope of any amendment to Rule 7001(1).

The Subcommittee on Consumer Issues surveyed bankruptcy clerks and chapter 13 trustees to determine the nature and extent of such local practices. The responses revealed that ten or so districts allow turnover to be sought by motion under certain circumstances. A few have local

rules expressly allowing such motions, while others have rules or practices that merely refer to "turnover motions" without specifically authorizing them. In some districts turnover motions are limited to chapter 13 cases or to specific types of property, and in some the respondent to a turnover motion can demand that an adversary proceeding be brought.

In arriving at its recommendation to the Advisory Committee on how best to amend the rules to allow more expeditious turnover proceedings, the Subcommittee considered the nature of the concerns expressed by Justice Sotomayor, the concerns motivating the local court practices that deviate from Rule 7001(1), and comments by clerks and trustees. All members agreed that having to wait a hundred days on average to get a car needed to commute to work to earn money to fund a chapter 13 plan is not desirable.

The Subcommittee discussed several possible limiting principles of a rule allowing turnover to be sought by motion. They included allowing turnover by motion only in chapter 13 cases, the situation most frequently cited as giving rise to concerns. Subcommittee members, however, thought that the need for the urgent turnover of property could exist in other types of cases, so that it would be better to limit the proposed amendment to cases involving individual debtors rather than just chapter 13 cases. The Subcommittee also agreed that the procedure should be used only when turnover is sought under § 542(a)—that is, efforts to obtain "property that the trustee may use, sell, or lease under section 363 . . . or the debtor may exempt under section 522." That limitation would still require adversary proceedings for the turnover of debts under § 542(b), turnover of records by an attorney or accountant under § 542(e), and turnover of property by a custodian under § 543.

The Subcommittee then considered whether the rule should further limit the types of property for which turnover could be sought by motion. Several possibilities were discussed, and the Subcommittee concluded that any such limitation should be one that is easily discernible, because the type of procedure needed to initiate a turnover proceeding should not depend on an uncertain factual determination. Members concluded that adoption of a motion procedure is most appropriate for the turnover of tangible personal property.

Although the law professors suggested creating a new rule that would provide a national procedure for turnover motions, the Subcommittee concluded that an amendment to Rule 7001 is sufficient to implement the proposal. Rule 9014 (Contested Matters) would apply, and courts could use their own procedures for motion practice. Should a particular turnover proceeding require more detailed procedure, a court under Rule 9014(c) could order the application of the full range of Part VII rules.

After discussion, the Advisory Committee accepted the Subcommittee's recommendation that an amendment to Rule 7001(1)—creating an exception for "a proceeding by an individual debtor to recover tangible personal property under § 542(a)"—be approved for publication.

III. Information Items

Information Item 1. Rule 9006(a)(6) (Legal Holidays). In response to the enactment of the Juneteenth National Independence Day Act, P.L. 117-17 (2021), the Advisory Committee approved an amendment to Rule 9006(a)(6)(A) to insert the words "Juneteenth National

Independence Day," immediately following the words "Memorial Day." It will recommend at the June 2022 meeting that the Standing Committee approve the amendment without publication.

Information Item 2. Electronic signatures.

At the fall meeting, the Advisory Committee continued its consideration of the suggestion (20-BK-E) by the Committee on Court Administration and Case Management ("CACM") regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account.[1] It also considered two additional suggestions by Sai (21-BK-H and 21-BK-I) that have been folded into the consideration of the CACM suggestion. In a suggestion specific to the Bankruptcy Rules Committee, Sai argued that *pro se* litigants should not be subject to any more rigorous security requirements for electronic signatures than CM/ECF imposes on its registered users.

The Advisory Committee is still in the fact-finding stage of its consideration of the suggestions. Representatives to the Committee from the Department of Justice have been engaged in internal discussions about the Department's views on the issues raised by the suggestions and whether those views have changed since 2014, when it opposed a proposed amendment to Rule 5005(a) that would have allowed the use of debtors' scanned signatures without the retention of the documents bearing the original, "wet" signatures. Meanwhile, Ken Lee of the Federal Judicial Center has collected information about local bankruptcy and district court practices regarding electronic signatures and requirements for retaining wet signatures, both during "normal times" and during the COVID-19 pandemic. His research shows that most bankruptcy courts require debtors' attorneys to retain in paper format clients' wet signatures on documents filed electronically, although some courts are now allowing the signatures to be retained in electronic format. He reported that in response to the pandemic 69 bankruptcy courts (73%) had some suspension of wet signature requirement, most frequently by temporarily allowing attorneys to file either without or before obtaining wet signatures.

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules' purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF account to constitute a valid signature and, if so, under what circumstances.

The current local procedure of requiring the retention of the wet signature of a represented party has the drawback of making the attorney the custodian of potential evidence against the client—a situation that may not be ideal for either prosecutors or debtors' attorneys. If a rule were instead to permit the electronic filing of documents with signatures in a form that was deemed to

[1] Because in bankruptcy cases the issue most frequently arises with respect to debtors' signatures on electronically filed documents, this report generally refers to "debtors," but any proposed rule would likely apply as well to others who sign documents but do not have CM/ECF accounts.

constitute a valid signature, a requirement for retention of wet signatures by debtors' attorneys would be unnecessary. The Advisory Committee's 2013 proposal—which would have required the filing of a scanned signature page along with an electronically filed document—was an attempt at this type of solution. In proposing the amendment, the Advisory Committee was unaware, however, of the FBI's position that it would not provide conclusive expert testimony on handwriting analysis without a wet signature.

A solution that provides for an acceptable electronic signature on the document that is filed by an attorney—rather than a retention requirement—presents a challenge in the bankruptcy context. Most bankruptcy lawyers use commercial software for the creation and filing of forms that debtors must sign, such as the petition and schedules. Such software incorporating acceptable e-signature technology may not currently exist, and a rule that requires the development and purchase of new software is not desirable.

Because of the software issue, the Advisory Committee's discussion focused on requiring authorization of the use of a represented debtor's electronic signature to be retained, rather than on the use of technology that would allow an electronically filed document bearing a debtor's signature to be sufficient by itself. The Technology Subcommittee presented the following preliminary draft of an amendment to Rule 5005(a)(2)(C) for discussion:

(C) *Signing.*

(i) A filing made through a person's electronic-filing account and authorized by ~~that~~ the person whose signature appears on the document, together with that person's name on a signature block, constitutes the person's signature.

(ii) A filing under (i) is authorized by a person other than the account holder if—prior to filing—the account holder receives the document with the person's actual signature affixed or the person's signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer. The account holder must retain the signed document for *x* years from the case's closing.

Discussion of the proposal brought up several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving. Some also noted that retention requirements are imposed by rules of professional responsibility and may not be appropriate for a national rule.

The Advisory Committee concluded that the question of electronic signatures of *pro se* debtors presents different issues and should be considered separately. If a local rule allows *pro se*

debtors to file electronically through CM/ECF, they are covered by Rule 5005(a)(2)(C), and their electronic signature would be treated the same as an attorney with a CM/ECF account. Some Advisory Committee members thought that expansion of *pro se* litigants' rights to have CM/ECF accounts—either on a full or limited basis—would be appropriate. We understand that an inter-committee group will be considering whether national rules should be proposed that presumptively permit *pro se* litigants to file electronically, so the Advisory Committee's consideration of electronic signatures will be greatly affected by the outcome of those deliberations.

Information Item 3. Restyling.

Parts III-VI of the restyled Federal Rules of Bankruptcy Procedure have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

During its fall 2021 meetings, the Restyling Subcommittee completed its initial review of the restyled Part VIII. It also began its initial review of Part IX. Meetings will continue until the Subcommittee and style consultants have agreed on draft amendments. The Subcommittee expects to present Parts VII, VIII, and IX—the final sections of the rules—to the Advisory Committee at its spring 2022 meeting for approval and submission to the Standing Committee for publication.

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

For Publication for Public Comment

Rule 7001. Types of Adversary Proceedings[2]

An adversary proceeding is governed by the rules in this Part VII. The following are adversary proceedings:

(a) a proceeding to recover money or property—except a proceeding to compel the debtor to deliver property to the trustee, a proceeding by an individual debtor to recover tangible personal property under § 542(a), or a proceeding under § 554(b), § 725, Rule 2017, or Rule 6002;

* * * * *

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

[2] The changes indicated are to Rule 7001 as currently proposed for restyling.

Committee Note

Paragraph (a) is amended to create an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need to obtain the prompt return from a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of property that may be exempted. As noted by Justice Sotomayor in her concurrence in City of Chicago v. Fulton, 141 S. Ct. 585, 592-95 (2021), the more formal procedures applicable to adversary proceedings can be too time-consuming in such a situation. Instead, the debtor can now proceed by motion to require turnover of such property under § 542(a), and the procedures of Rule 9014 will apply. In an appropriate case, however, Rule 9014(c) allows the court to order that additional provisions of Part VII of the rules will apply to the matter.

TAB 4B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 14, 2021
Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Circuit Judge Thomas L. Ambro
Bankruptcy Judge Rebecca Buehler Connelly
Circuit Judge Bernice Bouie Donald
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia S. Krieger
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq. (by phone)
Tara Twomey, Esq.
District Judge George H. Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura B. Bartell, associate reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Professor Daniel R. Coquillette, consultant to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office
Susan Jenson, Administrative Office
Burton DeWitt, Rules Law Clerk
Molly T. Johnson, Federal Judicial Center

S. Kenneth Lee, Esq., Federal Judicial Center
Carly E. Griffin, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees
Jakub Madej, Research Assistant to Professor Robert Schiller, Yale University
John Hawkinson, freelance journalist

Discussion Agenda

1. **Greetings and Introductions**

Judge Dennis Dow, chair of the Advisory Committee, was unable to attend the meeting because of a family medical emergency, so Scott Myers welcomed the group and thanked them for joining this meeting. He asked everyone to keep microphones muted unless that person is talking. Motions will be passed if there are no objections. Otherwise, members will use the raise hand function for voting and discussions. He introduced new member Judge Benjamin Kahn.

2. **Approval of Minutes of Remote Meeting Held on April 8, 2021**

The minutes were approved by motion and vote after one correction to move David Hubbert's name to the list of committee members.

3. **Oral Reports on Meetings of Other Committees**

(A) ***June 22, 2021 Standing Committee Meeting***

Professor Bartell gave the report.

(1) **Joint Committee Business**

(a) ***Emergency Rules.*** Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, required that "the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)." Each of the Advisory Committees for the Civil, Criminal, Appellate and Bankruptcy Rules presented to the Standing Committee its version of an emergency rule. Professor Dan Capra provided a side-by-side comparison of the rules and discussed the outstanding differences between them. The Standing Committee approved the proposed rules for publication.

(2) **Bankruptcy Rules Committee Business**

The Standing Committee recommended for final approval:

(1) restyled versions of the 1000 rules series (Part I-Commencing a Bankruptcy Case; The Petition and Order for Relief) and 2000 rules series (Part II-Officers and Administration; Notices; Meetings; Examinations; Elections and Appointments; Final Report; Compensation);

(2) rules to replace the interim rules issued to implement the Small Business Reorganization Act: Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 1020 (Chapter 11 Reorganization Case for Small Business Debtors), 2009 (Trustees for Estates When Joint Administration Ordered), 2012 (Substitution of Trustee or Successor Trustee; Accounting), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case), 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case), Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11), new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement), Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and

(3) amendments to Rule 3002(c)(6) (Filing Proof of Claim or Interest), Rule 5005 (Filing and Transmittal of Papers), Rule 7004 (Process; Service of Summons, Complaint), Rule 8023 (Voluntary Dismissal), and Official Form 122B (Chapter 11 Statement of Your Current Monthly Income).

The Standing Committee also recommended for publication:

(1) restyled versions of the 3000 rules series (Part III-Claims; Plans; Distribution to Creditors and Equity Security Holders); the 4000 rules series (Part IV-The Debtor's Duties and Benefits); the 5000 rules series (Part V-Courts and Clerks); and the 6000 rules series (Part VI-Collecting and Liquidating Property of the Estate);

(2) amendments to Rule 3002.1 (Chapter 13 Claim Secured by a Security Interest in the Debtor's Principal Residence); and

(3) amendments to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy), Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors)), and Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors under Subchapter V)), and Official Forms Related to Rule 3002.1 amendments: Form 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)); Form 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)); and Form 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim).

Judge Dow also provided the Standing Committee information on the status of:

(1) Interim Rule 4001(c) (Obtaining Credit) to be distributed to the courts if the Administrator of the Small Business Administration authorizes debtors in bankruptcy to obtain certain loans under the Small Business Act;

(2) Director's Form 4100S (Supplemental Proof of Claim for CARES Forbearance Claim);

(3) Consideration of *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) and Suggestions 21-BK-B and 21-BK-C for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding; and

(4) Consideration of Suggestion 20-BK-E from the Committee on Court Administration and Case Management for a rule amendment establishing minimum procedures for electronic signatures of debtors and others.

(B) *April 7, 2021 Meeting of the Advisory Committee on Appellate Rules*

Because this Committee received a report on the April 7, 2021 meeting of the Appellate Committee at its last meeting, and the next meeting is on October 7, 2021, there was no report.

(C) *April 23, 2021 Meeting of the Advisory Committee on Civil Rules*

Judge Catherine Peek McEwen provided a report on the April 23, 2021 meeting. The meeting was conducted virtually because of the COVID-19 health emergency.

1. **No Pending Amendments.** There are no amendments to the Civil Rules scheduled to become effective on December 1, 2021.

2. **Fed. R. Civ. P. 12(a)(4).** The Civil Advisory Committee gave final approval to an amendment to FRCP 12(a)(4) which expands the time from fourteen to sixty days to file a responsive pleading after the court has denied a Rule 12 motion or postponed its disposition until trial if the defendant is a United States officer or employee sued in an individual capacity for an official act or omission. Civil Rule 12(a) is not applicable in bankruptcy, but Fed. R. Bankr. P. 7012(a) specifies that a responsive pleading must be served within 14 days after the court has denied a motion or postpones its disposition until trial. There is currently no different time period for United States actors. The Bankruptcy Advisory Committee should consider taking like action if the Civil Advisory Committee's amendment is adopted.

3. **CARES Act – Rules Emergency.** The Civil Advisory Committee approved for publication Rule 87, the rules emergency proposal.

4. **Privilege Logs and Sealing Court Records – Rules 26(b)(5)(A) and 45(e)(2).** The Discovery Subcommittee is considering proposals to amend Rules 26(b)(5)(A) and 45(e)(2). These rules apply in bankruptcy cases, so we will continue to monitor the Subcommittee's efforts.

5. **Rule 9(b).** The Civil Advisory Committee considered as an information item a suggestion from Dean Spencer (William & Mary) to amend Rule 9(b). The amendment would change the sentence that allows state of mind to be pleaded "generally" by deleting that word and saying instead that state of mind may be pleaded "without setting forth the facts or circumstances from which the condition may be inferred." The goal is to undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged "with particularity," the allegation must still satisfy Rule 8(a) – meaning some facts must be pleaded. Dean Spencer's view is set out at length in a *Cardozo Law Review* article.

This is a question of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy (adopted by reference in Fed. R. Bankr. P. 7009) because some of the section 523(a) exceptions to discharge and some of the objections to discharge under § 727 have state of mind elements. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

6. **Joint Civil-Appellate Subcommittee on Final Judgment Rule.** The Joint Civil-Appellate Subcommittee (aka "*Hall v. Hall* Subcommittee") appointed to study the effects of the final judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S. Ct. 1118 (2018), received an extensive Federal Judicial Center study of appeals in consolidated actions filed in 2015, 2016, and 2017. It subsequently began informal efforts to ask judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about their experience with *Hall v. Hall*. Only the Second Circuit has dismissed appeals based on *Hall v. Hall*. The Subcommittee will meet again to consider further steps. The initial study was not useful. Consequently, the FJC's Emery Lee devised a different study methodology that he believed would yield better data. His initial findings were released recently. The Subcommittee has not met to discuss them.

7. **IFP Practices and Standards.** The Civil Committee has received various submissions over the past couple of years relating to the great variations in standards employed to qualify for

in forma pauperis status as among different districts and as among judges in the same district. The Civil Advisory Committee discussed creating a joint subcommittee or other joint study of *in forma pauperis* standards, which could craft a civil rule or provide uniform and good practice guidance on IFP standards.

"Who is poor?" in the eyes of different courts could lead to some poor people having to pay a filing fee for some kinds of cases and some other poor people not having to pay. There are two criteria in 28 U.S.C. § 1930(f)(1) for the filing fees to commence a bankruptcy case, one a bright line (tied to the poverty line) and the other inexact—the debtor is "unable to pay . . . in installments." And there are other filing fees that are waivable by the district or bankruptcy court under § 1930 as well as under other authority, such as appellate fees.

Judge McEwen supports the idea of a joint subcommittee or study and thinks the Bankruptcy Advisory Committee should participate. Judge Bates suggested that the reporters for the various committees discuss whether there is interest in creating a joint subcommittee to consider IFP standards.

The next meeting of the Civil Advisory Committee will be a virtual meeting on October 5, 2021.

(D) ***June 22-23, 2021 Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

The Bankruptcy Committee met by videoconference on June 22-23, 2021. The next meeting is December 7-8, 2021.

The Bankruptcy Committee previously made a legislative proposal on responses to emergencies, which was withdrawn. They are now considering whether a new legislative proposal is appropriate.

The proposed amendments to Rule 3011 on unclaimed funds are currently published for comment, and the Bankruptcy Committee thanks the Advisory Committee for pursuing that proposal.

The *City of Chicago v. Fulton* proposal is also important to the Bankruptcy Committee, and the Bankruptcy Committee will be available to provide feedback on the proposal.

Judge Bates wants to make sure that there is coordination between any proposals by the Bankruptcy Committee and the Advisory Committee with respect to proposals to deal with emergency situations.

Subcommittee Reports and Other Action Items

4. **Report by the Consumer Subcommittee**

(A) ***Recommendation Concerning Suggestion 21-BK-G for Amendments to Rule 1007(b)(7)***

Professor Bartell provided the report.

Rule 1007(b)(7) requires that, "[u]nless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a statement that such a course has been completed (Form 423)."

Bankruptcy Judge Arthur I. Harris of the N.D. Ohio submitted Suggestion 21-BK-G, in which he proposed that use of Official Form 423 not be required. Instead, he suggests that the rule be amended to also allow submission to the court of the Certificate of Debtor Education that is provided to the debtor by the provider of that course.

The Subcommittee agreed with Judge Harris that the certificate of completion issued by the provider should be acceptable evidence of completion of the required course on personal financial management, but recommended that the amendment go further and make that certificate the *only* acceptable evidence. The Subcommittee sees no benefit in allowing debtors to complete an Official Form in lieu of submitting the actual certificate to evidence course completion.

Second, the Subcommittee recommended that a debtor who is not required to complete such a course be explicitly excluded from the requirements of the rule. If the debtor has been excused from completing the course by court order, the court order will provide adequate evidence of that fact and submission of an Official Form seems unnecessary.

Since the draft language of the proposed amendment was circulated, Professor Struve has pointed out that there are a number of other bankruptcy rules that refer to the "statement required by" Rule 1007(b)(7), all of which would have to be modified if the language of Rule 1007(b)(7) were changed to require a certificate rather than a statement. This could be avoided if the draft language replaced the words "certificate of course completion" with "statement of course completion" in both the text of the rule and the committee note.

There were four issues for the Advisory Committee to decide:

1. Should the certificate of compliance be permissible evidence of completion of the financial management course?

2. Should the certificate of compliance be the only permissible evidence of completion of the financial management course?

3. Should a debtor who is not required to complete a financial management course be required to file something?

4. If the Advisory Committee agrees with the Subcommittee recommendation, should the draft language replace the word "certificate" with "statement"?

On the first two issues, the Advisory Committee supported the approach adopted by the Subcommittee. Deb Miller stated that the certificate is the best evidence of completion of the financial management course and enables the trustee and court to ensure that there has not been a forgery. Judge Donald asked whether anything other than the official form is currently submitted, and whether there are people providing these courses for free. Deb Miller described the resources for low-income debtors to get the course for free. Professor Bartell noted that the rule currently requires submission of Official Form 423. Mr. Schaible asked whether every provider provides a certificate to the debtor, and whether it is in a standard form. Judge Rebecca Connelly replied that they do, and it is. Ramona Elliott said that the EOUST licenses the providers, and a certificate is always generated with a unique bar code. The certificate numbers can be linked to the bar codes to confirm authenticity.

As to the third issue, there was discussion about whether the form would still be needed for those who were excused from filing the report. Various parties pointed out that the court's order on the motion to excuse the debtor from completing the course would already be on the docket, so the form does not provide any additional information. The general consensus was that it was unlikely to be needed, but the matter will be referred to the Forms Subcommittee for consideration.

On the fourth issue, Deb Miller and Judge Kahn stated that they did not think changing the language from certificate to statement was appropriate because the document from the providers is clearly labeled a certificate. There was a suggestion that the language might be changed to "statement of completion of the course in the form of a certificate of completion," but the suggestion generated little enthusiasm. The general consensus was that the other rules referring to the statement required by Rule 1007(b)(7) should be amended to refer to a "certificate."

The Advisory Committee decided to refer this back to the Subcommittee to reconsider the language and propose it for publication at the same time as it proposes possible amendments to the other rules referring to Rule 1007(b)(7), and the Forms Subcommittee should consider the continued need for Official Form 423.

(B) ***Consideration of City of Chicago v. Fulton, 141 S. Ct. 585, and Suggestions 21-BK-B, 21-BK-C, and 21-BK-J for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceedings***

Professor Gibson provided the report. On January 14, 2021, the Supreme Court decided in *City of Chicago v. Fulton*, 141 S. Ct. 585, that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under

§ 362(a)(3). The Court concluded that a contrary reading would render largely superfluous the provisions of § 542(a) providing for turnover of property of the estate. In a concurring opinion Justice Sotomayor noted that turnover proceedings "can be quite slow" because they must be pursued by adversary proceedings, *id*. at 594, and stated that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id*. at 595.

Since the decision in *Fulton*, the Advisory Committee received suggestion 21-BK-B from 45 law professors for rules amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding for all chapters and all types of property. Another suggestion, 21-BK-C, submitted by three of those law professors proposed amended language from that offered in the original suggestion. Since the Advisory Committee last met, the National Bankruptcy Conference submitted suggestion 21-BK-J in support of the law professors' suggestions, although the language in the Conference's letter was more narrowly focused on chapter 13 and § 542 motions.

The Advisory Committee discussed this topic at its last meeting and asked the Subcommittee to consider the feedback it received and come back with a proposal. The Advisory Committee tentatively expressed its view that a narrower approach than that proposed by the law professors would be preferable.

The Subcommittee gathered information from bankruptcy clerks and from chapter 13 trustees on their practices in dealing with turnover of estate property, both before and after *Fulton*. Professor Gibson described the results of that survey. After reviewing the results of this survey, the Subcommittee considered various limiting principles for a rule allowing more expeditious turnover proceedings, such as limiting it to chapter 13 or certain types of property or property necessary for an effective reorganization. The Subcommittee agreed that the amendment should extend to individual debtors, without regard to the chapter under which they file, and to tangible personal property when turnover is sought under § 542(a). That would still require adversary proceedings for other situations. The Subcommittee concluded that an amendment to Rule 7001(1) would accomplish this result without creating a new rule to create a national turnover procedure.

The Subcommittee recommended an amendment to Rule 7001(1) (which is Rule 7001(a) in the restyled version) to add language excluding from adversary proceedings "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

Since the proposed amendment was circulated, Professor Struve asked whether the Advisory Committee should consider including proceedings under § 543 (turnover by custodians). Professor Gibson said this may include agents that take possession of property to enforce a lien. For example, a towing company taking possession of a debtor's automobile, or a sheriff executing on an automobile, might be deemed a custodian under § 543.

Judge Krieger asked whether the Subcommittee considered the due process implications of changing from an adversary proceeding to a motion practice. Professor Gibson said that she

did not see a due process concern; the third party gets notice and an opportunity to respond under a motion practice. If the issues get more complicated, the court may incorporate other part VII rules under Rule 9014.

Judge Kahn said creditor rights in property are dealt with by motion all the time, such as cash collateral orders and adequate protection. Dealing with property in the jurisdiction of the bankruptcy court has not traditionally caused due process concerns, dating back to the summary/plenary distinction in jurisdiction under the Bankruptcy Act. He agrees with the recommendation of the Subcommittee. He has two questions: Why not limit to chapter 13? If a turnover order is like an injunction, is there a need to except § 542(a) from Rule 7001(7)?

Professor Gibson responded that a chapter 12 debtor or even a chapter 7 debtor may need to get the car back quickly. And as to the second question, if the turnover is excepted in Rule 7001(1), she did not think it was needed to be expressly excluded in Rule 7001(7) as an injunction.

Judge Connelly agreed that due process was not implicated by changing the turnover proceeding from adversary proceeding to motion. The issues that might arise are manageable in a motion mechanism. The service provisions applicable to adversary proceedings will apply, and the court can apply any other part VII rules. The court can also specify the time to respond. She saw no reason to distinguish between individuals in chapter 13 and those who file under other chapters.

Dave Hubbert supported limiting the proposal to tangible personal property.

As to § 543, Professor Gibson suggested that perhaps it has not been a problem, and it might be best to just publish our proposal and see if we get any comments on it. Judge Connelly noted that the Subcommittee did not consider § 543 and the Advisory Committee should either recommit the suggestion to the Subcommittee or publish it. Deb Miller does not want to expand the proposal any further than necessary. Professor Struve said that she thought the proposal was terrific and that it could be modified in the future if creditors shifted property into the hands of custodians. Judge McEwen said that in her district § 543 actions are already by motion.

The Advisory Committee approved the proposed amendments to Rule 7001(1), and committee note and directed that they be submitted to the Standing Committee for publication.

5. **Report by the Forms Subcommittee**

Professor Gibson provided the report.

The Advisory Committee received Suggestion 21-BK-K from Charles A. King, an attorney for the City of Chicago. Mr. King practices bankruptcy law in the Northern District of Illinois, a district that uses the national chapter 13 plan form—Official Form 113. Based on what he considers to be inappropriate treatment of the City's claims that were secured by statutory liens, Mr. King suggested that a portion of Part 3.1 of the form be revised. Specifically, he contends that the following plan statement regarding the effect of lifting the automatic stay is

contrary to the Bankruptcy Code and produces consequences that were likely unintended by the Advisory Committee:

> If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

The Subcommittee reviewed the history of the lift-stay provision in Part 3.1 of Form 113, and concluded that the impact on creditors other than the creditor that sought relief from the stay was intended by the drafters and was not inconsistent with § 1325(a)(5)(B) of the Code. The purpose of the provision is to require secured creditors to look to the collateral (rather than the plan) for payment of their secured claims once the stay has been lifted with respect to that collateral. Mr. King simply disagrees with that decision.

The Subcommittee noted that only a few districts use Official Form 113 rather than their own local form, and the provision in question is not one that Rule 3015.1 requires local forms to include. Its impact is therefore limited. Because the provision is consistent with the Code and seems to be operating as intended, the Subcommittee recommended that the Advisory Committee take no further action on the suggestion. The Advisory Committee agreed to take no action on the suggestion.

6. **Report by the Technology and Cross-Border Insolvency Subcommittee**

Judge Oetken and Professor Gibson presented the report.

Rule 5005 requires electronic filings, but does not deal with what counts as a valid electronic signature for individuals who do not have a CM/ECF account. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management (CACM), submitted a suggestion (20-BK-E) based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ's opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in

pursuing the issues. The matter was assigned to this Subcommittee. Subsequently two more suggestions filed by Sai, 21-BK-H and 21-BK-I, made related points.

The Subcommittee is still in the fact-finding stage of its deliberations. Dave Hubbert and Ramona Elliott are engaged in discussions within the Department of Justice about its views on the issues raised by the suggestions and whether those views have changed since 2014, when DOJ opposed a proposed amendment to Rule 5005(a) that would have allowed the use of debtors' scanned signatures without the retention of the documents bearing the original, "wet" signatures. While no official position has been arrived at, there is an acknowledgment that electronic signature technology has advanced considerably since 2014. Because the Department's position will likely be closely tied to the types of electronic signature products allowed and the security features required, the Subcommittee's exploration and understanding of the technological aspects of electronic signatures will be important.

Ken Lee of the Federal Judicial Center gathered information on the practices of bankruptcy and district courts with respect to requirements for the use and retention of wet signatures of debtors and other non-attorney participants in bankruptcy, civil, and criminal cases, showing the alterations in court practices in response to the COVID-19 pandemic.

The rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently sufficient for evidentiary purposes. The issue the Subcommittee has been considering, therefore, is how best to require an evidentially sufficient form of a debtor's signature that appears on an electronically filed document.

Currently, this goal is generally achieved by the requirement in local rules that the attorney retain the original document with the wet signature for a period of years. This method works, although it has the drawback of making the attorney the custodian of potential evidence against his client—a situation that in the past has caused concerns for both prosecutors and debtors' attorneys.

A solution that provides for an acceptable electronic signature on the document that is filed—rather than a retention requirement—is what CACM seems to have in mind. Its suggestion refers to "the ability of those without CM/ECF filing privileges in bankruptcy cases to electronically sign documents that are submitted to the court." A drawback of this approach, however, is that it would require adequate e-signature technology in the software that many bankruptcy lawyers use for the creation and filing of forms that debtors must sign, such as the petition and schedules. Such software may not currently exist, and a rule that requires the development and purchase of new software is not desirable.

Although the Subcommittee was not prepared to make a formal recommendation to the Advisory Committee, it presented possible amendments to Rule 5005(a) that would create a national retention requirement of either wet signatures or electronic signatures in an evidentially acceptable form. Subdivision (a)(2)(C), governing signatures, could be amended to provide for

persons who are not CM/ECF account holders. Such amendments could impose a national retention period, but it also allows the retention of electronic signatures. It could further declare that, if the requirements are met, the electronic signature that is filed constitutes the debtor's signature. That statement allows electronically filed documents signed by represented debtors to comply with rules and statutes that require the debtor to sign.

As to unrepresented debtors, the Subcommittee recommended no action in response to Sai's suggestion to revisit the electronic filing rights of pro se debtors. But because courts are authorized to allow pro se debtors to file electronically, an all-encompassing amendment about electronic signatures needs to include such filers.

If a court allows pro se debtors to file electronically through CM/ECF, they are covered by Rule 5005(a)(2)(C), and their electronic signature would be treated the same as an attorney with a CM/ECF account.

If a court allows pro se debtors to file by other means—such as by email or through an eSR program—then there needs to be a method of authenticating the electronic signature. A retention requirement is likely ineffectual in this situation. Prosecutors are unlikely to favor a requirement that the pro se debtor retain the document with the wet signature, so unless courts are willing to retain such documents, there would need to be a rule requiring the electronic signature itself to be evidentially sufficient. A rule could require such a debtor to use "a signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer." However, based on information that Molly Johnson provided the Subcommittee about the need for a DocuSign license, such a requirement is probably feasible only if courts can include such technology in their software for pro se filers because the filers will not have their own license.

Sai has suggested that pro se litigants should not have more onerous signature requirements than CM/ECF requirements. Sai also suggests that electronic filings should be required for all litigants whether or not represented, subject to limited exceptions. The Subcommittee suggests that the filing requirements for pro se litigants should not be pursued now. But the Subcommittee asked the Advisory Committee for feedback on whether the approach with respect to represented litigants was appropriate.

Once the Subcommittee has a concrete proposal that is consistent with the Advisory Committee's views, it would like to seek input from outside groups. These groups would include, among others, other rules advisory committees or their reporters; court officials; the Department of Justice and law enforcement officials; debtors' attorneys; IT experts; and bankruptcy software vendors. Ken Lee from the FJC has agreed to survey some outside groups, and the Subcommittee has discussed the possibility of seeking permission to convene a miniconference on a proposed amendment.

Dave Hubbert reiterated that the Department of Justice does not currently have a firm position on electronic signatures. They need to detect fraud and prove the elements in an appropriate case. With respect to the technology, it ranges from authenticating a signature

without verifying the identity of the signer, to something like TSA pre-check where there is in-person verification at some point.

Professor Gibson pointed out the § 341 meeting is unique to bankruptcy where there is a way of verifying the debtor's signature that does not exist in other judicial proceedings.

Deb Miller asked whether this proposed rule modification affects the filing by someone with an account where there are subaccounts, like the trustee's office and large firms. Judge Connelly asked whether there is any need to specify a retention period given the requirements imposed on lawyers under state law. Tara Twomey asked how this applies to proofs of claim, which are often filed by pro se litigants. She also asked how it applies to a document with signatures of multiple persons that is electronically filed by one of them. Professor Gibson said that the Subcommittee had focused mostly on debtor signatures.

Judge McEwen asked how DocuSign works. Ken Gardner explained how it works, but noted that someone has to have a DocuSign account, like the lawyer. Professor Coquillette said this is a complicated area and we have to avoid inconsistent regulation with state rule systems.

Judge Isicoff stated that her district requires email confirmation of signature and a mailed-in wet signature retained by the court. Their new rule will require that the wet signature must be retained by the lawyer or by the court (for pro se filers).

Judge Connelly said Rule 5005 already allows local courts to allow pro se litigants to file electronically. What is the purpose in changing the rule? Is there a problem here? Professor Gibson says that all electronically filed documents already have electronic signatures. The rule is addressing what requirements are needed to provide evidentially valid electronic signatures. Currently local rules are handling this issue. She suggested that perhaps a federal rule is needed to provide uniformity.

Scott Myers pointed out that pro se filers who do not use CM/ECF accounts for filing are not covered by the existing rule.

Judge McEwen said that her district has a local rule dealing with multiple signatures. That same rule has a retention requirement for certain types of papers.

Ken Gardner thinks we need to make this simple. He asked why we cannot offer limited filing access to CM/ECF for pro se filers. He suggested that we could require that everyone have a login that constitutes a signature. Professor Gibson asked about the represented debtor. Ken Gardner thinks the § 341 meeting confirms the signature and that should be satisfactory evidence. Judge McEwen said this does not work for remote § 341 meetings conducted by telephone. Scott Myers said that a limited filing account could really help pro se debtors. Judge Kahn likes the idea of limited filing accounts for pro se debtors. With respect to represented debtors, he does not think the § 341 meeting solves everything because many documents are signed after the § 341 meeting. Deb Miller said that her district requires retention of wet signatures on everything.

The Subcommittee will consider all the input from the Advisory Committee.

7. **Information Items**

(A) ***Restyling Subcommittee***

Judge Krieger and Professor Bartell provided the report. The 7000 series of restyled rules is almost finalized for publication. The style consultants have prepared initial drafts of the 8000 and 9000 series, which will be considered by the Subcommittee at its next meetings. All three series will be ready for approval for publication at the next Advisory Committee meeting.

Rules in the 1000-5000 series that have been amended since the restyling project began have also been restyled by the style consultants and reviewed by the Subcommittee and are almost finalized. The Subcommittee expects to make a recommendation to the Advisory Committee about publication of those rules at its next meeting.

8. **Future meetings**

The spring 2022 meeting has been scheduled for March 31-April 1, 2022.

9. **New Business**

There was no new business.

10. **Adjournment**

The meeting was adjourned at 12:45 p.m.

Proposed Consent Agenda

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

1. Advisory Committee.

A. Recommendation of amendment to Rule 9006(a)(6) to add "Juneteenth Independence Day" to list of Federal holidays (Professor Bartell).

2. Business Subcommittee.

A. Recommendation of no action regarding Suggestion 21-BK-F from Judge Catherine Peek McEwen to shorten the deadline to file schedules in Chapter 11, Subchapter V (Professor Bartell).

TAB 5

TAB 5A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 14, 2021

Introduction

The Civil Rules Advisory Committee met on a teleconference platform that included public access, on October 5, 2021. Draft minutes of the meeting are attached.

Part I of this report presents one item for action at this meeting, recommending publication of an amendment of Rule 12(a)(2) and (3) to recognize statutes that set a time to file a responsive pleading different than the 60-day period in the present rule.

Part II of this report provides information about a proposal that will be recommended for publication at the June meeting, recommending that Rule 6(a)(6) be amended to add "Juneteenth National Independence Day" to the list of statutory holidays. This proposal might well be adopted as a technical amendment, but the choice should be uniform for all the advisory committees that make the same recommendation.

Part II also provides information about ongoing subcommittee projects. The MDL Subcommittee is continuing to consider possible rule amendments that would include provisions in Rule 16(b) or Rule 26(f) addressing the court's role in appointment and compensation of leadership counsel and management of the MDL pretrial process, including ongoing supervision by the court of the development and resolution of the litigation. The draft now being developed would simply focus attention on these issues by the court and the parties without greater direction or detail. The subcommittee has begun to receive comments from interested bar groups on the approach presented to the Advisory Committee in October and outlined in this report. The Discovery Subcommittee has begun to study suggestions that amendments should be made to Rule 26(b)(5)(A) on what have come to be called "privilege logs." It will defer further consideration of a proposal to create a new rule to address standards and procedures for sealing matters filed with the court. A sealing project has been launched by the Administrative Office, and it seems better to wait to receive the benefits of that project. The work of these two subcommittees is described in parts IIA and IIB.

There is no need for further description of the work of two other subcommittees. A joint subcommittee with the Appellate Rules Committee has explored possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. It awaits completion of a second FJC study. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. Work to support further deliberations continues, but it may be some time before enough information has been gathered to support renewed deliberations.

The Advisory Committee has determined that it remains premature to begin work toward possible rules related to third party litigation financing. Third-party funding continues to grow and to take on new forms. The agreements that establish funding relationships vary widely, and may not express the full reality of the actual relationships. It would be difficult even to define what sorts of funding might be brought within the scope of a rule. And many of the questions raised about third-party funding address issues of possible regulation that are beyond the reach of Enabling Act rules. The Advisory Committee continues to gather information.

Part III describes continuing work on topics carried forward on the agenda for further study. The first is a proposal to amend Rule 12(a)(4) to allow 60 days to file a responsive pleading after the court denies, or postpones until trial, a motion under Rule 12 in an action against a federal officer sued in an individual capacity for acts on the United States' behalf. This proposal was published in 2020 and discussed extensively in the Standing Committee last June. Additional information about experience in present practice has been requested from the Department of Justice.

Four other topics are carried forward. One is the question whether an attempt should be made to establish uniform standards and procedures for deciding requests for permission to proceed in forma pauperis.

Another topic carried forward is a proposal to amend Rule 9(b) to allow malice, intent, knowledge, and other conditions of a person's mind to be pleaded as a fact, without requiring

additional circumstances that support an inference of the fact. A subcommittee has been appointed and has begun studying this proposal.

Rule 4 provisions for serving the summons and complaint were studied by the CARES Act Subcommittee and are involved with the emergency rules provisions in Rule 87 as published last August. Rule 4 will continue to be studied in light of the comments on Rule 87 and may carry forward for independent consideration. A recent proposal sent to the Advisory Committee suggests a possible first step by amending Rule 4(d)(1) to allow a request to waive service of the summons and complaint to be made by email.

Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties also are being carried forward, to be studied by a cross-committee group that is refining a research agenda.

Part III omits an additional topic carried forward on the agenda but not discussed at this meeting. This topic arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure for ordering a United States marshal to serve process in an in forma pauperis or seaman case.

Part IV describes several new items that have been added to the agenda for further work.

Judge Furman suggested that it may be desirable to amend Rule 41(a)(1)(A) to resolve a split in the decisions on the question whether a party can dismiss part of an action by notice without prejudice. This question leads to related questions, some of them implicated in the same words referring to "the plaintiff" and "an action."

Rule 55(a) directs that the clerk "must" enter a default in prescribed circumstances, and Rule 55(b)(1) directs that the clerk "must" enter a default judgment in narrowly described circumstances. An informal survey suggests that in many districts all default judgments are entered by the court. The first step will be to undertake a broader survey of actual practices for lessons about what the rule might say.

Rule 63 lists criteria for determining whether a successor judge "must" recall a witness to complete a hearing or nonjury trial begun before a different judge. Discussion of a suggestion that the rule might point to the value of a video transcript in applying these criteria led to a broader question whether the criteria are too narrow.

A thoughtful submission suggested that a rule should be adopted to establish uniform national standards and procedures for filing amicus curiae briefs in the district courts. Guidance can be found in a good local rule, the Appellate Rules, and the Supreme Court Rules. A central question will be whether the role of district court litigation, and party control of the record, complicate the issues beyond the analogies in appellate practice. The submission suggests that amicus briefs are filed in about 0.1% of district court cases, some 300 a year; the relative infrequency of the practice may be a reason to avoid adding a new rule on a topic, briefs, that is not otherwise addressed in the rules.

Part V describes four proposals that are not being pursued further. One suggested adoption of a new Rule 9(i) to establish a "particularity" standard for pleading access impediment claims under Title III of the Americans with Disabilities Act. A second suggested that opt-out class actions

be discarded, substituting opt-in classes. A third suggested that Rule 25(a)(1) be amended to provide that a judge may enter a statement of death on the record. The fourth raised a question about the alternative sanctions provision in Rule 37(c)(1).

I. Action Item: Rule 12(a)(2), (3) for Publication

Rule 12(a) sets the times to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern. Rule 12(a)(2) and (3) does not recognize the possibility of conflicting statutes. Statutes setting shorter times than the 60 days provided by paragraph (2) exist. It is not clear whether any statute inconsistent with paragraph (3) exists now. This proposal would amend paragraphs (2) and (3) to bring them into line with paragraph (1), recognizing that a different statutory time should supersede the general 60-day rule time.

Rule 12(a) begins like this:

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

* * * * *

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers of Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

* * * * *

The amendment would recast the beginning of Rule 12(a) to read like this:

> (a) TIME TO SERVE A RESPONSIVE PLEADING. ~~(1)*In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
>
> (1) *In General.*
>
> (A) a defendant must serve an answer
>
> * * * * *

The most frequently encountered statute that sets a different time from Rule 12(a)(2) is the Freedom of Information Act. The Department of Justice reports that it understands and adheres to the 30-day response time set by FOIA. But this question came to the agenda from a lawyer who had to argue with a clerk's office to gain a 30-day summons, and research by an independent journalist with a law librarian suggests that many districts issue 60-day summonses and that mean and median response times exceed 30 days.

The reasons to recommend the amendment are direct. Rule 12(a)(2) and (3) was never intended to supersede inconsistent statutes. It is embarrassing to have rule text that does not reflect the intent to defer. Worse, comparison of the text of paragraph (1) with the texts of paragraphs (2) and (3) might suggest a deliberate choice that only the response times set by paragraph (1) should defer to inconsistent statutory periods. And the risk that the rule text may be read to supersede inconsistent statutory provisions may be real. Working through a supersession argument, moreover, would lead to the prospect that the rule supersedes inconsistent earlier statutes, but is superseded by later statutes. It is better to avoid these problems by a simple amendment.

The reasons to hesitate are few. One is the ever-present concern that bench and bar should not be burdened with a never-ending flow of minor rules amendments. Time and again the committees find divergent or likely wrong interpretations of the rules but draw back from proposing amendments. The other is that the Department of Justice regularly encounters actions that involve both claims subject to a shorter period and claims subject to the general 60-day period in Rule 12(a)(2) and (3). Often it wins an order that allows it to file a single answer within the 60-day period. The Department has some concern that express recognition of the shorter statutes in rule text might make it more difficult to win such extensions. These reasons proved troubling to the Advisory Committee when this proposal was first considered in October 2020; the proposal was held for further study by an evenly divided vote.

The reasons to recommend this amendment for publication proved more persuasive to the Advisory Committee after further discussion. The recommendation was adopted without dissent.

II. Information Items

A. Rule 6(a)(6): Juneteenth National Independence Day

The Juneteenth National Independence Act, P.L. 117-17 (2021) amends 5 U.S.C. § 6103(a) to add "Juneteenth National Independence Day, June 19" to the list of public legal holidays.

The Bankruptcy Rules Committee has recommended that Bankruptcy Rule 9006(a)(6) be recommended for adoption without publication as a technical amendment. Civil Rule 6(a)(6)(A) should be amended in parallel, as also the similar Appellate and Criminal Rules. Publication for comment does not seem necessary, but the same approach should be followed for all four rules.

As amended, Rule 6(a)(6)(A) would read:

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

(a) COMPUTING TIME. * * *

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day,

* * * * *

Even without this amendment, Rule 6(a)(6)(B) will effect the same result until amended subparagraph (A) takes effect. Subparagraph (B) includes as a "legal holiday" "any day declared a holiday by the President or Congress." It remains important, however, to maintain a complete set of statutory holidays in subparagraph (A).

Committee Note

Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside by statute as legal holidays.

B. MDL Subcommittee

As reported during the Standing Committee's June meeting, the MDL Subcommittee continues to study some of the topics it originally undertook to examine.[1] Another topic initially assigned to the subcommittee was a proposal to require disclosure of third party litigation funding (TPLF) arrangements. After review of these issues, and in light of the reported infrequency of TPLF issues in MDL proceedings, the subcommittee decided that the issues did not warrant

[1] One topic that was intensely considered was a proposal to create by rule an additional route to interlocutory appellate review for at least some orders in at least some MDL proceedings. After extensive consideration the subcommittee concluded that rulemaking was not warranted for this purpose.

rulemaking for MDLs. But because TPLF did appear to be an important and rapidly evolving matter, the Advisory Committee kept the topic on its agenda and has been monitoring it. The agenda book for the Advisory Committee's October 5, 2021 meeting contained more than 40 pages of material reporting on that monitoring activity, including the 20-page compilation prepared by successive Rules Law Clerks of articles about TPLF. The agenda book did not recommend immediate action on this front, and during the meeting the Advisory Committee did not decide that immediate action was called for, but it did recognize that TPLF is a large topic, and that continued monitoring was in order. This report outlines current thinking. The subcommittee invites and welcomes reactions from the Standing Committee.

1. Current Focus: Facilitating Early Attention to "Vetting" and Provisions Regarding Appointment of Leadership

As it began its work, the subcommittee looked carefully at a different set of issues, sometimes called "vetting," prompted partly by assertions that a large proportion of plaintiffs in some mass tort MDLs had not used the product involved or had not suffered the harm allegedly caused by the product.

The subcommittee's examination of these issues, greatly aided by FJC research, showed that a practice known as "plaintiff fact sheets" (PFS) had developed in response to these concerns, and that PFS practice was used in the great majority of "mega" MDL proceedings. In many of those proceedings there was also something like a "defendant fact sheet" (DFS) process, calling for defendants to provide information to plaintiffs early in the proceedings. But it also became apparent that the actual contents of a PFS or a DFS had to be tailored to the particular MDL proceeding, so that a rule trying to dictate the contents would be unlikely to work. In addition, it appeared that the process of developing a tailored PFS or DFS was time-consuming and difficult. Finally, some objected that PFS practice had become too much like full-bore discovery and produced overlong requests for information.

At the same time, concern with unfounded claims in MDL proceedings persisted, among both defense and plaintiff counsel. A new simplified method, called a "census," was introduced, and it is being employed in several major MDL proceedings presently. (Judge Rosenberg, Chair of the subcommittee, is presiding over one of these — the Zantac MDL.) The idea with this method is to devise a less burdensome initial fact-gathering method, and expedite the early development of the litigation. As reported in April, the subcommittee continues to monitor these developments.

Meanwhile, the subcommittee's focus shifted to early attention to other matters in MDL proceedings, notably appointment of leadership counsel on the plaintiff side and arrangements (often called common benefit fund arrangements) for compensating leadership counsel for their added efforts.

This focus on settlement and management was partly stimulated by a comparison of MDL mass tort proceedings with class actions. At least among academics, there have been calls for rules specifying criteria for appointment of leadership counsel parallel to the criteria for appointment of class counsel in class actions, and also for adoption of rules for judicial involvement in the process

of settling MDL proceedings, or major parts of them, analogous to Rule 23(e)'s newly expanded provisions regarded review of class action settlements.

Comparison to class actions: There is much to be said for the view that some MDL proceedings are similar to class actions, perhaps particularly from the perspective of claimants whose lawyers are not selected to serve in leadership positions, sometimes called individually represented plaintiffs' attorneys (IRPAs). With some frequency, these claimants (and their lawyers) may feel that they are "on the outside looking in" as the MDL proceeding advances. Neither the claimants nor the IRPAs may be free to pursue ordinary litigation activities, such as doing discovery or making motions. And it may happen after extensive litigation conducted by leadership counsel appointed by the court that some sort of broad "global" settlement will be announced, which may be contingent on participation by most or all claimants, leading to considerable pressures to accept that settlement negotiated by leadership counsel.

These scenarios, which may have played out in some prominent MDL proceedings, can be seen to call for creating a judicial role in MDL proceedings analogous to the judicial role in class actions. But in very important ways MDLs are different from class actions. For example, Rule 23(g)(4) says that class counsel "must fairly and adequately represent the interests of the class." And Rule 23(e)(2)(D) makes judicial approval of a class action settlement contingent on the court's conclusion that "the [settlement] proposal treats class members equitably relatively to each other."

But input from the bench and bar has identified significant concerns about importing some of these class action practices into the MDL context. In class actions, the court is in effect appointing class counsel to act as lawyers for all members of the class. Hence the directive of Rule 23(g)(4) that class counsel represent the interests of the class as a whole, not just their individual clients. As the committee note to Rule 23(g) points out, that means that although the class representatives are in form the "clients" of class counsel, they cannot "fire" class counsel as an ordinary client may fire a lawyer. Under Rule 23(g)(4), class counsel must give class interests priority over the interests of the class representatives as individual clients. The MDL situation is different.

For leadership counsel in MDL, the "class" of claimants may be divided into those who are actual clients of leadership counsel and others who are not. Those other claimants usually have their own lawyers (the IRPAs), something probably not true of most class members in most class actions.

Finally, in class actions the court has authority under Rule 23(e) to reject a settlement, denying whatever benefits it may offer to class members, or to approve a settlement despite class-member objections. An MDL transferee judge may not require a claimant to accept a settlement the claimant regards as unacceptable, nor prevent a claimant from accepting a settlement the claimant finds acceptable. (Technically, any class member could settle an individual claim with the defendant, but the reality of class action practice is that often defendants will settle only for something resembling "global peace.")

Realities of MDL settlements: The input the subcommittee has received from various sources portrays a very different settlement reality in MDL proceedings, particularly "mass tort" MDL proceedings. For one thing, the scope of settlements does not seem to fit the class action model. Though there is a possibility in class actions for subclassing, it seems that class action settlements most often involve something like "global peace," and therefore are "global deals." In the MDL mass tort world, there are some "global" settlements and individual settlements, but also "continental," "inventory," and probably other non-individual settlements.

In the class action world, there have been "inventory" settlements, but those occur without court review. In effect, such an "inventory" settlement operates as an opt out if the class has already been certified. It appears that something like that also occurs with some frequency in MDL proceedings, at least of a mass tort variety. And it may be that some lawyers — whether in leadership or IRPA positions — may receive settlement offers for their clients that differ from terms offered to other lawyers and their clients. Overall, it seems that judges are not in a position to do something in MDL proceedings like what Rule 23(e) tells them to do in class actions — focus on whether settlements treat claimants "equitably relative to each other."

So it may be that the most a judge might do in regard to settlements in MDL proceedings would be to consider whether the process of reaching a settlement was appropriate. Rule 23(e)(2)(B), for example, instructs a judge reviewing a proposed class action settlement to determine whether the settlement "was negotiated at arm's length." Perhaps some similar attention to the negotiation process could be useful in MDL proceedings. (As noted below, however, the subcommittee is not confident presently that even this role in regard to settlements would work in the MDL setting.)

Issues raised by Judge Chhabria's common benefit order: Another feature of the subcommittee's discussions has been the use and allocation of "common benefit" funds to compensate leadership counsel. In June, Judge Chhabria (N.D. Cal.) entered a very thoughtful order about common benefit funds in the *Roundup* MDL, over which he is presiding. *See In re Roundup Products Liability Litigation*, 2021 WL 3161590 (N.D. Cal. June 22, 2021). The judge began his 33-page decision with the following observation:

> [C]ourts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control. (slip op. at 1)

The judge made a number of other observations in this opinion that bear mention here because they relate to some of the topics the subcommittee is currently addressing:

> [A]n MDL judge's first order of business is often to decide which lawyers will take the lead in managing and litigating the cases. This is an important decision because of the performance of those lawyers, and the strategic decisions they make, often affect the outcome of the entire group of plaintiffs. (slip op. at 3)

> [T]o be candid, this Court did not adequately scrutinize lead counsel's proposal [regarding creation of a common benefit fund] — the motion was unopposed at the time, and the Court was not very familiar with the nuances of MDL proceedings." (slip op. at 4)

> [L]ead counsel's hard work helped lay the groundwork for other lawyers in the MDL to get settlements for their clients, but the settlements obtained by those lawyers were likely far lower than the settlements obtained by lead counsel for their "inventories," thus diminishing the need to address the free rider problem [that IRPAs get a free ride due to the work of leadership counsel]. (slip op. at 27)

Judge Chhabria also raised questions about whether familiar common fund practices in MDL proceedings really correspond to situations in which the litigation itself creates the fund that is then distributed to beneficiaries. In the MDL context, the "funds" may come from settlements with individual plaintiffs or groups of plaintiffs, and the fund results solely from the court's order holding back a portion of those settlement proceeds. See slip op. at 9-16.

Need for attention to MDL proceedings in the Civil Rules? One additional topic merits mention. Discussions with experienced MDL transferee judges and lawyers with much MDL experience did not disclose great enthusiasm for rule changes. Indeed, there might be some resistance to that idea.

That attitude among experienced judges and practitioners is important, but perhaps not dispositive. For one thing, the subcommittee may not emerge with the more limited rule changes it now has under consideration. For another, it may be that rules would benefit those not so experienced in MDL proceedings. Consider, for example, Judge Chhabria's comment (quoted above) that at the time he initially accepted the parties' proposed common benefit order he "was not very familiar with the nuances of MDL proceedings."

One recurrent theme the subcommittee has heard for some time is that MDL proceedings seemed to be limited to "insiders" — judges who were repeatedly transferred cases by the Judicial Panel and lawyers who were appointed to leadership positions in those MDLs because of their track record in prior MDL proceedings. We understand that there has been a conscious push to broaden involvement to other judges and other lawyers. For these new participants, rule provisions may provide "guard rails" of a sort.

Beyond that, the absence of any mention of MDLs in the Civil Rules seems striking. In historical terms, it is understandable. Until relatively recently, MDL proceedings did not have much of a profile. Consider, for example, the beginning of a 2004 interview with Judge Hodges, then Chair of the Panel, by an experienced Maine lawyer:

> Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order — from a court you have never heard of — declaring your case a "tag-along" action and transferring it to another federal court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation.

Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 Me. B.J. 16, 16 (2004).

It is unlikely that multidistrict litigation remains an unknown to the bar since something between one third and half of the pending civil cases in the federal system are subject to a Panel order. Instead, one might say that the fact it is unnoticed in the rules is a gap that should be addressed. Some argue that MDL proceedings exist "outside the rules." That is surely overstatement; they are conducted under the rules, though often judges take advantage of the rules' flexibility in managing these complex proceedings. But some formal recognition in the rules might both provide guidance for those not among the *cognoscenti* and constitute recognition within the rules of the major importance of this form of litigation.

2. Current Focus: Rule 16(b) Approach/Rule 26(f) Corollary

Below is the sketch of the current subcommittee approach as presented to the Advisory Committee during its October 5 meeting. Since that meeting, the subcommittee (which now includes Judge Proctor, a former member of the Judicial Panel on Multidistrict Litigation) has held an online meeting to examine these issues with care, and its exploration of them is ongoing. In addition, representatives of the subcommittee will likely participate in events with experienced members of the bar to receive reactions to the approach outlined below. The first of these events occurred on December 3, 2021.

The sketch below includes a variety of questions that the subcommittee has already begun discussing in detail, and which are receiving ongoing scrutiny. It is expected that input received from members of the bench and bar will also focus on the subcommittee's current thoughts, though discussions are ongoing on whether the Rule 26(f) treatment should be expanded to include items beyond information exchange, such as sequencing of decisions and scheduling of pretrial conferences.

It bears emphasis that the subcommittee's examination of these issues — including the questions below — is ongoing and dynamic. The subcommittee has already had one online meeting (on November 2, 2021), and its focus continues to evolve. Among the possible issues going forward are whether to expand the topics for consideration at Rule 26(f) conferences in MDL proceedings beyond the exchange of information on claims and defenses, whether to pursue a judicial role in regard to settlements, and the appropriate role for the MDL transferee court regarding common benefit funds.

Careful attention to terminology is also ongoing. An example is the term "leadership counsel" rather than "lead counsel." The term "lead counsel" has long been recognized, but there may be good reason to use a different term in a Civil Rule for multidistrict litigation. In addition, some attention to appointment of liaison counsel on the defense side may be valuable. Indeed, it may be useful also to address a possible judicial role regarding common benefit funds to cover defense costs. *See In re Three Additional Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 93 F.3d 1 (1st Cir. 1996) (upholding requirement that defendants added late in the litigation contribute more than $41,000 as their share of common benefit defense costs under the

district court's case management order, even though these defendants said they wanted to "go it alone" and had not benefitted from the common benefit expenditures).

Given the evolving nature of subcommittee discussions, Standing Committee input would be valuable to the subcommittee as it receives reactions from sectors of the bar.

Rule 16(b) Approach

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Case Management.

* * * * *

(3) ***Contents of the Order.***

* * * * *

(B) *Permitted Contents.*

* * * * *

(vii) include an order under Rule 16(b)(5); and

(viii) include other appropriate matters.

* * * * *

(5) ***Multidistrict Litigation***. In addition to complying with Rules 16(b)(1) and 16(b)(3), a court managing cases transferred for coordinated pretrial proceedings under 28 U.S.C. § 1407 should[2] consider entering an order about the following at an early pretrial conference:

(A) directing the parties to exchange information about their claims and defenses at an early point in the proceedings;[3]

[2] The operative verb is "consider." The subcommittee discussed whether a rule might say "must" or "may" consider. Neither of those seemed appropriate. Using "should" is a prod, not a command.

[3] This provision refers to both claims and defenses because we have been informed that there has been an active DFS (defendant fact sheet) practice in many MDL proceedings. It does not delve into how to characterize claimants on a "registry" or other arrangement of that sort, as in the Zantac MDL.

(B) appointing leadership counsel[4] who can fairly and adequately discharge[5] their duties in representing plaintiffs' interests[6], and including specifics on the responsibilities of leadership counsel,[7] [specifying that leadership counsel must throughout the litigation fairly and adequately discharge the responsibilities designated by the court],[8] and stating any limitations on the activities of other plaintiff counsel[9];[10] [11]

(C) addressing methods for compensating leadership counsel [for their efforts that provide common benefits to claimants in the litigation];[12]

[4] This term is used in place of "lead counsel" because often such appointments are of numerous lawyers drawn from different law firms.

[5] This phrase somewhat emulates Rule 26(g)(1)(A)'s criteria for appointing class counsel. A committee note might mention the similarity of concerns, but it seems that the detail included in Rule 23(g)(1)(A) would not be helpful here.

[6] The question what exactly "represent" means here may need to be addressed carefully in a committee note since most (perhaps all) plaintiffs have their own lawyers.

[7] There may be some reason to stress in the committee note the value of fairly detailed appointment orders as a way to avoid problems down the line.

[8] It is not clear whether the bracketed phrase is necessary in the rule. Perhaps a rule provision recommending that the court select counsel who can "fairly and adequately discharge their duties" suffices, though the bracketed phrase calls attention to whether that early forecast is borne out by later events.

[9] This provision refers to the common limitation on activities by other plaintiff lawyers (the IRPAs). Absent such limitations, an MDL proceeding might become unmanageable.

[10] This provision does not discuss appointment of lead counsel for defendants, though that may be vital in multi-defendant situations.

[11] As noted below in regard to bracketed (E), it may be best to deal with settlement issues solely as an aspect of appointment of leadership counsel.

[12] This provision deals with the issues addressed by Judge Chhabria in his recent *Roundup* opinion. Rulemaking on authority to create such funds probably should be approached cautiously. The use of common benefit funds in MDL proceedings has a considerable lineage, going back at least to *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977), less than a decade after adoption of the MDL statute in 1968.

The bracketed material might best be removed to avoid tricky issues about what efforts of leadership counsel actually confer benefits on the clients of other lawyers. For one thing, it is perhaps inevitable that in ordinary litigation of individual cases the efforts of Lawyer A, representing client A, may produce advantageous effects for Lawyer B, representing client B with a similar claim against the same

411 **(D)** providing for leadership counsel to make regular reports to
412 the court — in case management conferences or otherwise
413 — about the progress of the litigation;[13]

414 **[(E)** providing for reports to the court regarding any settlement of
415 [multiple] {a substantial number of} [all] individual cases
416 pending before the court;][14] and

417 **[(F)** providing a method for the court to give notice of its assessment of
418 the fairness of the process that led to any proposed settlement subject
419 to Rule 16(b)(5)(E) to plaintiffs potentially affected by that
420 settlement].[15]

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defendant. It is a reality of individual litigation that this sort of effect can happen, and that does not routinely lead to Lawyer A having a right to part of Lawyer B's fee.

Another difficulty in the MDL setting is to account for the possibility that cases in state court may be handled under state court procedures like the Judicial Panel. California and New Jersey, for example, have such procedures, and it may sometimes be that state court cases aggregated and managed in this fashion outnumber the federal court cases centralized by the Panel. The question which counsel are "benefitting" from the efforts of other counsel could be quite difficult in such cases.

It is unlikely that specific rule prescriptions would be a successful way to manage these questions, which probably depend too much on the facts of individual MDL proceedings.

[13] It seems likely that MDL transferee judges will often schedule case management conferences at regular intervals to supervise the evolution of the litigation. It may be that, beyond that, courts would desire regular written reports. One focus of this management, or of the original appointment order, might be the method used by leadership counsel to advise IRPAs and their clients about the progress of the litigation.

[14] The subcommittee has considerable uneasiness about a rule provision delving into settlement in this manner. It may be that the preferable approach would include reference to developments on this front under (B) or (D).

Separately, it is worth noting that providing rule language to define which settlement proposals trigger this reporting obligation is tricky. It appears that experienced MDL practitioners speak at least of "individual," "inventory," "continental," and "global" settlements. There are probably other permutations. Perhaps, if a rule provision along these lines is pursued, it would be best not to try to define in a rule which settlement developments must be reported to the court, leaving that choice to the court. But, if so, it might suffice to include that issue under (B) or (D).

[15] (F) is retained in brackets. But the inclination of the subcommittee is that proceeding along these lines would invite considerable problems without providing considerable advantage.

For one thing, it is difficult to say how the court is to assess the settlement deal. As noted above, the court is really not in any position to evaluate what might be called the "merits" of the deal — whether it is a good deal or a bad deal. Instead (F) asks the court to assess the "process" by which it was reached. The 2018 amendments to Rule 23(e) settlement review in class actions recognized in the committee note

The Rule 26(f) Corollary

If something like the foregoing were pursued, it seems valuable to have the parties get to work on the PFS/DFS sorts of issues at their Rule 26(f) conference and include a report about those efforts in their report to the court before it enters its Rule 16(b) scheduling and case management order:

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * * **(3)** ***Discovery Plan***. A discovery plan must state the parties' views and proposals on:

* * * * *

(F) In actions transferred for coordinated pretrial proceedings under 28 U.S.C. § 1407, whether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings;

(G~~F~~) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

There may be many other topics the court would consider under something along the lines of new Rule 16(b)(5) above. But it does not seem that defendants have a rightful seat at the table to discuss most of those topics, such as selection of leadership counsel, creation of a common benefit fund, judicial oversight of the conduct of the litigation by leadership counsel, or settlement. As noted above, however, the subcommittee is engaged in ongoing discussions of whether to

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that there is a difference between "procedural" and "substantive" review of a proposed class-action settlement. But trying to draw that dividing line in MDL proceedings may prove quite tricky. If the deal looks like a terrific win for the plaintiffs, should the court be overly concerned about the peculiar manner in which it was negotiated? On the other hand, if the deal looks totally worthless, benefitting only counsel, should the court be satisfied that the process used to reach it seems upstanding?

Separately, the idea of providing notice to plaintiffs raised concerns. In a class action, the court may decide to accept or reject a proposed settlement as "fair, reasonable and adequate." Class members can object, but the court can approve the settlement over their objections. Objectors can then appeal. But under (F) it seems as though the court is offering something one might liken to an advisory opinion. Plaintiffs can take it or leave it. If they take the court's advice and reject the deal, they may lose at trial. If they take the court's advice and accept the deal while others do not, they may regret their choice if those who rejected the deal end up with sweeter deals. Those possibilities exist with class actions also, but the absence of judicial authority to approve or disapprove the settlement makes the MDL setting seem markedly different.

expand the list of matters on which counsel in MDL proceedings should confer and address in their report to the court in relation to the entry of a Rule 16(b) order.

An additional consideration is the question who should speak for the plaintiffs during this early meet-and-confer session. In class actions, Rule 23(g)(3) authorizes the court to appoint interim class counsel before making the formal appointment of class counsel. In some MDL proceedings, arrangements of this sort have occurred. Whether a provision for such a temporary appointment should be included in a rule (or perhaps mentioned instead in a committee note) is under subcommittee consideration.

C. Discovery Subcommittee

The Discovery Subcommittee has two principal issues before it, but one of them seems to be a part of a more general A.O. study of sealed filings, and Advisory Committee action will likely be deferred pending the outcome of that A.O. work.

1. Privilege Logs

The Advisory Committee received two recommendations that it revisit Rule 26(b)(5)(A), adopted in 1993, requiring that parties withholding materials on grounds of privilege or work product protection provide information about the material withheld. Though the rule did not say so and the accompanying committee note suggested that a flexible attitude should be adopted, the submissions said that many or most courts had treated the rule as requiring a document-by-document log of all withheld materials. One suggestion made was that the rule be amended to make it clearer that such listing is not required, and another was that the rule be amended to provide that a listing by "categories" be recognized as sufficient in the rule.

In May, the subcommittee concluded that it should seek more information about experience under the current rule. Accordingly, at the beginning of June, the subcommittee posted an invitation for comment on the A.O. website and also sent copies to a variety of bar groups inviting dissemination. That invitation produced more than 100 thoughtful comments. A summary of those comments appears at pp. 213-43 of the agenda book for the Advisory Committee's October 5 meeting. In addition, the National Employment Lawyers Association organized an online discussion with its members for the subcommittee in July, and representatives of Lawyers for Civil Justice (LCJ) held an online discussion with subcommittee members in September. Finally, later in September members of the subcommittee had the opportunity to participate in a very informative online conference organized by retired Magistrate Judge John Facciola and Jonathan Redgrave, who was also the source of one of the proposals for rulemaking that stimulated this effort.

One thing that this input has made clear is that there appears to be a recurrent and stark divide between the views of plaintiff counsel (who worry that a rule change could enable defendants to hide important evidence) and defense counsel (who stress the burdens of preparing privilege logs, say the logs are rarely of value, and feel that the need for a document-by-document log might sometimes be used by plaintiff counsel to apply pressure to defendants).

In addition, the subcommittee held an online meeting in August concerning the ideas presented to the Advisory Committee during its October 5, 2021, meeting and presented below. It is worth noting that various subcommittee members expressed differing attitudes toward these ideas, so none of them is presented as a subcommittee preference. They are the subject of ongoing subcommittee study, and it is expected that there will be at least one additional session with an interested bar group — the American Association for Justice — about privilege log concerns.

Perhaps it is useful to begin by presenting the original proposed addition to Rule 26(b)(5)(A) submitted by LCJ:

> If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

In early August, LCJ submitted a more extensive and aggressive proposal to amend the rule. Meanwhile, the subcommittee has begun to focus on Rule 26(f) and Rule 16(b), which might be the natural place to locate a rule provision designed to consider such an agreement and call it to the court's attention. The subcommittee welcomes input from the Standing Committee on this approach.

Rule 26(f)/16(b) Approach

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties' discovery plan must state the parties' views on:

> (D) any issues about claims of privilege or of protection as trial-preparation materials, including the method to be used to comply with Rule 26(b)(5)(A) and—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the scheduling order may:

> (iv) include the method to be used to comply with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

These changes could support a committee note explaining that the parties and the court can benefit from early discussion, with details, of the method to be used for creating a workable privilege log. The note might also stress the value of early "rolling" privilege log exchanges and warn against deferring the privilege log exchange until the end of the discovery period. It might also stress the value of early judicial review of disputed privilege issues as a way to provide the

parties with detailed information about the court's view on what items privilege does and does not apply to. The parties can then govern their later handling of privilege issues with that knowledge.

This approach can be supported on the ground that it is desirable to prod the parties and the court to attend to the privilege log method up front. Several members of the subcommittee reported that serious problems can develop when privilege logs are not forthcoming until near the end of the discovery period, and disputes about them or about what was withheld therefore had to be addressed at that time. A prompt in a committee note in favor of production of a "rolling" privilege log might also be desirable.

One thing the parties might address in their Rule 26(f) conference, and the court might include in a Rule 16(b) scheduling order, would be categories of materials that need not be listed. Subcommittee discussion has suggested that often communications with outside counsel dated after the commencement of the litigation might be a category exempted from listing on a log. Another category that has been discussed within the subcommittee is that any documents produced in redacted form need not also be listed in the log since it will be apparent from the face of the redacted documents that portions have not been included.

This Rule 26(f) approach would allow the parties to tailor any categorical exclusions or methods of reporting withheld materials to their case. It bears noting that some comments received asserted that some parties seem to route communications through in-house counsel, or copy them on communications, in situations in which no privilege really applies. Some who commented claim that this is a subterfuge designed to conceal evidence. Presumably that sort of misgiving could be explored in conferences of counsel.

Another feature of this approach is that the nature of privileges may vary significantly in different types of federal court litigation. It may be that the original submissions to the Advisory Committee were principally concerned with what might be called commercial litigation. But comments submitted in response to the invitation for comment emphasized that very different issues often exist in other types of litigation. One example involves suits for violation of civil rights due to alleged police use of excessive force. Various sorts of privilege that may be invoked in such litigation — internal review privilege or informer's privilege, for example — are quite different from the attorney-client and work product protections. Another example is medical malpractice litigation, which may involve peer review, confidentiality of medical records, and other privileges that do not often appear in typical commercial litigation.

Another topic that is mentioned in many of the comments and has come up in subcommittee discussions is the possibility that technology can facilitate creation of a log. It does seem that technology can now sometimes ease the task of preparing a log, perhaps even make it a "push the button" exercise to produce a "metadata log." But subcommittee members' experience has been that this possibility has not proved a cure-all for privilege-log disputes. To the contrary, attempts to use technology to generate logs too often produce disputes between counsel. Often, the technology "solution" is ultimately abandoned in favor of document-by-document logs. All of this can generate more work for the court.

Perhaps, if the parties carefully considered this high-tech possibility during their Rule 26(f) conference and presented the judge with either an agreed method or their contending positions on how it should be done, the court could, early in the litigation, direct use of a method that seemed effective, and also direct that an initial logging report using that method be presented fairly promptly so that if further disputes occurred, they could be addressed in a timely fashion.

All in all, then, it may be that adding this topic to the Rule 26(f) discussion may provide needed flexibility that takes account of both the nature of the privileges likely to be invoked and the nature of the litigation and the litigants. And calling the court's attention to it in relation to the Rule 16(b) scheduling order may pay dividends.[16]

2. Sealed Court Filings

Several parties — Prof. Eugene Volokh, the Reporters Committee for Freedom of the Press, and the Electronic Frontier Foundation — submitted a proposal to adopt a new Rule 5.3, setting forth a fairly elaborate set of requirements for motions seeking permission to seal materials filed in court.

[16] The agenda book for the Advisory Committee's October 5 meeting also included discussion of the possibility of amending Rule 26(b)(5)(A) directly, perhaps in conjunction with a change to Rule 26(f) and Rule 16(b). Various alternative drafts were presented, including the following:

Alternative 1

(ii) describe <u>for each item withheld — or, if appropriate, for each category of items withheld —</u> the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Alternative 2

(ii) describe the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. <u>The description may, if appropriate, be by category rather than a separate description f or each withheld item.</u>

Alternative 3

(ii) describe the nature of the <u>categories of</u> documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privilege or protected, will enable other parties to assess the claim.

There is considerable concern, however, that amending the rule to invite use of "categories" to satisfy the rule might "tip the playing field" on this subject, or invite overbroad categories. Going beyond this general approach and attempting to describe in a rule the categories that need not be listed seems to present even greater challenges. These possibilities remain under study by the subcommittee, however.

The question of filing under seal is an important one, but the proposal itself included a significant number of complicating features that may be unnecessary to the fundamental points to be made — (1) that "good cause" sufficient to support a Rule 26(c) protective order does not itself supply a ground for filing under seal, and (2) that every circuit has a more demanding standard for permitting filings under seal, as required by the common law and First Amendment right of public access to court files. Research done by the Rules Law Clerk demonstrated that every circuit has articulated a standard for such filing under seal.

The subcommittee initially discussed revisions to Rule 26(c) to recognize that good cause supporting a protective order does not itself provide a basis for filing under seal, and a revision to current Rule 5(d) specifying that filing under seal may only be done on grounds sufficient to satisfy the common law and First Amendment right of access to court files. The thinking was that a rule ought not try to spell out those common law or First Amendment requirements, which are phrased somewhat differently in different circuits.

In addition, information received from the Federal Magistrate Judges' Association suggested that, while using the applicable circuit standard for sealing decisions worked well, there might be reason to consider adopting some nationally uniform procedures for sealing decisions. At present, it seems that sealing procedures and methods vary considerably in different districts. Whether to attempt to develop uniform national standards remains on the agenda, but it seems worthwhile to make some observations about the issues that might arise in such an effort, so this report introduces some of the issues.

As a starting point, it's likely that there are differences among districts on how to handle other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion papers to 25 pages in length, and provide specifics on what motion papers should include. Oppositions are due 14 days after motions are filed and also subject to length limitations. There is also a local rule about seeking orders regarding "miscellaneous administrative matters," perhaps including filing under seal, which have briefer time limitations and stricter page limits.

In all likelihood, most or all districts have local rules of this sort. In all likelihood, they are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal should be handled uniformly nationwide if other sorts of motions are not.

One reason for singling these motions out is that common law and constitutional protections of public interests bear on those motions in ways they do not normally bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files a motion for something the other side will oppose it. But it may sometimes happen not only that neither side cares much about the public right of access to court files, but that both sides would rather defeat or elude that right. So there may be reason to single out these motions, though it may be more difficult to see why notice periods, page limits, etc. should be of special interest in regard to these motions as compared with other motions.

A different set of considerations flows from the reality at present that local rules diverge on the handling of motions to seal. At least sometimes, districts chafe at "directives from

Washington." There have been times when rule changes insisting on uniformity provoked that reaction. Though this committee might favor one method of processing motions over another, it is not obvious that this preference is strong enough to justify making all districts conform to the same procedure for this sort of motion.

Without meaning to be exhaustive, below are some examples of issues that might be included in a national rule designed to establish a uniform procedure, building on the proposal from Prof. Volokh et al:

Procedures for motion to seal: The submission proposes that all such motions be posted on the court's website, or perhaps on a "central" website for all district courts. Ordinarily, motions are filed in the case file for the case, and not displayed otherwise on the court's website. The proposal also says that no ruling on such a motion may be made for seven days after this posting of the motion. A waiting period could impede prompt action by the court. Such a waiting period may also become a constraint on counsel seeking to file a motion or to file opposing memoranda that rely on confidential materials. The local rules surveyed for this report are not uniform on such matters.

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that "confidential" materials be filed under seal? In at least some instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designate materials they produce "confidential" and subject to the terms of the protective order. It is frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

Provisional filing under seal: Some local rules permit filing under seal pending a ruling on the motion to seal. Others do not. Forbidding provisional filing under seal might present logistical difficulties for parties uncertain what they want to file in support of or opposition to motions, particularly if they must first consult with the other parties about sealing before moving to seal. This could connect up with the question whether there is a required waiting period between the filing of the motion to seal and a ruling on it.

Duration of seal: There appears to be considerable variety in local rules on this subject. A related question might be whether the party that filed the sealed items may retrieve them after the conclusion of the case. A rule might also provide that the clerk is to destroy the sealed materials at the expiration of a stated period. The submission we received called for mandatory unsealing

Procedures for a motion to unseal: The method by which a nonparty may challenge a sealing order may relate to the question whether there is a waiting period between the filing of the motion and the court's ruling on it. A possibly related question is whether there must be a separate motion for each such document. Perhaps there could be an "omnibus" motion to unseal all sealed filings in a given case.

Requirement that a redacted document be available for public inspection: The procedure might require such filing of a redacted document unless doing so was not feasible due to the nature of the document.

Nonparty interests: The rule proposal authorizes any "member of the public" to oppose a sealing motion or seek an order unsealing without intervening. Some local rules appear to have similar provisions. But the proposal does not appear to afford nonparties any route to protect their own confidentiality interests. Perhaps a procedure would be necessary for a nonparty to seek sealing for something filed by a party without the seal, or at least a procedure for notifying nonparties of the pendency of a motion to seal or to unseal.

Findings requirement: The rules do not normally require findings for disposition of motions. See Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or Rule 56). There are some examples of rules that include something like a findings requirement. See Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction). The rule proposal calls for "particularized findings supporting its decision [to authorize filing under seal]." Adding a findings requirement might mean that filing under seal pursuant to court order is later held to be invalid because of the lack of required findings.

Treating "non-merits" motions differently: Research by the Rules Law Clerk indicates that the circuits seem to say different things about whether the stringent limitations on sealing filings apply to material filed in connection with all motions, or only some of them. (This issue might bear more directly on the standard for sealing.) The Eleventh Circuit refers to "pretrial motions of a nondiscovery nature." The Ninth Circuit seems to attempt a similar distinction regarding non-dispositive motions, perhaps invoking a standard similar to Rule 72(a) on magistrate judge decisions of nondispositive matters. The Seventh Circuit refers to information "that affects the disposition of the litigation." And the Fourth Circuit seems to view the right of access to apply to "all judicial documents and records." And another question is how to treat matters "lodged" with the court or submitted for in camera review (as to whether a privilege applies, for example). If the subcommittee moves forward on these proposals, some of the above issues will likely have to be addressed.

The subcommittee's inquiries also revealed, however, that the Administrative Office is undertaking a broader project on sealing of court files. That project may consider not only civil cases, but also criminal cases and other court files. The effort aims to address the management of sealed documents through operational tools such as model rules, best practices, and the like. A newly formed Court Administration and Operations Advisory Council will provide advice on operational issues. It may be that this effort will provide views on the desirability or framing of a new civil rule.

In light of this A.O. effort, the Advisory Committee determined at its October 5 meeting that further work on the question of sealing court files should be deferred to await the results of the A.O. work. It would be premature to conclude there is no need to consider amending the Civil Rules, but also premature to pursue action now.

This matter will remain on the Advisory Committee's agenda.

III. Continuing Projects Carried Forward

A. Rule 12(a)(4): Additional Time to Respond

This proposal to amend Rule 12(a)(4) was suggested by the Department of Justice and published for comment in August 2020:

> **Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**
>
> (a) TIME TO SERVE A RESPONSIVE PLEADING.
>
> (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
>
> * * * * *
>
> (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
>
> (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

There were only three public comments. Two of them opposed the amendment. The deliberations in the Advisory Committee, moved in part by these comments, were more vigorous than the discussion before publication. Two central issues were debated: If any additional time is appropriate, should it be reduced to some period less than 60 days? And if any additional time is appropriate, should it be afforded only when the motion raised an immunity defense? Proposals to reduce the number of days, and to limit any extended period to motions that raise an immunity defense, failed by rather close votes.

The questions were framed around perceptions of current practice, to be informed by empirical answers to at least these questions: How often does the Department seek an extension now? How often is an extension granted? How many days are typically allowed by an extension? How many cases involve an immunity defense? And how often is an immunity appeal taken? Only anecdotal information was available, but it seemed to support the proposal.

Thorough discussion during the Standing Committee meeting last June explored the same questions — how much extra time, if any, and whether extra time should be available only in actions that raise an immunity defense. Empirical questions about Department of Justice experience were raised. The proposal was deferred for further consideration in light of whatever additional empirical information about actual practices might be made available.

The Department of Justice stated clearly at the October meeting of this Committee that any period shorter than 60 days would not be worth the burdens entailed by the amendment process. It did not provide any additional empirical information before the meeting, and remained unable to provide more than somewhat elaborated anecdotal information at the meeting.

This Committee continues to believe that it is important to have as much information as can be gathered about current experience with these cases, focusing on "Bivens" actions as those most likely to be involved and most readily researched. It may prove difficult to gather information as precise as might be wished. Diffuse sources are involved. The Torts Branch in the Department of Justice has much of the experience, but another large swath is held in United States Attorney offices in each district.

One continuing view sees the rule and the proposal as alternative presumptions. The present rule presumes that a responsive pleading should be filed within 14 days after a motion to dismiss is denied or postponed to trial. It recognizes that extensions can be ordered. The amendment would shift the presumption, setting 60 days as the standard period but recognizing that a shorter time can be set. Shifting to the 60-day presumption will not often increase delays in developing litigation on the merits if the government commonly wins extensions now, and the extensions commonly come at least close to 60 days. The risk of increasing delays may be greater as actual experience falls farther from that level. In that circumstance, the case for the 60-day period will need to be evaluated in light of the intrinsic needs described by the Department of Justice.

The thorough discussion last June, and the anticipation of a recommendation to be made to the Standing Committee next June, limit the present value of a more thorough review of the reasons advanced by the Department of Justice for needing more time than other litigants, including state agencies that similarly provide defenses to state employees. The Department urges both that it needs the full 60 days in all of these cases, and that a more particular need arises from the need to consider the availability of immunity appeals in many of them. These concerns will continue to weigh in the balance, along with such additional empirical information as may become available.

B. In Forma Pauperis Standards and Procedures

There are serious problems with administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees on submitting an affidavit that states "all assets" the person[17] possesses and states that the person is unable to pay such fees or give security therefor. The procedures for gathering information and granting leave vary widely. Many districts use one of two forms created by the Administrative Office, but many others do not. The standards for

[17] The statutory text says "prisoner" at this point, but this is accepted as a scrivener's error.

granting leave also vary widely, not only from court to court but often within a single court as well. Widely used forms for gathering information have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. There are clear opportunities for improvement.

The Appellate Rules Committee is considering Appellate Rules Form 4, the "Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis." This work may provide valuable information for work on other sets of rules.

The opportunities for improvement, however, may not be well suited for the Enabling Act process. One potential limit is that many of the issues test the vague zone that separates substance from procedure for these purposes. One example is obvious: what should be the test for inability to pay court fees, as it is affected by living expenses, dependents, assets, income, alternative earning opportunities, and other financial circumstances? Should these standards vary between districts that have high costs of living, at least in some areas, and districts that have lower costs of living? Another example is not so obvious, but implies equally substantive judgments. Appellate Rules Form 4 exacts extensive information about a spouse's financial circumstances, implying a judgment that this information is relevant to the statutory determination of ability to pay.

Even apart from possible substantive entanglements, the range of information that may be relevant to determining i.f.p. status could be wide, at least in theory. The scope of a uniform form or rule might be less comprehensive, reasoning as a practical matter that few i.f.p. applicants are likely to be involved with most of the more elaborate and sophisticated possibilities. But even the most common elements may be complex. Dependents can be family members, or not. Each dependent may have distinctive needs and distinctive abilities to contribute to meeting those needs. What counts as a dependent's "need" also may be distinctive — what, for example, of college tuition, whether at a low-rate local public institution or at a prestigious private college ranked among the very best in the world?

Not only are there many and difficult, almost diffuse, determinations to be made. Some of them are likely to call for reconsideration and for adjustments to be made on a schedule that does not fit the designedly deliberate pace of the Rules Enabling Act process.

This topic has been retained on the agenda because of its obvious importance and with the thought that ongoing work by the Appellate Rules Committee may provide new grounds for continuing work. It remains important, however, to continue to ask what other bodies might be found outside this Committee to provide more expert advice in these matters and more nimble responses to changing circumstances.

C. Rule 9(b): Pleading State of Mind

A Rule 9(b) Subcommittee has been appointed to study this proposal. A report and recommendations are scheduled for consideration at the March 29 meeting of this Committee. The

questions can be described by repeating the description presented to the Standing Committee for its June 22, 2021 meeting:

Dean Spencer, a member of the Advisory Committee, has submitted a suggestion, developed at length in a law review article, that the second sentence of Rule 9(b) should be revised to restore the meaning it had before the Supreme Court decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 686-687 (2009). A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal," 41 Cardozo L. Rev. 1015 (2020). The suggestion has been described to the Advisory Committee in some detail, both in the April agenda materials and in the April meeting. In-depth consideration was deferred to the October meeting, however, because there was not time enough to deliberate in April.

The proposal would amend Rule 9(b) in this way:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

The opinion in the *Iqbal* case interpreted "generally" to mean that while allegations of a condition of mind need not be stated with particularity, they must be pleaded under the restated tests for pleading a claim under Rule 8(a)(2).

Dean Spencer challenges the Court's interpretation on multiple grounds. In his view, it is inconsistent with the structure and meaning of several of the pleading rules taken together. It also departs from the meaning intended when Rule 9(b) was adopted as part of the original Civil Rules. The 1937 committee note explains this part of Rule 9(b) by advising that readers see the English Rules Under the Judicature Act. Dean Spencer's proposed new language tracks the English rule, and he shows that it was consistently interpreted to allow an allegation of knowledge, for example, by pleading "knew" without more. More importantly, the lower court decisions that have followed the *Iqbal* decision across such matters as discrimination claims and allegations of actual malice in defamation actions show that the rule has become unfair. It is used to require pleaders to allege facts that they cannot know without access to discovery, and it invites decisions based on the life experiences that limit any individual judge's impression of what is "plausible."

For about a decade, the Advisory Committee studied the pleading standards restated by the decisions in *Iqbal* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544* (2007). That work focused on Rule 8(a)(2) standards, not Rule 9(b). Consideration of Rule 9(b) is not preempted by the decision to forgo any present consideration of Rule 8(a)(2). But any decision to take on Rule 9(b) will require deep and detailed work to explore its actual operation in current practices across a range of cases that account for a substantial share of the federal civil docket. Any eventual proposal to undo this part of the *Iqbal* decision must be supported by a strong showing of untoward dismissals.

D. Rule 4: Service of Summons and Complaint

Rule 87, published for comment last summer, includes several Emergency Rule 4 provisions for a court order authorizing service by a method specified in the order that is reasonably calculated to give notice. Study of these provisions by the CARES Act Subcommittee included several alternatives. The alternatives remain open for further study. Comments on the published proposal may show that it is better to adopt what were proposed as emergency rules provisions directly into Rule 4 itself, dispensing with the emergency rules. Or it may be shown that it is better to forgo any alternative methods of service, either as emergency rules provisions or generally. Or it may appear that other and more detailed revisions of Rule 4 should be recommended.

Rule 4 will be considered further as comments on Rule 87 come in. There is no sense now what directions this work will take.

E. Rule 5(d)(3)(B)

Rule 5(d)(3)(B)(i) provides: "A person not represented by an attorney: (i) may file electronically only if allowed by court order or by local rule * * *."

This rule was worked out in collaboration with the other advisory committees to reach consensus on a common approach and language. Some participants in that process were initially drawn toward a more open approach that would allow electronic filing more generally, subject to the court's ability to direct paper filing by a party unable to engage successfully with the court's system. Experience with limited programs in some courts seemed encouraging. Important benefits would be realized for the unrepresented party, including speed, low cost, and avoiding what may be considerable costs in delivering papers to the court. The court and other parties would also benefit. Fears about the difficulties that might arise from ill-advised attempts to engage with the court's system, however, led to the more conservative approach adopted in the rule.

Reconsideration of these questions may be appropriate in light of experience with electronic filing by unrepresented parties during the pandemic. Some, perhaps many, courts allowed electronic filing and found it a success. Often these practices involved not direct access to the court's system but e-mail messages to the clerk, who then entered the filing in the system. Other courts, however, seem to have found less success.

A promising next step will be to undertake a broader survey of recent experience with electronic filing by unrepresented parties. As with drafting the current rules, the Appellate, Bankruptcy, Civil, and Criminal Rules Committees will work together to determine whether, when, and how the task will be taken up.

IV. New Subjects Carried Forward

A. Rule 41(a)(1)(A): Dismissing of Part of an Action

Rule 41(a)(1) governs voluntary dismissals without court order:

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) By the Plaintiff.

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice of dismissal or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Rule 41(a)(2) governs dismissal at the plaintiff's request by court order. It is not involved with the present proposal.

The question was originally brought to the Advisory Committee by Judge Furman, who pointed to the longstanding division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. The preponderant view is that the rule text authorizes dismissal only of all claims. Anything less is not dismissal of "an action." Some courts, however, allow dismissal as to some claims while others remain. Somewhat surprisingly, however, many courts appear to allow dismissal of all claims against a particular defendant even though the rest of the action remains.

One reason to study this question is the simple value of uniformity. Disuniformity of interpretations, however, has not always been found a sufficient reason to propose amendments. It may even be valuable to allow divergent interpretations to persist and perhaps point the way to the better answer. So it may be here. If experience suggests it is better to allow Rule 41(a)(1)(A)(i)

dismissal as to part of an action, displacing the opposite interpretation, amendment may be appropriate.

Taking up this proposal will include the question of dismissing only as to a defendant, leaving others to continue in the action. It is not clear on the face of the rule how this is dismissal of "an action" while dismissal of some claims is not, nor is it clear what the better answer may be.

Taking up these direct questions also may lead to related questions. Rule 41 speaks of dismissal by a "plaintiff." What of other claimants, whether by counterclaim, crossclaim, or third-party claim? How is the rule interpreted now, and what may be the good answer?

The study of Rule 41(a)(1)(A)(i) also may extend to another longstanding puzzle. The right to dismiss by notice is cut off by an answer or motion for summary judgment. Why not also a motion to dismiss? A similar question was presented by Rule 15(a)(1), which cut off the right to amend a pleading once as a matter of course by a responsive pleading, but not a motion to dismiss. Rule 15(a)(1) was amended in 2009 to add a motion to dismiss to the events that cut off the right to amend as a matter of course. Defendants urged this amendment on the ground that a motion to dismiss often requires as much effort as or more than an answer, and does more to educate the plaintiff about the shortcomings of the action as initially pleaded. It may be useful to address this question if any amendments are to be proposed.

B. Rule 55: Clerk's Duties

Judges curious about departures of local practices brought to the Advisory Committee questions about the clerk's duties under Rule 55 to enter defaults and, in narrowly defined circumstances, default judgments. Incomplete information indicates that at least some courts restrict the clerk's role in entering defaults short of the scope of Rule 55(a), and many courts restrict the clerk's role in entering default judgments under Rule 55(b).

Rule 55. Default; Default Judgment

(a) ENTERING A DEFAULT. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) ENTERING A DEFAULT JUDGMENT.

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

* * * * *

"Must" in these rules clearly imposes a duty. An incongruity appears in the rules, however, because Rule 77(c)(2) provides:

> (c) CLERK'S OFFICE HOURS; CLERK'S ORDERS.
>
> * * * * *
>
> (2) *Orders.* Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may: * * *
>
> (B) enter a default;
>
> (C) enter a default judgment under Rule 55(b)(1); and
>
> * * * * *

"May" is not "must." And the court's power to suspend, alter, or rescind the clerk's action seems to depend on finding good cause.

The Style Project changed "shall" in Rule 55 to the "must" that was put in place in 2007 with a committee note statement that the changes "are intended to be stylistic only." Former Rule 77(c)(2) provided that "All motions and applications in the clerk's office * * for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown." "[G]rantable of course" seems to trace to Equity Rule 16, which authorized a plaintiff to "take an order as of course that the bill be taken pro confesso."

An entry of default can be set aside rather readily. Courts prefer to decide actions on the merits. Under Rule 54(b) a default judgment against one defendant can be set aside, albeit with greater difficulty, before entry of a partial final judgment or a final judgment that disposes of all claims among all parties. After final judgment, the demanding standards of Rule 60(b) apply.

There may be persuasive reasons to distinguish between the duties fairly imposed on the clerk to enter a default under Rule 55(a) and the duties now imposed by Rule 55(b) to enter a default judgment. Entry of a default may be a rather routine task in many cases. Court files show whether a party has failed to plead, and a proof of service may be regarded as sufficient to establish jurisdiction over a defendant. Failure of a present party to respond to a claim after the complaint may be readily apparent. Still, it may be useful to gather information on how many cases present more difficult questions. Rule 55(a) precludes a default against a party that has "otherwise defend[ed]," including acts that may not be apparent to the court and may not be shown "by affidavit or otherwise."

Information from clerks about these sorts of questions will help in thinking about such questions as whether "must" in Rule 55(a) should be changed to "should," or "may."

The Rule 55(b) direction that the clerk "must" enter a default judgment when the claim is for a sum certain or that can be made certain by computation is a clear candidate for further inquiry. The random but small sample in the committee showed several districts where all default judgments are ordered by a judge. This practice may rest on experience with difficulties in implementing the rule, on more conceptual concerns, or on something else. It is important to find out more.

The Federal Judicial Center will be asked to help in framing a suitable research project to learn as much as can be learned about actual practices under Rule 55. The information gathered by this project will guide the determination whether to propose amendments.

C. Rule 63: Decision by Successor Judge

After substantial expansion in 1991 and a style revision in 2007, Rule 63 reads:

Rule 63. Judge's Inability to Proceed

> If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Rule 63 was brought to the Advisory Committee by a judge who reacted to a nonprecedential decision in the Federal Circuit. Although the Federal Circuit case did not directly involve the question, the judge suggested that the availability of a video transcript of a witness's testimony should bear on the decision whether to recall a witness when a successor judge is proceeding with a hearing or nonjury trial after the initial judge becomes unable to proceed.

Rule 63 as it stands includes several provisions that seem to authorize a successor judge to take account of the advantages that may be offered by a good video transcript. Reliance on a video transcript may be more easily justified for some types of "hearings," as compared to completing a nonjury trial. If the only question is whether to amend the rule to point to the possible advantages of a video transcript, the question might well be dropped there.

Brief discussion in the Advisory Committee, however, elicited concerns that the rule may be phrased in ways that defeat the elements of flexibility and discretion that may properly influence a decision whether to recall a witness. The Advisory Committee will explore reported decisions to see whether the rule is interpreted in ways that inappropriately restrict a successor judge's discretion.

D. Briefs Amicus Curiae

Three lawyers with an extensive nationwide practice in submitting briefs amicus curiae to district courts have suggested adoption of a rule to establish uniform standards and procedures for filing amicus briefs. They report that practices vary widely, and are so little formed that some

courts do not quite know what to make of a motion for leave to file. And they offer a draft rule, based on a local rule in the District Court for the District of Columbia and informed by Appellate Rule 29 and the Supreme Court Rules. The draft would be a good starting point for any rule that might be proposed.

The submission also reports that district court amicus briefs are filed in some 300 cases a year, about 0.1% of all federal civil actions. It is likely that a few districts receive a preponderant share. This relative infrequency likely accounts for much of the vagueness and uncertainty encountered in many courts. It also frames the question whether a national rule is needed.

It is important to keep in mind the different roles of trial courts and appellate courts. Most questions of law presented on appeal are anchored in a completed trial record. The amicus brief takes the record as it was shaped by the parties. In the district court, however, the parties are responsible for developing the record, and do so by seeking maximum adversary advantage. The Civil Rules are shaped by a tradition of party responsibility. Any amicus practice should be designed in ways that preserve a large measure of independent party control. The need for care may be reflected by this passage in the submission:

> At a high level, amicus parties should bring a unique perspective that leverages the expertise of the party submitting the brief and adds value by drawing on materials or focusing on issues not addressed in detail in the parties' submissions * * *.

Focusing on materials or issues not addressed "in detail" by the parties may be important for the district court, and for the court on appeal, even if it impinges on party control of the record. A true friend may advance the courts' ability to reach a better determination of difficult, complex, or contentious legal issues by improving the record that supports the determination. Some sacrifice of party autonomy that supports the judicial task may be a desirable incident of a system that, if shaped by purely adversary interests, may not advance the public interest. And the district court may be in a good position to distinguish between true friends and those who seek to pursue narrow private interests, perhaps at the expense of the public interest.

The absence of any provisions for briefs in the Civil Rules may be another reason for caution. Details of format, length, times for filing and the like are left to local practice. Any national rule for amicus briefs should take care to ensure that such matters are governed by local rules, even if a national standard is set to time a motion to file an amicus brief.

The Advisory Committee will explore these questions further.

V. Proposals Removed from Docket

A. Rule 9"(i)": ADA Title III Pleading

A letter dated June 7, 2021, from Senators Tillis, Grassley, and Cornyn to Chief Justice Roberts suggests that the Chief Justice "coordinate with the Judicial Conference to create a pleading standard for Title III ADA cases that employs the 'particularity' requirement currently contained in Rule 9(b) of the Federal Rules of Civil Procedure."

The letter suggests that pleading with particularity would facilitate prompt removal of barriers to access by the owners of noncompliant facilities, to the benefit of disabled persons and the owners. Enhanced pleading also would enable courts to determine more readily whether Title III has been violated.

The letter and Advisory Committee discussion suggest that Title III litigation has expanded at a great rate, especially in a few states. Appellate decisions at times identify individual plaintiffs that, acting as testers, have filed hundreds of actions against as many defendants. Burgeoning litigation may well reveal that many noncomplying barriers remain in facilities open to the public.

Recognizing the growth in litigation, and the problems it may present, the Advisory Committee was not persuaded that these problems should be addressed by a court rule specifically addressed to Title III actions alone. The powerful tradition that counsels against substance-specific rules was invoked and explored thoroughly in the lengthy discussions that preceded approval for adoption of the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g). In the end, the value of adopting rules that reflect the character of § 405(g) actions as seeking review on an administrative record prevailed. A contrast is provided by the Advisory Committee's experience over nearly fifteen years as it considered whether to propose heightened pleading requirements for specific kinds of cases, such as official immunity cases. The Advisory Committee could not find a persuasive reason for attempting to propose any such rules. There may be opportunities for statutory amendments to address problems that Congress may find in litigation under Title III, but a particularized pleading rule is not among them.

The Advisory Committee removed this proposal from its agenda.

B. Rule 23: Opt-in, Not Opt-out Classes

This proposal revived a question that has been encountered at intervals since Rule 23(b)(3) opt-out class actions were adopted in 1966. One suggestion was to authorize opt-in class actions as an alternative, giving courts the choice between certifying an opt-out class or an opt-in class. That suggestion did not succeed. The present suggestion is to abolish opt-out classes, substituting only opt-in classes.

The suggestion was advanced by a person who was dissatisfied by the opt-out procedure in a class action that included his wife as a class member. The Advisory Committee recognizes that many countries approach collective litigation by opt-in procedures, not opt-out. But the opt-out procedure in Rule 23(b)(3) is firmly established. Changing to an opt-in procedure likely would defeat many "small claims" class actions.

The Advisory Committee removed this proposal from its agenda.

C. Rule 25(a)(1): Court Statement of Death

Rule 25(a) includes these provisions:

Rule 25. Substitution of Parties

(a) DEATH.

(1) *Substitution if the Claim is not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed. * * *

(3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

The suggestion by a law clerk to a federal judge is that Rule 25(a)(1) should be amended to include an express provision for entry of a statement of death by the court. The concern is that a case may linger indefinitely as a "zombie" action if there is neither a motion to substitute nor a statement of death to trigger the 90-day deadline for a motion to substitute.

The research submitted with the motion identified a few cases that present this set of non-events. They do not seem to show any actual problems with the actual dispositions.

The first sentence of Rule 25(a)(1) can readily be found to confer full authority to order substitution, and to impose terms that set a deadline, when a court becomes aware of a party's death. Action, indeed, may be required. Under Article III, the death of a party moots claims by or against the party, requiring dismissal unless a substitute party is brought in.

Reliance on the current authority to order substitution may have an additional advantage. An order may find a suitable method to give notice to a nonparty that is not bound by the particular requirements of Rule 4 for serving a summons and complaint that are invoked by Rule 25(a)(3).

The Advisory Committee removed this proposal from its agenda.

D. Rule 37(c)(1): Sanctions for Failures to Disclose

Rule 37(c)(1) implements the initial disclosure provisions of Rule 26(a) and the allied duty to supplement the disclosures imposed by Rule 26(e):

> (c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

This submission pointed to a pair of dissenting opinions by the same judge that rely on the 1993 committee note to Rule 37(c)(1) to find a meaning that contradicts the plain text. The text provides first that a party who fails to disclose information or a witness, or to supplement a disclosure, is barred from using that information or witness to supply evidence. Then it explicitly provides a list of other sanctions "[i]n addition to or instead of this sanction." Even if the failure was not substantially justified and is not harmless, the omitted information or witness may be used to supply evidence and the court may order an alternative sanction.

The 1993 committee note characterizes exclusion as a "self-executing sanction" and an "automatic sanction" because it can be implemented without a motion. The note then observes that exclusion is not an effective sanction when a party fails to disclose information that it does not want to have admitted in evidence. The alternative sanctions address that circumstance. The dissent juxtaposes these note observations to conclude that the alternative sanctions cannot be imposed as a substitute for excluding evidence offered by the party who failed to disclose it.

Research by the Rules Law Clerk found that other courts have been bemused by this argument from the committee note, but that district judges' hands are not tied. The rule has functioned as intended.

The Advisory Committee removed this subject from its agenda.

TAB 5B

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
OCTOBER 5, 2021

The Civil Rules Advisory Committee met by Teams teleconference on October 5, 2021. The meeting was open to the public. Participants included Judge Robert M. Dow, Jr., Committee Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C. Boal; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge David C. Godbey; Justice Thomas R. Lee; Judge Sara Lioi; Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Julie Wilson, Esq., S. Scott Myers, Esq., Bridget M. Healy, Esq., and Burton DeWitt, Esq., represented the Rules Committee Staff. Judge John S. Cooke, Director, Dr. Emery G. Lee, Dr. Tim Reagan, and Jason Cantone, Esq., represented the Federal Judicial Center.

Members of the public who joined the meeting are identified in the attached Teams attendance list.

Judge Dow opened the meeting with messages of thanks and welcome. He expressed regret that it had not proved wise to meet in person and the hope that the March meeting will be in person. "Technology has saved us. We owe special thanks to Brittany Bunting for keeping the trains running and on schedule."

Judge Dow welcomed two new members. Judge Cathy Bissoon sits on the Western District of Pennsylvania in Pittsburgh. She is a law school classmate of Judge Dow -- the class is "surely overrepresented on the Committee." Judge David Proctor sits on the Northern District of Alabama in Birmingham. Judge Proctor has participated in many of the Committee's MDL activities, both as an experienced MDL judge and as a member of the Judicial Panel on Multidistrict Litigation.

Burton DeWitt is the new Rules Law Clerk. He has already engaged in e-mail exchanges with the reporters. "The Rules Law Clerks are a gift to all committees."

Judge Jordan is unable to attend today's meeting because he is President of the American Inns of Court and must preside over their meeting in London. He has been a tireless chair for the CARES Act Subcommittee, and will have more work in that role as comments come

in on the draft emergency rule, Rule 87, that was published last August.

Judge Dow further noted the long list of observers. "Their interest is appreciated." They should remember that they also can participate by commenting on published proposals and by sending in suggestions. The representatives from Capitol Hill were particularly welcomed.

Judge Dow reported on the Standing Committee meeting last June. All advisory committees other than the Evidence Rules Committee recommended publication of emergency rules. Hard work by Reporters Struve and Capra produced a high level of uniformity among the proposals, with only a few departures at specific points. Civil Rule 87 was approved for publication. But it should be remembered that in recommending publication this Committee reserved the question whether it will be best to proceed toward adoption of Rule 87, instead to recommend amendments of Rules 4 and 6, or to abandon the proposal. The comments on the published proposal will provide helpful guidance. The Supplemental Rules for Social Security cases were given final approval. If they proceed through the remaining stages of the process smoothly, they will take effect on December 1, 2022. Discussion of the recommendation to adopt proposed Rule 12(a)(4) as published found a division of views similar to the divisions expressed in this Committee at the April meeting. The proposal was essentially remanded for further consideration, and will be considered today.

The Standing Committee Report to the Judicial Conference essentially mirrors the same points. It reflects the approval at the January Standing Committee meeting of the recommendation to publish proposed amendments to Rules 15 and 72 when a suitable package of proposals can be presented. The package was formed with Rule 87, and they too were published in August.

Legislative Update

Julie Wilson delivered the legislative update. The update tracks legislation that would amend court rules outside the Rules Enabling Act process. There have been no new bills to add to those described in the chart in the agenda materials.

April 2021 Minutes

The draft minutes for the April 23, 2021 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Juneteenth National Independence Day

Congress has made Juneteenth National Independence Day a new statutory holiday. It can be added to the list of statutory holidays in Rule 6(a)(6)(A):

> **Rule 6. Computing and Extending Time; Time for Motion Papers** * * *
>
> (a) COMPUTING TIME. * * *
>
> (6) *"Legal Holiday" Defined.* "Legal Holiday" means:
>
> (A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day, * * *.

The Bankruptcy Rules Committee has voted to recommend addition of the new holiday to Bankruptcy Rule 9006(a) as a technical change without publication. It is expected that the same addition will be recommended for Appellate Rule 26(a)(6)(A) and Criminal Rule 45(a)(6)(A). The recommendation as to publication of Rule 6(a)(6) should be the same as recommended by the other advisory committees, but adoption without publication seems appropriate. It was noted that even without amending Rule 6(a)(6)(A), subparagraph (B) defines as a legal holiday "any day declared a holiday by the President or Congress," so Juneteenth National Independence Day is already covered in the rules.

The Committee unanimously voted to recommend addition of the new holiday to Civil Rule 6(a)(6)(A) as a technical change without publication.

Rule 12(a)(4)

Judge Dow introduced the discussion of Rule 12(a)(4) by noting that this proposed amendment was requested by the Department of Justice and published for comment in August, 2020:

> **Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**
>
> (a) TIME TO SERVE A RESPONSIVE PLEADING.
>
> (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

* * * * *

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

This proposal is straight-forward. It extends the time to respond from 14 days to 60 days in all of the cases it describes, without attempting to distinguish between motions that raise an immunity defense and other motions. There were only three public comments, but two of them objected to the proposal. Discussion at the April Committee meeting raised two questions: whether any extended time should be less than 60 days, and whether any extended time should be available only when the motion raises an immunity defense. A motion to allow the extended period only when "a defense of immunity has been postponed to trial or denied" failed, six votes for and nine votes against. The motion to recommend the proposal for adoption as published passed, ten votes for and five votes against. The Standing Committee was troubled by the same concerns, and after thorough discussion asked for further consideration by this Committee, with a particular focus on the length of any extended period to respond that might be recommended.

Discussion opened with a reminder that this topic has proved more difficult than it initially seemed. If it continues to present challenges that are not readily resolved in this meeting, it can be carried forward to the March meeting without losing impetus. If it were presented to the Standing Committee in January with a renewed recommendation for adoption, it would be presented to the Judicial Conference in October 2022, the same time as if a recommendation for adoption were approved by the Standing Committee at its spring meeting.

When it made its proposal, the Department of Justice offered two reasons. The broader general reason was that, as compared to other law firms and organizations, it intrinsically needs more time to decide on a responsible course of action after denial of a motion to dismiss claims against an individual official. That is why Rule 12(a)(3) sets a 60-day period to file a responsive pleading when there is no motion. The more specific reason is that motions to dismiss claims against an individual official regularly

include an official immunity defense. Denial of an immunity motion supports a collateral-order appeal. The time to appeal in these actions was extended to 60 days by Appellate Rule 4(a)(1)(B)(iv) by analogy to Rule 12(a)(3) and with the support of Congress through an amendment of 28 U.S.C. § 2107. For like reasons, the time to file a responsive pleading should be 60 days after a motion to dismiss is denied.

The reason for setting the appeal period at 60 days, moreover, reflects a concern unique to the Department of Justice. Department regulations require approval of any appeal by the Office of the Solicitor General. Review is essential to ensure deliberate consideration of the legal positions that will be taken, and to maintain national control that establishes uniform practices across all United States Attorney offices. One dimension of this practice is a concern described in the agenda materials: decision of what may be important legal questions on the sketchy record afforded by a complaint may be intrinsically unsatisfactory, and may go wasted when any further proceedings that ensue show that the question decided on the pleadings need not have been decided.

The argument for a 60-day response period was further supported by describing a routine practice of seeking an extension of the present 14-day period, and the routine experience of winning extensions. This practice was framed in discussion at the April meeting as something that can be seen as a choice between competing "presumptions." The current rule presumes that a 14-day response period suffices in these cases, leaving it to the government to justify an extension. The published rule shifts the presumption, giving the government 60 days and leaving it to the plaintiff to win a shorter time by showing a need for expedition. If experience indeed shows that motions are routinely made and generally granted, it may be more efficient to set the presumption at 60 days. This practice, further, will alleviate the uncertainty that prevails between the time a motion to extend is made and the time a ruling on the motion is made. Until the government knows that an extension will be granted, it must do the work of preparing an answer, and must file a perhaps inadequately developed answer. Once the answer is filed, it may be required to enter the routine pretrial procedures of scheduling conferences, initial disclosures, perhaps even discovery, while it is still deciding whether to appeal. Those activities are cut off by filing a notice of appeal, but the initial efforts are not undone.

These concerns encountered some skepticism in the April Committee discussion. The 60-day period seemed too long to some members, reflecting the concerns expressed in the two comments that opposed the proposal. Those comments stressed that plaintiffs face formidable obstacles in these actions, and should not be saddled with yet another source of delay in getting into litigation on the merits. These doubts prompted several questions asking for greater detail about Department of Justice experiences that show the need for so long an extension, and that provide more precise information

about both the frequency of motions to extend and the rate of success on those motions. The response, framed after mid-meeting consultation with the Torts Branch -- where the proposal originated -- provided anecdotal accounts of real need, "many" requests for extensions, and frequent extensions. No more precise information was available.

The need for time in cases that present an immunity defense and the prospect of an immunity appeal led to similar questions. What share of these cases actually involve an immunity defense? What is the experience with the need to engage in pretrial litigation after denial of the motion and while a decision is made whether to take an appeal that will cut off further pretrial litigation? These questions were wrapped up with the time questions, and were met with similar answers. Immunity defenses are raised in most cases, appeals are seriously considered in all of them, and appeals are frequently taken.

Similar questions were raised in the Standing Committee. As noted at the outset, much of the discussion there focused on the need for a response period more than four times longer than is afforded in other cases, including actions against the United States, its agency, or its officer sued in an official capacity. As in this Committee, questions also were raised about the reasons for favoring the United States when state governments, which may have similar justice department structures, are treated as all other litigants.

These concerns suggest at least four possible outcomes. One is to adhere to the proposal as published. Another is to abandon it. The third is to reduce the number of extra days. The fourth, which could be combined with a reduced number of days, is to limit the extension to motions that raise an immunity defense.

Framing the questions for discussion began with a reminder that the choice among these alternatives will not affect the incidents of police conduct decried by the public comments, nor will it modify official immunity doctrines. The question is how to tailor this narrow and specific procedure rule to the realities of litigating individual-liability claims against federal officials.

The choice among the alternatives, or perhaps some still different approach, is likely to be influenced by the ability of the Department of Justice to provide additional information about its actual experience.

The Department of Justice representative responded by noting that these cases are handled both in "main Justice" and by U.S. Attorney offices. "There is no mechanical way to track them." But the Torts Branch says that motions to dismiss are made in 90% of these cases, and that an immunity defense is raised in 90% of the motions. When the motion is denied, appeals are considered in every case by a career attorney, and then by an appeal attorney. The

recommendation may be not to appeal. But the frequency of "no appeal" recommendations cannot be quantified now. Nor can the Department track "hard numbers" on requests for an extension of time after a motion to dismiss is denied. The Torts Branch, however, proposed the rule amendment because it is "weary of routine motions that are often, but not always, granted."

A question asking how the Department defines "immunity" prompted a response that the Department "could live with an immunity-only rule. That would largely serve our concerns."

A member asked how many extra days are included in a request for an extension? How many days are granted? This information would help in understanding how big the problem is. The Department's response was that "there is a diffuse process." All of the US Attorney offices are hard to canvass. But it can be noted that the appeal period is 60 days, and an extension to 60 days affords an opportunity to weigh the decision whether to appeal. If an extension is denied, the effort of continuing to litigate before the decision whether to appeal defeats the purpose of immunity.

An alternative approach to the same issue asked whether the Department can find out how many people in the Torts Branch run into these problems? The Department "will try to get more robust information. But we are careful in making rules suggestions. This is not a single, one-off problem." It may be possible to examine the files of individual attorneys to get a better picture.

A new member observed that in coming to this issue for the first time, one apparent element is that all defendants consult with counsel in deciding whether to take an appeal, but only those represented by the Department find their counsel has to get approval. "Immunity is still the law." The defendant should be entitled to get review of the defense before being required to litigate. The Department added that in carrying forward with the defense before knowing whether an extension will be granted, or after an extension is denied, pretrial litigation is shaped by the prospect that an immunity appeal may be taken.

Another member asked whether the purpose of the proposal is to avoid the need to request an extension, or instead is to address the occasions when an extension is denied -- would a rule setting a period less than 60 days meet the need? The Department responded that the primary concern is making the motion and the need to continue pretrial activity until learning whether an extension has been granted. A period shorter than 60 days would be counterproductive. As the recent letter from Acting Assistant Attorney General Boynton points out, "you still have to keep preparing until you know."

A judge framed the issues of delay and uncertainty by observing that a rule allowing 60 days to respond will not much increase delays, and will alleviate uncertainty, if 90% of the

motions raise immunity, and if appeal is always considered after an immunity motion is denied, and if a request for an extension is almost always made. Another judge recalled that this observation reflected the discussion in April. A presumption that the period is 60 days, with the opportunity for a plaintiff to request a shorter period when there are real problems with delay, "may be the Rule 1 answer." This answer, however may be found more comfortable if it is given only for cases with an immunity motion.

Another member asked why, indeed, the rule should not be limited to immunity cases. The Department position was repeated -- "we can live with that." But the proposal as published is clean.

A judge asked what prompted the Torts Branch to suggest this proposal? They have been living with the 14-day period; did something change? The Department's sense is that the issue "has been around for a while."

The question recurred: if the extra time is to be available only in cases with an immunity motion, how is immunity to be defined? Apparently the underlying concept focuses on immunities that confer a "right not to be tried," thus supporting a collateral-order appeal. That may not be appropriate rule language. Discussions that eventually led to the 2010 amendments of Rule 56 considered and abandoned various ways to draft a rule that would require the court to identify disputed material facts when denying summary judgment in a case with an opportunity to appeal. It might be worked out in this way, however, given the lack of any clearly limiting concepts of the "qualified" and "absolute" official immunities that support collateral-order appeals. Or the rule might simply refer to "official immunity," with an explanation in the Committee Note. Or, if it proves possible to identify and define one or two types of immunity that are involved in 90% of the cases, that might suffice.

Another member, who in April voted to recommend adoption of the published proposal for the reasons discussed by some other members today, renewed the question whether this is a problem that has built up over time. Would it be possible to survey U.S. Attorneys to find out more?

Support for the proposal as published was summarized by another member. If 90% of these motions raise an immunity defense, and 100% of the denials are considered for appeal, a clean rule that covers all cases is better. It would clearly address all the cases that present a need for added time, that is the vast majority of all cases, and it avoids the risk that an attempt to define the forms of immunity that afford the extra time to respond will miss some cases that should be included.

The discussion at the June Standing Committee meeting was brought back, beginning with the reminder that the published proposal might be modified by limiting it to immunity cases, by

reducing the allowance of extra time, or both. The focus in the Standing Committee was on the number of extra days, reflecting concern that there is too much delay in litigation as it is. That concern needs to be addressed. The prospect that the full 60-day period would not have much effect on delay, given the frequency of successful requests for extensions, should be developed as fully as possible. Another concern was the appearance of favoritism -- affording more than four times the number of days to respond seems much. The comparison to the 60-day appeal period may weaken this perspective, since that is only double the 30 days allowed other litigants. The 60-day appeal period, however, provides a functional justification that can be offered. And it can be noted that excluding non-immunity cases may generate more work than it's worth.

The Standing Committee's concern with "equity" was noted again. The 60-day appeal period applies to all parties, not only the United States. The proposed extended response time does not. One possibility would be to cut the response time back to 40 days. That is 2/3 of the 60-day appeal period, the same ratio as holds between the 14-day response period for all litigants in Rule 12(a)(4) and the 21-day initial response period afforded by Rule 12(a)(1) to all litigants other than the United States.

The importance of addressing the Standing Committee's concern was echoed. The Department responded that it understands the questions and will get as much information as can be gathered for consideration at the March meeting.

Discussion concluded with the observation that the consensus is to give the Department the opportunity to respond to the concerns expressed today and in the Standing Committee. The Department's work is much appreciated. This will be an action item on the March agenda.

Rule 12(a)(2), (3)

Judge Dow opened discussion by noting that a proposal to recommend publication of an amendment that would conform Rule 12(a)(2) and (3) to statutory requirements has been considered twice, first at the October 2020 meeting and then again at the April 2021 meeting. The Committee divided by a rare tie vote at the October meeting and did not have time for full consideration at the April meeting. The time has come to decide whether to recommend publication.

The reasons supporting amendment are simple. As it stands, the rule is inconsistent with statutes that set a shorter time to respond than the 60 days allowed by paragraphs (2) and (3). There has never been any intention to supersede such statutes, but the failure to provide for them may be aggravated by the prospect that a close reading might even support an inference from the exception for other statutory periods in (a)(1) that (2) and (3) were

intended to supersede inconsistent statutes. The problem with the present rule text can be readily amended to subject all three paragraphs to inconsistent statutes, as shown by the present rule text and the proposed amendment.

Rule 12(a) begins like this:

> (a) Time to Serve a Responsive Pleading.
> (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
> (A) A defendant must serve an answer:
> (i) within 21 days after being served with the summons and complaint; or * * *
> (2) *United States and its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
> (3) *United States Officers of Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later. * * *

The amendment would recast the beginning of Rule 12(a) to read like this:

> (a) TIME TO SERVE A RESPONSIVE PLEADING. ~~(1)*In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
> (1) *In General.*
> (A) a defendant must serve an answer * * *.

There are in fact statutes that set a shorter time than 60 days to respond in actions within Rule 12(a)(2). The submission that prompted consideration of this topic was made by a lawyer who had to argue vigorously to persuade a clerk to issue a summons with the 30-day response period set by the Freedom of Information Act. It is not the only such statute. The potential for confusion is more than abstract speculation. Independent research on PACER by a

journalist and research law librarian shows that mean and median response times in Freedom of Information Act actions exceed 30 days. Breaking it down further, in the cases with responses within 30 days -- one-third of the total -- the mean was 22.4 days and the median was 24 days. In the remaining two-thirds, the mean was 62.1 days and the median was 48 days. The District for the District of Columbia accounts for approximately 2/3 of all these cases, and has a "practical mechanism" for obtaining 30-day summonses. In other districts, 60-day summonses are commonly issued.

The proposed amendment is supported by the desire to have rule text that accurately reflects the intended purpose. That may suffice in itself to overcome the general reluctance to avoid burdening bench and bar with what may seem a steady profusion of minor adjustments. There is a more important concern as well. As it stands, Rule 12(a)(1) expressly defers to inconsistent statutes. (2) and (3) do not. The apparent distinction may imply an intent to supersede inconsistent statutes. That has never been intended, and should be clearly rejected now. The very implementation of supersession, moreover, can impose significant burdens. An Enabling Act rule supersedes inconsistent statutes in effect at the time the rule is adopted, but is in turn superseded by later enactment of an inconsistent statute. What counts as the relevant time of adoption or enactment may be further confused by changes in rule text or statutory provisions that are associated with the inconsistent texts but do not directly change the relevant texts. Research has not yet uncovered a statute inconsistent with the 60-day period in Rule 12(a)(3), but such statutes may exist now, and might be enacted in the future.

The only contrary concern has been suggested by the Department of Justice. The Department reports it knows and honors the 30-day statutory periods. But some cases combine claims subject to a 30-day statute and other claims that are not. Often they move for an extension of the 30-day period so they have adequate time to prepare a response to all claims. They are concerned that adding express deference to statutes to rule text might make it more difficult to persuade some judges to grant extensions in the mixed-claim cases.

The view that supersession concerns provide a strong reason to go forward with the proposal was expressed forcefully. Although the problem does not seem to have yet emerged in the cases, treatises have noted it as a concern.

Further discussion suggested that it is a good idea to clean up this problem. "The rules maven in me wants to fix it." There is no reason to expect any interference with practice in the District Court for the District of Columbia, where the majority of FOIA actions are brought.

Another member supported the amendment. The rule "is inaccurate now." It is important that the rule reflect the

statutes. Discussion with some judges who are not committee members suggests that if the amendment affects practice in granting extensions, the effect will not be adverse to the Department of Justice.

The committee voted without dissent to recommend publication of this proposal.

MDL Subcommittee

Judge Rosenberg began the report of the MDL Subcommittee with thanks to the subcommittee for a much hard work, including several meetings and the Emory conference. She also thanked Professor Marcus for drafting illustrations of ways in which Rule 16 could be revised to embody some of the approaches to managing MDL proceedings that the subcommittee has been discussing.

The subcommittee retains the question of interlocutory appeal opportunities on its agenda, but holds it in reserve without plans for further consideration now. Third party litigation funding remains an important topic to be discussed later in this meeting, but it does not seem to be peculiarly involved in MDL proceedings and has been relinquished by the subcommittee to a watching agenda of the full committee.

Attention now focuses on early "vetting" of claims and judicial involvement in the settlement process. Most subcommittee members attended the Emory conference arranged by Professor Dodge. The conference focused on management of MDL proceedings and settlement. Academics frequently invoke an analogy to Rule 23 provisions for appointing counsel in class actions and for reviewing proposed settlements. The conference showed that MDL settlements often are not "global." Rather than settling all the claims swept into the proceeding, settlements commonly involve a greater or smaller subset. One common event is an "inventory" settlement that resolves all claims represented by a single lawyer. And it often happens that different inventories settle for different values. Participants accounted for the differences by suggesting that higher prices are paid for claims represented by a lawyer who has carefully developed each case in the inventory, making it clear that the claims are strong. As compared to class actions, further, there is no authority for an MDL court to reject proposed settlement reached between a plaintiff and a defendant. The subcommittee is not looking toward a rule that would require court approval, but instead is considering the possibility of providing for judicial monitoring or perhaps supervision of the settlement process.

The subcommittee also is considering the questions raised by common benefit fund practices. Common benefit funds are regularly established as the vehicle for compensating court-appointed lead counsel for pretrial work undertaken on behalf of all claimants in the proceeding. Judge Chhabria's thoughtful opinion in the Roundup

MDL proceeding says that courts and attorneys need clear guidance. The practice seems to have got out of control, at least in some of the largest MDL proceedings. The opinion invites consideration of new rules.

The subcommittee met in August. It considered the choice between looking for a "high impact" rule or looking for a "low impact" rule. A high impact rule would be something of the sort illustrated by the sketch Rule 23.3 that has been in agenda materials for some time but has never been much discussed. A low impact rule would offer less guidance, at least in rule text. Professor Marcus was asked to draft an illustrative rule, and quickly produced the sketch of a new Rule 16(b)(5) included in the agenda materials. This is what many MDL courts are doing now. The subcommittee plans to develop this low impact approach, without looking for present discussion of the "Rule 23.3" high impact alternative.

The familiar proposition that MDL proceedings now include nearly half of all civil actions on the dockets of federal courts may of itself provide good reason to continue looking for possible new rules. Additional reasons may be found in the reports that the Judicial Panel on Multidistrict Litigation is expanding the number of judges selected to entertain MDL proceedings, and that MDL judges are seeking to expand and diversify the pool of lead counsel. Explicit MDL rules could help guide judges and lawyers new to these proceedings. The Manual for Complex Litigation remains relevant, but parts of it are outdated. The parts for early vetting and early exchange of information are increasingly behind evolving practice.

Professor Marcus added that the agenda includes the first sketch of a new Rule 16(b)(5), and a companion addition to Rule 26(f)(3) that would add a new subparagraph (F) calling for party discussion about an early exchange of information about claims and defenses. The sketch includes many footnotes that call attention to issues that need to be addressed. Discussion today will help the subcommittee as it advances its work. Judge Dow agreed that feedback will be welcome and helpful.

A subcommittee member found the Rule 16(b)(5) sketch helpful, but expressed concerns. It is true that MDL proceedings occupy a large share of the federal court case inventory. The draft provisions are "hefty." It is regrettable that the Manual has not been updated. But these provisions "do not reflect how MDLs actually work." They might give leadership counsel still greater leverage than they now have over cases not in the MDL. And it must be remembered that mass-tort cases are not the only kind that find their way into MDL proceedings. "We may be further muddying waters that are already muddy," and "add to present conflicts."

A judge agreed with these concerns "to some extent," asking how much have these issues been discussed with the bar? The focus

seems to have whittled down to settlement. How much discussion has there been with members of the MDL bar about rules for appointing lead counsel, the responsibilities of lead counsel, reports of lead counsel to the court?

Judge Rosenberg explained that the draft was prepared at the subcommittee's request. The subcommittee saw it for the first time at its August 23 meeting. Early vetting has been discussed in conferences with lawyers -- plaintiff and defense lawyers agree that it is important, but have not discussed how. Rule 16(b)(5)(A) addresses this. The subcommittee has discussed that topic repeatedly, but has not addressed this draft.

The question was reframed to ask whether the subcommittee will go back to the bar to discuss the issues raised by provisions regarding leadership counsel.

A partial response was made by recalling discussions early in the MDL Subcommittee's work with former committee member Parker Folse, who focused on widespread use of TPLF in patent litigation. The subcommittee has "intensely focused on ideas that have fallen by the way. Ideas have come from various sources. They have not been fully explored. There is a good deal of work yet to be done." There are academic papers that focus on the importance of including detailed provisions in the orders that appoint leadership counsel. These orders limit what other lawyers can do. The order needs to look four or five years ahead. The subcommittee needs to raise these issues in conferences with the bar, giving them the attention that has been lavished on ideas that have fallen by the way.

The work to continue to develop possible rules is justified in part because there is a lot that new MDL judges do not know. Guidance in formal court rules might help. But in the end, the Committee may decide not to attempt to frame a formal rule of procedure.

A subcommittee member noted that the subcommittee has wrestled with these issues. Many questions remain open. The "low impact" approach represents the subcommittee's best thinking for right now, but without consensus on the issues flagged in the footnotes.

Professor Marcus added that indeed this draft has not been reviewed with the bar. Resistance is likely, but it may be different from what a high impact approach would encounter. It is useful to pursue these issues with the bar to see whether a low impact approach can win support.

A new committee member noted that while a member of the Judicial Panel on Multidistrict Litigation he had engaged in many conferences with the subcommittee and had been impressed with its work. Some of the issues may prove to be suitable for addressing in the annual conference for MDL judges, but determining what may be better addressed by court rules is the question to be addressed

now. That is the work going forward.

Judge Dow noted that there has been a lot of resistance to the idea that judges might be called on to approve settlements. Many lawyers emphasize the right to settle, and lawyers and judges agree that there is nothing an MDL judge can do when parties file a stipulated dismissal. The low impact approach focuses on the process of settlement, and on the disconnect between leadership and other counsel. There is reason to be nervous about the prospect that a judge might upset a settlement reached between two parties, but perhaps a procedure can be devised to improve the flow of information in ways that will advance the fairness of individual inventory settlements, or other forms of settlement.

A judge asked whether it would be wise to test a new rule through a pilot project. "I'm not sure this feels right for a rule right now." The response observed that many of these ideas are being tried in practice now. Early vetting of claims is an example of practices that have evolved dramatically during the time the subcommittee and Committee have been studying MDL practice. The concept is not controversial. Plaintiffs and defendants agree that it is desirable. The means of implementation depend in part on the particular characteristics of each mass tort. Settlement review practices vary in practice, but the subcommittee can find orders that illustrate a variety of approaches, and may be able to learn about implementation. The subcommittee continues to gather information about many aspects of ongoing MDL practice. Its work remains in mid-stream.

Professor Marcus noted that the mandatory initial discovery pilot project fixed on two districts, and asked how would a pilot project for MDL procedures be structured. The Judicial Panel selects the transferee judge for each MDL. Would that element of itself interfere with the ability to compare pilot courts to other courts in a neutral, random way?

A judge said that it is worth pursuing the low impact model now to see how lawyers and judges react to it. "The concepts seem attractive. It's worth pursuing."

Judge Cooke said that the Federal Judicial Center is in the early stages of developing a new edition of the Manual for Complex Litigation. A steering committee is being formed. But the new edition is not likely to be ready soon. Professor Marcus added that the Fourth Edition was drafted shortly after Rule 23 amendments. The prospect of a Fifth Edition is not a reason to defer work on a possible MDL rule.

Judge Rosenberg noted again that the subcommittee has not reached uniform views on the concepts in the Rule 16(b)(5) sketch. "We will work more to crystallize thinking about general concepts." The subcommittee will meet as often as needed to work out a draft that is ready for review at another conference, either arranged by

Professor Dodge at Emory or in some other forum. A conference is being held later this week at George Washington Law School to discuss all these issues as part of a project to develop best practices. Others as well are working for best practices guidelines. The concepts in the Rule 16(b)(5) sketch subparagraphs (A), (B), and (D) are being done now -- early exchanges of information about claims and defenses, detailed orders appointing leadership lawyers, and regular reporting by leadership to the court. The footnotes to subparagraph (C) on identifying methods for compensating leadership counsel for efforts that produce common benefits reflects the uncertainties that surround current practice. Subparagraphs (E) and (F) address settlement issues that remain "hot button" subjects of controversy. And there is one optimistic note. The pandemic has led to many Zoom conferences in MDL proceedings, engaging attendance by hundreds of lawyers. As compared to travel from distant places to attend a hearing in person, this practice should be encouraged as a regular feature of MDL management.

Discovery Subcommittee

Judge Dow prefaced the Discovery Subcommittee report by noting that Discovery Subcommittee members participated in remote conferences on privilege logs on September 20, and 22 to 23.

Judge Godbey began the report by thanking subcommittee members for their hard work. Special thanks are due to the lawyers from private practice, who have devoted much valuable time to this subcommittee and all of whom have also devoted much valuable time to the MDL Subcommittee. Two main subjects have occupied the discovery work -- sealing court records and privilege logs.

The sealing topic began with a proposal for a new Rule 5.3 submitted by Professor Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation. The proposed rule draft is complex, but is designed to make it harder to seal and easier for the press to oppose sealing. The subcommittee has not voted on this specific proposal, but it seems to have little support.

Sealing "is complicated." A sample of local rules, without yet undertaking a comprehensive survey, shows clearly that practices are different in different districts. The circuits seem to have pretty similar standards for sealing, although it might be useful to confirm in rule text that the standard for sealing court records is different from the standard for discovery confidentiality orders.

The Administrative Office has launched a sealing project. Julie Wilson noted that the effort aims to address the management of sealed documents through operational tools such as model rules, best practices, and the like. The newly formed Court Administration and Operations Advisory Council will be asked for advice on

operational issues with unsealing, and will be asked for advice on the need for a civil rule on sealing. "It's very early in the process. They will be gathering information on what the operational issues are." That may extend to offering views on the desirability or framing of a new civil rule.

The agenda materials include a sketch of a new Rule 5(d)(5) to govern sealing, along with a companion cross-reference provision to be added as Rule 26(c)(4). Professor Marcus observed that it would be premature to decide now to do nothing, or to adopt some version of this draft, or even to look at the procedures for sealing. These issues affect other advisory committees, particularly the Criminal Rules Committee. It may make sense to pause work for now.

The Committee agreed that present work on sealing court files should be deferred to avoid competition with the parallel work in the Administrative Office.

Judge Godbey described the subcommittee's work on privilege logs. Suggestions for rule amendments have relied on the view that privilege logs can be vastly expensive and at the same time provide little or no benefit. The subcommittee responded by issuing an invitation for public comments that produced more than 100 responses and a considerably revised and elaborated version of the suggestion that prompted the inquiry. Professor Marcus summarized the comments as shown in the agenda materials. The subcommittee met with representatives of the National Employment Lawyers Association and of Lawyers for Civil Justice, a proponent of a new rule. They also attended a day and a half long symposium produced by Jonathan Redgrave and retired Magistrate Judge Facciola with participation by dozens of practicing lawyers. The American Association for Justice will be asked whether it is interested in arranging a discussion group for the subcommittee.

These events have demonstrated a drastic divide between plaintiffs and defendants. Defendants think that the predominant practice that requires a document-by-document log is expensive, often prohibitively expensive, and leads to nearly useless logs that no one uses. Plaintiffs think that defendants over-designate documents that are not privileged. Their theory is in part that the actual designations are made by junior associates or contract lawyers that are terrified that failure to designate a privileged document will be a career disaster. And plaintiffs also believe that switching the proposed rule to allow designation by "categories" will lead to less informative logs that make it difficult or even impossible to ferret out which designations to challenge. Defendants, of course, will be equally unhappy if we do nothing. It is likely to be impossible to find a mid-point that is acceptable on all sides.

There may, however, be agreement on one issue. Most observers agree that many of the problems with current log practice arise from producing logs late in the discovery period. Making challenges

and getting them resolved before the close of discovery, and then getting discovery of documents successfully challenged, is a regular problem. Some means to encourage early attention to the log process, including "rolling" logs to keep pace with rolling discovery responses, may be acceptable on all sides.

Professor Marcus pointed to pages 187-190 of the agenda materials to illustrate possible ways to call attention to these issues early in the litigation through Rules 26(f) and 16(b). "It is an open question whether this would be useful. Good lawyers tell us they do this now." But some plaintiffs say they try to do it and meet a blank wall of refusal even to discuss the issues.

Professor Marcus further observed that the proposal to enshrine in rule text recognition of logs that describe only categories of withheld documents would appear to "tilt the playing field" away from the current presumption in most courts that document-by-document designations are required. And trying to define the contours of appropriate categories in rule text will be tricky, perhaps even in approaching such suggestions as one that would specifically describe in rule text a category of documents involving communication with outside counsel after the first complaint is filed. The subcommittee has not had an opportunity to meet and discuss the many surrounding issues that were described in the recent conferences.

A Committee member noted that "people feel very strongly on both sides of the "v." We have heard complaints from people involved in very big cases. But the rule seems to be working in ordinary cases. But the time at which logs are produced does seem to be a problem in cases both large and small.

Another judge member observed that "not all cases are created equal." A run-of-the-mill employment case may have few documents in the privilege log. It might be useful to add discussion of log issues to the matters for discussion in the Rule 26(f) conference, and include the possibility of a categorical approach and timing in the report.

Judge Dow concluded the discussion by repeating thanks to the lawyer members for all the time they contribute to the subcommittee. "It makes a tremendous difference in the quality of our work."

Appeal Finality After Consolidation Subcommittee

Judge Rosenberg delivered the report of the joint subcommittee, informally dubbed the "Hall v. Hall" Subcommittee. The subcommittee is studying the Supreme Court's suggestion that new rules may be appropriate if problems arise from the ruling that a case initially filed as an independent action retains its identity for purposes of appeal finality after consolidation with another action. Final disposition of all claims among all parties

to what began as a separate action is appealable, and appeal time starts to run.

The subcommittee has reported on an exhaustive Federal Judicial Center study of appeals in all consolidations in the district courts over a period of three years. These years were evenly divided between cases filed before, and cases filed after, Hall v. Hall. The study revealed no problems. Replicating the study for a later year or two would be a great effort that does not seem worthwhile. The subcommittee had come close to deciding that it had little left to do apart from considering the question whether a new rule might be justified as a way to enhance trial court control of the consolidation from start to finish. But Dr. Lee has devised a different study method that begins with cases on appeal rather than beginning with all original filings in the district courts. That study is continuing. The subcommittee will study the results when the study is completed, and decide then whether further consideration of Hall v. Hall is appropriate.

End of Day for e-Filing

Judge Dow reported that the Federal Judicial Center continues to gather information that will inform the work of the joint subcommittee formed to study the question whether the several sets of rules should continue to define the end of the last day for electronic filing as midnight in the court's time zone. The pandemic has slowed progress. A new Civil Rules member will be appointed to this subcommittee.

Rule 9(b)

Dean Spencer, a Committee member, has submitted a proposal to revise Rule 9(b) to allow malice, intent, knowledge, and other conditions of a person's mind to be pleaded as a fact without requiring pleading of facts that support inference of the fact. The proposal has been on the agenda for two meetings, but the press of other work has prevented full consideration. The proposal is important enough to justify appointment of a subcommittee. Judge Lioi has agreed to chair the subcommittee. Other members will be appointed soon. A report is expected for the March meeting, and will generate robust discussion.

In Forma Pauperis Standards and Procedures

The Committee, prompted by submissions by a frequent litigant and by Professors Clopton and Hammond, has considered forma pauperis questions at three earlier meetings. The topic was carried forward to await the outcome of work by the Appellate Rules Committee on the i.f.p. Form 4 appended to the Appellate Rules. That work is nearing completion, but not in time for consideration at this meeting.

The Committee has concluded that there are serious problems

with administration of forma pauperis practice. There are no uniform standards to govern determinations whether a litigant qualifies under 28 U.S.C. § 1915(a) as unable to pay fees. In practice, standards vary widely from one court to another, and often among different judges on the same court. Nor are there uniform practices in gathering information to consider in applying whatever standard is adopted. Many courts use forms created by the Administrative Office, but many others do not. The forms, moreover, are criticized as ambiguous or opaque, leaving the party uncertain what is being asked. As a simple example, should "income" be defined as for the Internal Revenue Code, or by some more natural test? The breadth and depth of the information requested by many forms is also challenged as an unwarranted invasion of nonparty privacy, perhaps even unconstitutional. Appellate Form 4 is offered as an example by pointing to the required wealth of information about resources available to the party's spouse.

These issues call out for a better approach. But it remains unclear whether the appropriate response is an Enabling Act rule. As a simple illustration, Appellate Form 4 assumes that a spouse's resources are relevant to the § 1915(a) determination, but that is a substantive interpretation of the statute that at best tests the limits of Enabling Act authority. Many of the questions that may be appropriate to determining pauper status also may be better addressed by setting different standards for different areas of the country. The resources required to support minimal standards of living in a major and congested metropolitan area, for example, may be considerably greater than what is required in a rural area. And even if not appropriately substantive, individual circumstances vary across countless important variations in other obligations. What account should be taken of health expenditures? Health expenditures for dependents? Education expenses incurred to qualify for better compensated employment? Enabling Act processes are not designed to address such questions. And even if appropriate answers could be worked out for the moment, the standards will surely require regular adjustments.

Judge Dow invited comments on this presentation. He observed that experience in the Northern District of Illinois reflects many of the problems. They have repeatedly revised their forms. Even with that, prisoners often fail to understand what they are being asked.

Judge McEwen said that if a joint subcommittee is formed to study forma pauperis issues, the Bankruptcy Rules Committee should be involved. They frequently encounter these problems. Judge Dow agreed that the advisory committees should think together about these issues.

Despite the obvious difficulties, the topic will remain on the agenda. Judge Dow will reach out to Professors Clopton and Hammond.

Rule 41(a)

Judge Furman, a member of the Standing Committee, submitted a suggestion that it might be useful to study a well-settled division of interpretations of Rule 41(a)(1)(A). The rule says that "the plaintiff may dismiss an action without a court order by filing a notice of dismissal or a stipulation signed by all parties who have been served. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. Dismissal without prejudice is not a judgment on the merits and does not establish res judicata.

The initial question is whether power to dismiss "the action" requires dismissal of the entire action as to all claims. Most courts, commonly relying on the plain meaning of "the action," conclude that the rule does not authorize a unilateral dismissal without prejudice as to some claims but not others. Other courts, however, allow dismissal of some claims while the action proceeds as to others. The suggestion is that it may be desirable to establish a uniform meaning. That leaves the question which meaning is better.

The reasons that move a plaintiff to wish to dismiss only part of an action are likely to be similar to the reasons that counsel dismissal of an entire action, but with the complication that part remains to be litigated here and now. Further preparation may show that one claim is simply not ready for litigation, while another is ready and may present a compelling need for prompt relief. Or joinder of the claims may come to be poor litigation tactics. Or the decisions of which plaintiffs to join together, which defendants to join, and what court to seek, may be rethought.

The impact on the defendant is more obviously different when only some claims are dismissed. The defendant is faced with the need to continue litigating the claims that remain, often incurring most of the costs that would be incurred to litigate them all. At the same time, the defendant is left at risk of future litigation, with continuing uncertainty as to total liability. Evidence must be preserved both for defense and to avoid spoliation, and further investigation may seem necessary.

Partial dismissal, in short, is markedly different from dismissal of an entire action. If the proposal is taken up, practical wisdom about the likely consequences of either choice may be the most important guide. The inquiry may prove reasonably manageable, or more difficult.

If the proposal is taken up, it will be appropriate to consider the possibility that related issues should be considered.

One potential set of issues relates both to the value of amending Rule 41(a)(1)(A) and consistency with other rules. Claims may be dropped by amending the complaint, subject to the rather permissive provisions of Rule 15. Parties may be dropped under Rule

21. How far do those rules afford an opportunity to dismiss without prejudice? If Rule 41 is amended, should there be some explicit provisions that address the role of each rule?

Judge Furman's submission notes that most courts seem to agree that Rule 41(a)(1)(A) authorizes dismissal without prejudice as to one defendant. That may be seen as dismissal of "the action," treating a single suit as including as many actions as there are defendants. As compared to dismissing a claim against a defendant who must continue to litigate other claims, this result may be appropriate because the dismissed defendant is in a position closer to the position of a defendant who was the only one joined to begin with. But this is not the only way the rule might be read.

Nothing in the submission asks whether "plaintiff" should be interpreted to reach any claimant by way of counterclaim, crossclaim, third-party claim, or conceivably interpleader. That question might, if considered, prove truly complicated.

Apart from those questions, a distinct question is presented by Rule 41(a)(1)(A)(i), which cuts off the right to dismiss without court order and without prejudice when the opposing party files an answer or a motion for summary judgment. There are good reasons to wonder whether, if Rule 41(a)(1)(A) is taken up for consideration, the work should also consider adding a motion to dismiss to this list. Rule 15(a)(1)(B) was amended not long ago to add motions under Rule 12(b), (e), and (f) to the events that trigger the time limit on amendment once as a matter of course. The reason was that a motion to dismiss often involves more work than an answer, and often does a better job of educating the plaintiff about the things that need be pleaded and proved. The same reasons may well apply here, perhaps adding a Rule 12(c) motion for judgment on the pleadings to the list.

Discussion began with the suggestion that there are enough questions to deserve additional attention. What is the intent of the rule? Should it be broadened?

Another observation was that a recent Fifth Circuit en banc decision has made dismissal without prejudice a trap for finality. This is a question distinct from frequent, and commonly unsuccessful, efforts to establish appeal finality after an adverse ruling on part of an action by dismissing what remains without prejudice.

The next observation was that "action" and "claim" are used to express different concepts in different settings. So Rule 41(d) refers to the consequences when a plaintiff has previously dismissed "an action, based on or including the same claim * * *." These words may have a different meaning than "action" has in Rule 41(a), or than "claim" would mean if it comes to be included there.

A judge agreed that these issues are worthy of attention.

Judge Furman's opinion exploring partial dismissal is useful.

The discussion concluded with the observation that judges are not uniform in applying the present rule. "On its face, we may be able to do better." Work will proceed to see what projects may be carved out.

Rule 55

The role of the provisions directing that the clerk "must" enter a default, and "must" enter a default judgment in narrowly defined circumstances, was brought to the Committee by the curiosity of judges on courts that regularly have a judge enter both the initial default and any eventual default judgment. How many courts, they wondered, engage in similar departures from the apparent mandate of the rule text? And why was the rule written as it is?

The role of "must" begins with the Style Project that amended all of the rules in 2007. Rule 55(a) and (b) had provided that the clerk "shall" enter the default, and, in the circumstances defined by the rule, the default judgment. Having banished "shall" from rules style conventions, the choice among "may," "should," and "must" was made for must and explained in the Committee Note as "intended to be stylistic only." That choice may have been unwise. At any event, it is confused by the parallel style revisions of Rule 77(c)(2), which now provides that "subject to the court's power to suspend, alter, or rescind the clerk's actions for good cause, the clerk may: * * * (B) enter a default; (C) enter a default judgment under Rule 55(b)(1)." "May" here seems inconsistent with "must" in Rule 55 itself. The court's role may be further confused by the apparent direction that the court may set aside the clerk's action only for good cause.

Whatever might be divined from these rule texts, the important question is what role clerks should play in the distinct processes of entering a default and entering a default judgment.

Entering a default is a less ominous step. Although it sets the stage for a default judgment, courts are willing to set aside a default on rather modest showings so that a case can be resolved on the merits. But it is not a purely ministerial act. It must be shown, "by affidavit or otherwise," that a party "has failed to plead or otherwise defend." A failure to plead is apparent from the court's records, but a proof of service may not be fully satisfactory. The problem of "sewer service" has not entirely disappeared. However that may be, "otherwise defend" may involve events that do not come to the court's attention. Nonetheless, the potential complications may be rare in comparison to straightforward defaults. Authorizing the clerk to enter the default is different from mandating, but a clerk that finds reasons for concern can submit the question to the court despite the mandate.

Entering a default judgment is intended to be just that, a judgment. Under Rule 54(b) it can be revised at any time before all claims are resolved as to all parties, but after that it becomes final and can be set aside only by vacating it under Rule 60(b). The determination that the claim is "for a sum certain or a sum that can be made certain by computation" may not be easy, and consideration by a judge may show reasons to doubt whether anything is due at all. The clerk's authority and duty are limited to cases in which the defendant has been defaulted for not appearing and who is not a minor nor an incompetent person. "[N]ot appearing" may not be free from all ambiguity. And the complaint may not show whether the defendant is a minor or an incompetent person, adding to the clerk's responsibilities to inquire.

These observations concluded with the suggestion that the first step in any inquiry into these parts of Rule 55 might begin with a quest for more information about actual practices. If the questions that prompted the inquiry bear out, much can be learned about the wisdom of the present rule by considering actual practices.

Judge Dow asked how many committee members have clerks enter a default. Some initial responses that this happens were followed by a more detailed accounting. The clerk representative reported that in the last two years, her office had 600 requests for a default and the clerk entered defaults in 480 cases; the reasons for not entering defaults in the other 120 cases are not yet clear. Her office does not enter default judgments. Six judges then reported that in their courts, the same practices prevail: the clerk enters defaults, but only a judge enters a default judgment. A practicing lawyer reported the same practices in another court.

Judge Dow noted that in his court a judge enters the default as well as a default judgment. "We may be in the minority." In any event, this topic merits a place on the agenda. "The rule should reflect the state of the world."

The Federal Judicial Center will be asked to help with this research. In addition to the general questions described in the earlier discussion, an added question was suggested -- to find out whether there are courts in which the clerk actively audits the files for cases that seem to be in default, as compared to waiting for a request from a party.

Rule "9(i)"

A letter dated June 7, 2021, from Senators Tillis, Grassley, and Cornyn to Chief Justice Roberts suggests that the Chief Justice "should coordinate with the Judicial Conference to create a pleading standard for Title III ADA cases that employs the 'particularity' requirement currently contained in Rule 9(b) of the Federal Rules of Civil Procedure." Enhanced pleading would enable property owners to more easily remove barriers to access, prompt

removal would benefit disabled plaintiffs, and courts could more readily determine whether Title III has been violated.

Professor Marcus introduced this topic by noting that ADA litigation has drawn a lot attention in recent years. There has been a great increase in the number of actions, as detailed in the agenda materials. Much of the attention seems to focus on California, perhaps because a parallel state statute provides for damages, a remedy not available under Title III; Florida, perhaps because there are a number of active "tester" plaintiffs there; and New York, perhaps because there are many outdated business structures that have not been brought into compliance with accessibility requirements.

Although there may be many reasons to worry about the blossoming of Title III litigation, "particularity in pleading may not be the answer." The Committee has always been reluctant to recommend substance-specific rules. The recent Supplemental Rules for Social Security cases were recommended only after searching and repeated demands for compelling reasons to justify substance-specific rules. The Social Security Rules are intended to establish a procedure for actions that involve appellate review on a closed administrative record, while Title III cases fall into the mainstream of civil litigation. Adoption of a particularized pleading standard, further, might simply lead California lawyers to file their actions only under state law in state courts. On balance, the initial conclusion may be that a particularized pleading standard is not the answer for whatever problems exist.

A committee member suggested that such problems of vague pleading as may exist can be addressed by a motion for a more definite statement. In addition, current general pleading standards may well be up to the task. It was pointed out that recent Ninth Circuit decisions uphold district court demands for specific pleading of barriers to accessibility.

A judge member observed that a wide variety of barriers exist. Such things as curb cuts, the height of towel rods, the placement of shower controls, floor plans themselves, are commonplace. And a lot is happening with claims based on access barriers to websites facing visually or hearing impaired persons. A better solution to the problems of litigation should be sought in legislation that requires pre-suit notification of barriers, affording an opportunity for correction, spending needed funds on improving access rather than wasting them on litigation.

Another participant agreed, and underscored the proposition that principles of transsubstantivity preclude making a rule for a specific problem in a particular area of the law.

A judge observed that the same problems arise in state courts, which may likewise resist pressures for substance-specific rules.

The discussion concluded by removing this topic from the agenda. Courts can implement appropriate pleading standards under the current rules. Congress can consider solutions outside the pleading rules. It is better not to infringe the transsubstantivity presumption in this setting.

Rule 23 Opt-In

Professor Marcus introduced this submission by a nonlawyer who, after his wife got a notice of an opt-out class action, believes that class actions should be limited to members who affirmatively choose to opt in. "The rest of the world doesn't believe in our opt-out class." But the opt-out feature was baked into Rule 23 in the 1966 amendments. It is an interesting argument, but it would be a dramatic change in class-action practice as it has matured in our system. An opt-in structure likely would defeat the utility of class actions for small claims.

This item was removed from the agenda without dissent.

Rule 25(a)(1)

This proposal by a federal judge's law clerk is to amend Rule 25(a)(1) to authorize the judge to enter a statement of death on the record. The purpose is to avoid the risk that a "zombie" action may continue indefinitely after a party has died and no party makes a suggestion of death. A statement made by the judge, just as a statement entered by a party, would trigger the 90-day limit for a motion to substitute.

Professor Marcus noted that an amendment framed as entry of a statement noting the death would have to resolve a complication framed by Rule 25(a)(3), which directs that a statement noting death must be served on the parties as provided in Rule 5 -- no problem there -- and served on nonparties as provided in Rule 4. It might become important to clarify the practice for Rule 4 service by the court, including the means of identifying the nonparties that must be served.

The proposal identifies four cases that appear to involve the "zombie" problem. One of them, from the Northern District of Illinois, appears to treat a judge's identification of a party's death as like a suggestion of death that must be served on a nonparty. The nonparty that must be served has an obvious interest in learning of the litigation and deciding whether to seek to substitute in.

This proposal does not seem a promising occasion for amending Rule 25. The first sentence of Rule 25(a)(1) confers authority to order substitution of the proper party when a party dies and the claim is not extinguished. The court, on learning of the death, can order substitution on terms that are suitable to the circumstances, just if there had been a formal statement of the death. Indeed once

the court learns of the death it is required to dismiss the action as moot as to the deceased party unless a new party with authority to pursue or defend against the claim is brought in.

Judge Dow described the circumstances surrounding the Northern District of Illinois action described in the proposal. The deceased defendant was the medical director at a large prison. He had been sued more than 400 times. In most of the related actions the state attorney general's office filed a statement noting the death. For some reason that did not happen in this action, but the judge was well aware from other cases that this defendant had died. It was a strange case with special circumstances, the sort of circumstances and judicial response that prove the worth of the current rule.

This item was removed from the agenda by consent.

Rule 37(c)(1)

Professor Marcus introduced this topic. Rule 37(c)(1) was added in 1993 to implement the disclosure requirements of new Rule 26(a) and the Rule 26(e) duty to supplement Rule 26(a) disclosures. The first sentence directs that a party who fails to disclose information or the identity of a witness as required by Rule 26(a) and (e) is not allowed to use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. The second sentence then begins: "In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard" may order other sanctions. The first in the list, (A), is an award of reasonable expenses, including attorney fees.

The rule text is unambiguous. Even though a failure to make a required disclosure is not substantially justified and is not harmless, the court may order an alternative sanction "instead of this [exclusion] sanction."

This question was raised by a submission that pointed to a pair of dissenting opinions in the Eleventh Circuit that argue that a court may not choose to award attorneys but permit a party to use as evidence information or a witness that was not disclosed when the failure to disclose was not substantially justified and is not harmless. The argument rests on the 1993 Committee Note. The Note characterizes exclusion as a "self-executing sanction," and as an "automatic sanction," because it can be implemented without a motion. The Note then observes that exclusion is not an effective sanction when a party fails to disclose information that it does not want to have admitted in evidence. The alternative sanctions address that circumstance. The argument juxtaposes these Note observations to conclude that the alternative sanctions cannot be imposed as a substitute for excluding evidence offered by the party who failed to disclose it.

Research by the Rules Law Clerk discloses that other courts

have been bemused by this argument from the Committee Note, as if the Note could somehow impair the explicit and unambiguous language of the rule text. The research further reveals, however, that the district judge's hands are not tied. The rule has functioned as intended for almost thirty years.

This topic was removed from the agenda by consensus, without further discussion.

Rule 63

Rule 63 addresses situations in which a judge conducting a hearing or trial is unable to proceed. The first sentence authorizes another judge to proceed on "determining that the case may be completed without prejudice to the parties." The second sentence applies only to a hearing or a nonjury trial, and provides:

> [T]he successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden.

The suggestion that brought this topic to the agenda responded to a nonprecedential Federal Circuit decision by asking whether the direction to recall a witness should be relaxed when the witness's original testimony was recorded by video.

Many features of Rule 63 suggest that it provides ample authority to account for the availability of a video transcript in determining whether a witness must be recalled. The question might be considered initially in determining whether the case can be completed without prejudice to the parties if the witness is not available to be recalled. If the witness can be recalled, the three factors listed in the rule come to bear. The testimony must be "material." Materiality is a concept that appears in many settings, often with uncertain meaning. At a minimum, it means that the testimony could make a difference in the outcome. It may also allow some room to determine, with the aid of a video transcript if there is one, that possible changes in the testimony are unlikely, in the context of the whole record, to affect the outcome. The testimony must be disputed. It may be fair to ask whether the dispute needs to be further illuminated, and credibility measured, by recalling the witness, a determination that again may be advanced by consulting a video transcript. The witness, finally, must be available for recall "without undue burden." Whether the rule means to consider only burdens on the witness, or also allows consideration of burdens on the parties and the court, whether a burden is "undue" can be measured in light of the confidence engendered by reviewing a video transcript.

A further consideration is that Rule 63 applies to hearings as well as trials. Hearings address a great many things. Witness testimony may be adduced for many different purposes, implicating

quite different fact-finding responsibilities and issues. Recalling a witness on an issue of personal or subject-matter jurisdiction, for example, may be less sensitive than recalling a trial witness.

One perspective on the rule text is that although "must" is used in the rules drafting convention to express a clear command, it is frequently accompanied, as in Rule 63, by provisions that qualify the command. The witness "must" be recalled only if available without "undue" burden, and so on. Any command is clearly qualified by some measure of discretion.

These considerations suggest that there is little reason to take up Rule 63 for the specific purpose of asking whether the rule text should be revised to refer to the availability of a video transcript.

Discussion began with a suggestion that it might be interesting to take a deeper look at Rule 63. "I'm not convinced there is as much flexibility as should be." The cases seem to close it down. To be sure, video trials today are far better than the video depositions that were known in 1991, when the Committee Note to the revised Rule 63 suggested that the availability of a video recording might be considered. But "must" seems to be specific, to be controlled by the parties more than the court. How often is the rule used? To what effect?

Another member suggested that, without greater familiarity with the cases, the plain rule language "seems fairly mandatory." It may not have as much "wiggle room" as the initial presentation suggests. That is not to say that the Department of Justice has encountered problems with Rule 63, only to suggest that it may deserve further inquiry.

A specific question looked to the sketch provided in the agenda materials to illustrate a possible amendment to incorporate reference to the forms of available transcripts. This version would add this at the end of the second sentence: "considering whether the testimony is preserved in written, audio, or video transcript." The question asked whether "considering" is consistent with "must."

The Committee concluded that Rule 63 should be carried on the agenda to determine how frequently it is used in practice, and whether it is sufficiently flexible to enable proceedings before a successor judge in ways that are both fair to all parties and efficient.

Briefs Amicus Curiae

This proposal was advanced by three lawyers who have an extensive nationwide practice of submitting briefs amicus curiae in district courts around the country. They suggest it would be desirable to establish uniform national standards and procedures to govern amicus briefs.

The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 and the Supreme Court Rules. If the subject is to be taken up, it will provide a good starting point.

The reasons for adopting a new rule on amicus briefs begin, in a perhaps surprising way, with the estimate that an amicus brief is filed in only one case out of every thousand filed in the district courts, some 300 cases a year. The relative rarity of amicus filings may in part account for the observed reasons for a rule. Many district courts do not really know what to make of amicus brief practice. They have no standards, or only vague standards, governing permission to file. And the procedures for seeking permission may be equally indistinct or ad hoc. Amicus briefs can improve the quality of decisions. As the submission puts it:

> At a high level, amicus parties should bring a unique perspective that leverages the expertise of the party submitting the brief and adds value by drawing on materials or focusing on issues not addressed in detail in the parties' submissions * * *.

The analogy to amicus practice in appellate courts is interesting, but may be complicated. The central task of appellate courts is to develop the law. Trial courts also are responsible for resolving what may be new, important, complex, and vigorously disputed questions of law. In addition, however, trial courts also are responsible for generating a trial record that provides as strong a foundation as possible for resolving the facts. The facts are critical in deciding the case, and also may be an indispensable part of the framework for identifying and deciding the relevant questions of law. The parties may welcome participation by an amicus. But a party also may prefer to maintain control of the information, issues, and arguments presented to the trial court to protect its own interests in shaping the record. On appeal, the trial court record is taken as given, significantly limiting the range of arguments open to an amicus brief.

The question, then, is whether a rule should be adopted to establish good and nationally uniform standards and procedures for authorizing amicus briefs.

Discussion began with an expression of uncertainty. "I'm not a strong advocate for doing anything." But the local rule in the District of Columbia is a fine rule. The District may be atypical, because it encounters a number of cases that raise issues of law. "I've had a number of cases that involve issues of law." A minimalist rule like the D.D.C. rule may be worth considering.

A judge noted that in 14 years on the bench he has had fewer than half a dozen amicus briefs. "I've never denied a motion. I'm not sure we need a rule." One concern is that the Civil Rules do not have a rule on briefs. Format, length, timing, and like issues

are left to local practice. The District of Columbia may be uniquely situated to draw amicus briefs. But it might be useful to survey local rules. And the proposal is well executed. It would be a helpful starting point if a rule is to be drafted.

The Committee concluded that these questions should be carried forward. The first task will be to determine how frequently amicus briefs are tendered in courts outside the District of Columbia.

Rule 4

The service of summons and complaint provisions of Rule 4 have drawn a number of suggestions over the last few years. Suggestions continue to arrive. The broader recent suggestions are to reduce the burden of multiple service in many of the actions involving the United States and governed by Rule 4(i); to authorize service on the United states by electronic means, greatly expanding the limited provision in Rule 3 of the pending Supplemental Rules for Social Security cases; and to dispense with service on a party who has actual knowledge of the suit.

Rule 4 was considered carefully by the CARES Act Subcommittee. The proposed new Rule 87 published last August includes several Emergency Rule 4 provisions for service by a means reasonably calculated to give notice when a court order authorizes a specific proposal. In recommending publication, the Committee explicitly reserved Rule 87 for further consideration in light of the public comments. One of the reserved alternatives would be to amend Rule 4 for general purposes, not only for a civil rules emergency, discarding the Rule 4 part of Rule 87. The subcommittee also recognized that however that question is resolved, it may be wise to consider Rule 4 in depth. The obvious question is whether it is time to contemplate the use of electronic service in at least some cases. One limited possibility would be to authorize electronic service on any defendant that consents and establishes an address for electronic service. Firms that are frequently sued might find that electronic service works to their advantage by enabling a structure that promptly brings new litigation to the attention of the relevant people within the firm. That and other possibilities, however, remain in the realm of speculation.

Rule 4 questions will be considered by the CARES Act Subcommittee while it studies comments on Rule 87.

Rule 5(d)(3)(B)

Rule 5(d)(3)(B) directs that a person not represented by an attorney may file electronically only if allowed by court order or by local rule. It was drafted as a joint project by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Alternatives that would allow readier access to electronic filing were discussed extensively during the drafting process. Proponents of a general right to file electronically noted that many pro se litigants are

adept with computer systems, and that their numbers grow every day. They emphasized the advantages of electronic filing for a pro se party, producing savings in time and expense that increase with the distance to the courthouse. These advantages were recognized, but the more limited approach was adopted from fear that inept litigants would impose undue burdens on the court and other parties.

The question has been renewed in light of experience during the pandemic. Several courts expanded the opportunities for pro se parties to use electronic filing. Susan Soong conducted an informal survey of clerks offices in the districts within the Ninth Circuit. Several of them allowed general access to e-filing by unrepresented parties. Many of those courts reported that it worked. It "worked fine" in the Northern District of California. For the most part, electronic filing was accomplished by e-mail messages to the clerk, who then entered the filings in the court's system. Other courts, however, were not enthusiastic about this process.

Judge Bates noted that there may be a risk that each of the advisory committees may hang back from this topic, waiting to see whether some other committee will take the lead. The Appellate Rules Committee, for example, has tabled the question pending consideration by the Civil Rules Committee. Deferring consideration by all committees may be the right course. Perhaps the reporters should take the question up among themselves, to make sure that it does not fall through the cracks. Professor Struve agreed that the reporters will confer.

Judge Dow noted that in addition to coordination among the advisory committees, it will be important to coordinate with the Court Administration and Case Management Committee to integrate with the next generation CM/ECF project. He also noted that some courts are experimenting with e-filing by supporting facilities in prisons.

Judge McEwen noted that there has been little progress on this subject in the Bankruptcy Rules Committee. "We're heading into the next generation CM/ECF. We need to find out how it works." In bankruptcy there often are hundreds of docket events in a single case, in a system that cannot work for untrained persons. Claims can be filed electronically, and frequent filers must do so. But any system for e-filing by unrepresented debtors or other parties would need "a lot of safeguards."

Another comment suggested that a distinction might be drawn between the events that initiate a case and later filings. Electronic filing of initiating papers could be troublesome. This concern was seconded by another participant who suggested that clerks' offices may well resist electronic filing of case-initiating filings by pro se litigants.

A practical note was sounded by asking how electronic filing

would relate to getting permission to file without paying fees under 28 U.S.C. § 1915. This question was expanded by an observation that § 1915 provides a screen for initiating frivolous filings without service of process. But if a fee is paid, not all judges do the initial screening.

This question will be retained. The next step may be collaboration of the reporters.

Third-Party Litigation Funding

Professor Marcus introduced the report on Third-Party Litigation Funding (TPLF) as a timely reminder that this growing and changing phenomenon continues to hold a place on the agenda. The report is further made timely by an inquiry last May from Senator Grassley and Representative Issa.

This topic first came to the agenda in 2014 with a proposal to add a rule requiring initial disclosures about TPLF arrangements. That proposal was studied carefully and put aside to await further developments and better knowledge of TPLF practices. It came back in 2019, and was then confided to the MDL Subcommittee. The subcommittee concluded that TPLF is not distinctively allied to MDL proceedings, and remitted the subject to the Committee's general agenda.

TPLF presents an important set of issues. The Committee will continue to monitor them. The Rules Law Clerks continue to gather a catalogue of relevant materials that has grown to impressive length.

Legislation has been introduced in Congress, S. 840, that would adopt disclosure requirements for TPLF in class actions and MDL proceedings.

TPLF continues to present many "uncertainties, unknowns, and difficulties."

Last week the Committee received a proposal that TPLF disclosure be tested by a pilot project. There are some local rules that might be seen as informal pilot projects. A Northern District of California local order providing for disclosure in class actions has been invoked once in four years. The District of New Jersey has recently adopted a local rule; there is no information yet on how it works. Wisconsin has adopted a disclosure requirement for TPLF arrangements in civil cases in its state courts, but informal inquiries have failed to garner much information about how it is working.

The agenda materials describe several of the many problems that must be confronted by any attempt to create a rule for TPLF arrangements. What should be its scope -- what sorts of financing, and perhaps what sorts of litigation should be included? What about

work-product protections? Many of the concerns, such as professional responsibility and usury, "are not the normal stuff of the Civil Rules."

Judge Dow said that the topic has been presented to take stock. What experiences have Committee members had? Some judges do ask about TPLF. A party can ask the judge to inquire.

A judge reported requiring disclosure of any TPLF arrangements by those applying for leadership positions in an MDL. The disclosures were to be made to the judge ex parte. No arrangements were reported.

This MDL experience was consistent with findings by the Judicial Panel on Multidistrict Litigation, which found that TPLF seems not to be used in big MDLs, likely because lawyers self-finance. Another judge, however, reported being aware of massive TPLF positions in some MDLs. The court has to keep in touch with this. Possibilities could include adding the subject to Rule 16(b) and Rule 26, or encouraging courts to discuss TPLF with the parties. The court might decide that there is nothing to do about the arrangements. And there is no need to make the arrangements public. He did have one case in which he admonished the lender that it could not affect settlement decisions.

A judge agreed that courts have authority to require disclosure. "A Rule 16 prompt could be useful." Not all judges are aware of the authority they have.

A judge who reported no personal experience with TPLF suggested that it would be good to learn more about the California, New Jersey, and Wisconsin arrangements. We heard years ago that TPLF is common in patent litigation, but the California order does not seem to touch that. A related issue is before the Appellate Rules Committee, concerning disclosure of who is actually funding an amicus brief. These are big issues. Holding them open may be the right course to pursue.

Another judge agreed that it would be useful to learn more about such local rules and practices as may be identified. And the reports about patent litigation indicated that TPLF is used by defendants as well as plaintiffs. It would be good to learn more about defendant financing practices.

A magistrate judge noted that magistrate judges frequently engage in mediations. They have discussed among themselves the effect that ex parte disclosures of TPLF might have in mediating a resolution.

Another participant noted that "there is a whole state regulatory mechanism. "This is a huge research burden," perhaps too heavy to impose on the rules law clerks. A judge agreed that state courts confront TPLF practices, and volunteered to approach the

Conference of Chief Justices and the National Center for State courts if that seems likely to be helpful.

A lawyer member provided a reminder that it is critical to be clear about defining terms in approaching TPLF. It can mean many different things. What of a traditional bank line of credit? All agree that's not "TPLF." TPLF goes on around the world, though it is more common in some places than others.

This observation included a reminder that it is important to encourage diversity, equity, and inclusion in the ranks of class action lawyers and MDL leadership. There are lawyers who need to borrow to represent clients they are perfectly able to represent. They should not be left at a disadvantage.

Another participant observed that lawyers frequently have financing in bankruptcy proceedings. In state courts, financing may provide living expenses for plaintiffs. "There are lots of things we're not talking about." Champerty is one of the things others are talking about.

Two participants agreed there is a distinction between "consumer" and "commercial" TPLF. There are so many permutations that it would be difficult to define what sorts of arrangements should be brought into a "TPLF" rule. "This is a challenge. There is much to be learned. But filling in the blanks will not make the rules choices go away."

The Committee agreed that TPLF is a big topic. It cannot be allowed to get away. Continued study will be important. But the time has not come to start drafting. The game for now is to stay the course.

Mandatory Initial Discovery Pilot Projects

Dr. Lee provided an interim report on the mandatory initial discovery projects in the District of Arizona and the Northern District of Illinois. The projects ran for three years in each court, beginning and concluding a month apart. All judges participated in the Arizona project. Most judges participated in the Northern District of Illinois.

The "pilot order" was docketed in more than 5,000 cases in Arizona. Discovery was filed in about half of them. Ninety-three percent of these cases have closed. In both Arizona and Illinois there is a backlog of cases awaiting trial because of the pandemic. Jury trials are on the lists. The pilot order was entered in more than 12,000 cases in Illinois. Ninety percent of these cases have closed, leaving some 1,200 open.

There are positive things to report about the study. The pandemic affected both districts, so it remains possible to compare their experiences. Case events have been loaded into the study

program with the cooperation of the clerks' offices. The FJC has interviewed judges and court staff. In-depth docket data is being collected.

Surveys are sent to the lawyers in closed cases at six-month intervals. More than 10,000 surveys have been sent. There are more than 3,000 responses. That is a great response rate.

The FJC has been working on the study for five years. "It's become part of my mental furniture." It will yield "lots and lots of information."

Judge Dow noted that circumstances in Arizona are different from circumstances in Illinois. Arizona lawyers have worked with expanded disclosures in Arizona state courts for more than twenty years. Greater resistance was faced in Illinois.

The meeting concluded with the hope that the next meeting, scheduled for March 29, 2022, will be in person.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 6

TAB 6A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 14, 2021

I. Introduction

The Advisory Committee on Criminal Rules met in Washington, D.C. on November 4, 2021. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents several information items. The Committee chose not to pursue several proposed amendments; referred one proposal to a subcommittee for further study; and approved an amendment incorporating Juneteenth in the definition of "legal holiday." That amendment will be included in a package of similar amendments to be presented at a later meeting, and appears here as an information item.

II. Information Items

This report presents the following information items:

- The Committee's decision not to move forward with the following:
  - multiple suggestions to amend Rule 6(e), governing grand jury secrecy, to allow the release of materials of special historical or public interest;
  - a suggestion to address the authority of courts to issue redacted versions of grand jury related judicial decisions;
  - a suggestion to amend Rule 6(c), governing the authority of grand jury forepersons;
  - a suggestion to adopt an amendment or new rule to deal with delays in the disposition of habeas appeals in the federal appellate courts; and
  - a suggestion to amend Rule 59(b)(2), governing objections to findings and recommendations by magistrate judges.
- The Committee's discussion of a suggestion to expand pro se access to electronic filing, which will be considered by a cross-committee group;
- The Committee's decision to appoint a subcommittee to consider an amendment to Rule 49.1 to address concerns about the Committee on Court Administration and Case Management (CACM) guidance included in the committee note; and
- The Committee's decision to approve an amendment to Rule 45(a)(6), recognizing Juneteenth as a national holiday; final action will be requested at a later date.

A. Proposals to Add Exceptions to Grand Jury Secrecy Under Rule 6(e)

The Committee earlier received and referred to a subcommittee multiple suggestions to amend Rule 6(e)(3) to create an exception allowing disclosure in cases of exceptional historical or public interest. After extended consideration of the subcommittee's report, the Committee decided, by a vote of 9 to 3, not to proceed further with the proposed amendments.

1. The Context, the Proposals, and the Committee's Process

The Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority."[1] Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*,

[1] The minutes of the meeting on April 22–23, 2012 state:

140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3).

The *McKeever* and *Pitch* decisions deepened a split in the circuits. The Sixth and Eighth Circuits had already held that Rule 6(e)'s exceptions are exclusive.[2] But the Second and Seventh Circuits have held that district courts possess inherent authority to release grand jury material in appropriate cases without an express exception. *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766–67 (7th Cir. 2016). This issue continues to be litigated in other circuits.[3] Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to resolve this question.[4] Given these developments, the Committee recognized that the situation has changed significantly since 2012.

The Committee's discussion focused on the suggestions submitted by Public Citizen Litigation Group (20-CR-B), the Reporters Committee for Freedom of the Press (20-CR-D), and Joseph Bell and David Shivas (21-CR-F), as well as proposals submitted in 2011, 2020, and 2021 by the Department of Justice during the Obama, Trump,[5] and Biden administrations (20-CR-H and 21-CR-J). Several of these suggestions would authorize not only disclosure of records of special historical interest, but also disclosure that would further the public interest generally. Some suggestions referenced the courts' putative inherent authority to disclose grand jury materials. In

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> Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

[2] *United States v. McDougal*, 559 F.3d 837, 840–41 (8th Cir. 2009) ("'Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside,' . . . courts will not order disclosure absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation.") (alteration and citation omitted); *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) ("[W]ithout an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.").

[3] On June 10, 2021, the First Circuit held oral argument in a case raising this issue. *In re: Petition for Order Directing Release of Records (Lepore v. United States)*, No. 20-1836 (1st Cir.).

[4] He wrote:

> Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.

McKeever v. Barr, 140 S. Ct. 597, 598 (2020).

[5] The Department's 2020 submission described this as a proposal "the Department Could Possibly Support." 20-CR-H at 6.

contrast, the Department's suggestions over the years have all (i) taken the position that courts lack inherent authority to order disclosures not specified in the rule, and (ii) sought only a limited exception for disclosure of historical records. All the proposals submitted to the Committee are summarized in a chart attached as an appendix to this report.

The Committee referred these suggestions to a subcommittee, which held a full-day miniconference in April 2021 to gather the views of experienced prosecutors, defense counsel, historians, journalists, and others affected by grand jury secrecy. The subcommittee also met by telephone four times over the summer. The subcommittee's report to the Committee included (1) a draft amendment defining a limited exception to grand jury secrecy for historical records that would balance the interest in disclosures with the vital interests protected by grand jury secrecy,[6] and (2) a recommendation by a majority of the subcommittee that the Committee pursue neither a historical records exception to grand jury secrecy, nor a broader exception that would ground a new exception in the public interest or inherent judicial authority.[7]

After lengthy deliberations at its November meeting, the Committee voted 9 to 3 not to proceed with an amendment to Rule 6(e) that would provide for disclosure of grand jury materials of historical or public interest.

2. The Committee's Decision Not to Proceed with a Historical or Public Interest Amendment

In its plenary review of the proposals, the Committee began with the premise that secrecy plays a critical role in the grand jury's effectiveness. As the Supreme Court explained in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211(1979):

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There

[6] The key elements of the subcommittee discussion draft were (a) a requirement that the government be provided with notice and an opportunity to be heard on any petition for release, (b) a threshold requirement that the case have been closed for at least 40 years, and (c) findings that the grand jury matter has "exceptional historical importance" and that "the public interest in disclosing the grand jury matter outweighs the public interest in retaining secrecy." The subcommittee declined to adopt the non-exhaustive list of factors several prior courts have considered, drawn from the Second Circuit's decision in *Craig* (though it referenced that case in the committee note), and it declined to provide for any automatic or presumptive disclosure after a certain period. *See* November 2021 Agenda Book (Criminal Rules Committee).

[7] As noted *infra*, the Department of Justice supported the subcommittee draft, though it proposed two key revisions.

> also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

441 U.S. at 218–19 (citation omitted).

As the Court recognized, the possibility of disclosure can undermine the grand jury's effectiveness. "Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Id.* at 222.

A majority of the Committee concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution. Members expressed concerns about the likely effects of such an amendment and the possibility of unintended and unforeseeable consequences. They found the interests in favor of disclosure insufficient to risk undermining an institution that has played a critical role in the criminal justice system for almost a thousand years. In assessing these risks, members drew on their own extensive experience with grand jury proceedings as well as the information gained at the miniconference. Five members described their own experience representing witnesses, targets, and other parties with an interest in the secrecy of grand jury proceedings. Nine members (including some who also represented witnesses at other stages of their career) had served as federal prosecutors. Many of these members referenced their experience working with prospective witnesses, seeking to reassure them, and eliciting their testimony.

A majority of members concluded that there was too great a risk that an amendment—even if narrowly tailored—could significantly complicate the process of advising witnesses, endanger witnesses and their families, and ultimately discourage witnesses' cooperation.

Grand jury witnesses typically want to know who will be able to learn about their testimony. Several members expressed the view that having to explain the possibility that a witness's testimony could be released—even after several decades—would impede witness cooperation. Many witnesses are fearful about testifying, especially in cases involving violent crime and criminal activity by groups, including drug cartels, terrorists, gangs, and other organized crime. One member recalled prospective witnesses who had been so frightened that they fled the country rather than testify.

The Committee discussed whether delaying disclosure for many decades, such as the 40-year floor in the draft amendment prepared by the subcommittee, would address this concern. Members explained that even lengthy delays do not negate either the fear or the danger that witnesses may face. Groups such as drug cartels and terrorist organizations have what one miniconference participant called "long memories"; those groups might seek to retaliate against a witness or the witness's family members even after many years have passed. Moreover, even after decades, the revelation of grand jury records could adversely affect the reputational and business interests of witnesses and their families. For example, one member described the devastating effect that a grand jury leak had on the reputation of a major civil rights leader and his family. Such a

revelation, she explained, would have a major impact even after many decades, on not only the affected person and his family, but also many others in the community.

The draft amendment prepared by the subcommittee and considered by the Committee included other safeguards that aimed to preclude any release that would harm or endanger witnesses. The amendment required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy. The draft committee note stressed that "[t]he court must evaluate . . . the possible impact of the particular disclosure on living persons (including witnesses, grand jurors, and persons investigated but not charged)." The draft amendment provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. Given this requirement, several members acknowledged that courts likely would not permit disclosure in a case in which a witness faced physical danger from groups such as terrorists, cartels, or violent criminal organizations. Moreover, as the Department of Justice suggested to the Committee, the amendment could have been revised to heighten the protection for witnesses and others by requiring the court to make a finding that disclosure would not materially prejudice any living person as a prerequisite to any release. The note also drew attention to Rule 6(e)(3), which authorizes the court to order disclosure with redactions or to impose other conditions to prevent prejudice.

Yet the members opposing the amendment concluded that the dangers of expanded disclosure would remain. Members recognized that exceptions to grand jury secrecy already exist, so witnesses cannot be assured that their testimony can never be revealed. But members considered the addition of the exception to be a significant change that would complicate the preparation and advising of witnesses and reduce the likelihood that they would testify fully and frankly. Moreover, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, all of which are intended to facilitate the resolution of other criminal and civil cases, and the investigation of terrorism.

The Committee was aware that the Justice Department had consistently supported an amendment for more than a decade (though with some variation in its proposals); but that support was not enough to overcome members' concern that the amendment could do subtle but incalculable damage to the grand jury as an institution. Members also noted that the Department's support of the amendment was at odds with the grave concerns raised by many current and former career prosecutors at the miniconference and on the Committee who saw the amendment as a threat to the grand jury and opposed it.

Numerous members acknowledged that this was a close issue, and some members agreed with the Committee's view in 2012 that the courts had appropriately handled the rare cases in which they permitted disclosure. Many members also recognized that the public has an interest in the disclosure of grand jury records in cases of exceptional historical interest, such as those involving Julius and Ethel Rosenberg. But some members who stated they were comfortable with the disclosure in rare cases such as *Rosenberg* thought that no amendment could fully replicate the prior judicial practice in these cases. Even with strict limits, an amendment expressly allowing disclosure of these materials would tend increase the number of requests and actual disclosures alike, thereby undermining the critical principle of grand jury secrecy.

Judge Kethledge stated that evolved institutions like this one are distillations of experience and wisdom. They work in ways we are not aware of, and often benefit us in ways we do not understand. The potential for unintended consequences is greater than usual. Moreover, an express exception might encourage potential leakers to define for themselves the situations in which such disclosures were desirable.

The Committee also considered the differences between the common-law and rulemaking approaches to this issue. Without an amendment, historians and other interested parties will continue to seek grand jury records in circuits where inherent authority has not been foreclosed, requiring those courts to develop standards for release. The common-law approach would allow those courts to move incrementally, comparing the case at hand to prior cases, rather than seeking to answer all the relevant questions for disclosure in one fell swoop. Given the existing circuit split, however, members thought the Supreme Court would eventually address the issue whether the courts have this authority. But the Supreme Court as well could choose to act incrementally in this area. In contrast, rulemaking might eliminate the need for the circuits and perhaps the Supreme Court to address that issue, and provide a national standard developed in a deliberative process with broad input. Moreover, the standard could strive to be highly protective of the interests of witnesses and their families, as well as the government's interest in ongoing investigations and prosecutions.

The Committee acknowledged Justice Breyer's call to resolve the circuit split regarding disclosure of grand jury materials. As discussed below, however, members concluded that the question whether courts have inherent authority to order that disclosure is substantive, not procedural, and thus beyond the Committee's purview. The Committee's role, instead, is to recommend whether—as a matter of positive procedural law—Rule 6(e) should be amended to provide for disclosure of grand jury materials of exceptional historical interest. For the reasons stated above, a majority of the Committee chose not to recommend such an amendment.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

3. The Committee's Decision Not to Address Either the Exclusivity of the Exceptions to Secrecy in Rule 6 or the Courts' Inherent Authority

Finally, the Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. On this point, the suggestions received by the Committee were sharply divided. In the Committee's view, however, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Committee's authority under the Rules Enabling Act.

B. Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions

The *McKeever* decision also prompted a request from District of Columbia Chief Judge Beryl Howell and former Chief Judge Royce Lamberth (21-CR-C). They wrote asking the Committee to consider whether Rule 6(e) should be amended to authorize courts "to release

judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The judges explained that "[t]he practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury." The judges further stated that "[t]his practice is critically important to avoid building a body of 'secret law' in the grand jury context." But they also observed that, to the extent "judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in [*McKeever*] rejected those bases." The judges thus concluded that "the D.C. Circuit's decision has cast a shadow about the legal basis for this practice," and accordingly the authority to continue this practice "deserves consideration and clarification."

In response to this suggestion, the reporters prepared a memo that detailed a number of redacted judicial decisions involving grand jury issues. After discussion, the subcommittee chose not to recommend an amendment to address this issue at this time.

After discussion at the November meeting, the Committee likewise decided unanimously not to pursue an amendment. Members thought the current means available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e). Whether judicial opinions may disclose grand jury materials in a manner inconsistent with Rule 6(e), of course, would be a difficult question. Since *McKeever*, however, no one has claimed that disclosure of grand jury material in a judicial opinion violated Rule 6.

C. Rule 6(c) Authority of Grand Jury Forepersons

The Committee declined to move forward with a suggestion from Judge Donald Molloy (21-CR-A) that it amend Rule 6(c) to authorize a grand jury foreperson to excuse members of the grand jury temporarily. The Committee learned that districts within the Ninth Circuit vary considerably as to who has authority to grant temporary excuses to grand jury members. The most common approach requires review by the district jury office. Other districts refer requests to the grand jury foreperson or to the chief judge. Only three districts (Idaho, Montana, and the N.D. California) allow the foreperson, acting alone, to grant temporary excuse requests.

The Committee saw no reason to displace the varying local practices with a uniform national rule, and no reason to favor one district's practice over others. The districts seem to have chosen systems that work well for them.

D. Time Limits on Habeas Dispositions in the Appellate Courts

The Committee declined to move forward with Mr. Gary Peel's suggestion (21-CR-G) that it adopt an amendment or new rule to deal with "non action" by federal appellate courts in habeas

appeals. The proposal did not include any evidence of a systematic problem in the courts of appeal, and appellate procedure falls outside the Committee's jurisdiction.

E. Rule 59(b)(2) Objections to Findings and Recommendations by Magistrate Judges

The Committee declined to move forward with Judge Patricia Barksdale's suggestion (21-CR-H) that it amend Rule 59(b)(2)—which governs objections to findings and recommendations by magistrate judges—to add language specifying a 14-day period to respond to objections. Judge Barksdale drew the Committee's attention to a discrepancy between Civil Rule 72(b)(2)—which provides a 14-day period to respond to objections—and Criminal Rule 59(b)(2)—which does not set a time for responses. Judge Barksdale provided no information suggesting that the current text of Rule 59 had created any problems, and Committee members thought that parties in criminal cases routinely file such responses. The Committee thus saw no need for an amendment.

F. Rule 49 and Pro Se Access to Electronic Filing

The Committee had a brief initial discussion of Sai's suggestion (21-CR-E) that the Committee expand access of pro se parties to electronic filing in criminal cases. Electronic filing has evolved significantly since the Committee amended Rule 49 in 2018, most recently in response to COVID-19.

Sai also proposed changes in the regulation of electronic filing in the Civil and Bankruptcy Rules. To facilitate cross-committee consideration of these related proposals, Professor Cathie Struve is convening a group made up of the reporters for the various Advisory Committees that will develop more information relevant to the issues.

G. Rule 49.1 and CACM Guidance Referenced in the Committee Note

The Committee discussed Judge Jesse Furman's suggestion (21-CR-I) to amend Rule 49.1 and its committee note. By way of background, in *United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021), Judge Furman held that a criminal defendant's CJA form 23s (and related affidavits)—submitted by defendants to demonstrate financial eligibility for appointed counsel—are "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common-law and the First Amendment. In contrast, the committee note to Rule 49.1 suggests that these forms should not be made available to the public. The committee note incorporates guidance from the CACM Committee and the Judicial Conference, and provides in relevant part:

> The following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> * * * * *
>
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

* * * * *

> To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).[8]

Judge Furman wrote that the Guidance is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." He proposed deletion of the reference to financial affidavits in the committee note, and the following amendment to Rule 49.1(d):

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

The Committee referred Judge Furman's suggestion to a subcommittee, which will consider the privacy interests of indigent defendants, their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee will also coordinate with the Civil and Bankruptcy Committees since their rules have similar language. Finally, the Committee will advise the CACM Committee that it is considering this issue.

H. Juneteenth National Independence Day

The Committee approved an amendment to Rule 45(a)(6) recognizing Juneteenth as a national holiday. At present, this is an information item. Final action will be requested at a later date when the parallel changes to the Appellate, Bankruptcy, Civil, and Criminal Rules will be presented together.

[8] This language was added after the public comment period. The committee note includes the following description of changes made after publication:

> Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

Appendix

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
Clear exception for historical importance?	Yes – "(vi) on petition of any interested person for reasons of *historical* or public interest…" (same as Reporters Committee)	Yes – "(vi) on petition of any interested person for reasons of *historical* or public interest…" (same as Bell & Shivas)	Yes – "(vi)(a) the petition seeks grand-jury records of *historical importance*"	Yes – "(vi)(b) the records have *exceptional historical importance*" Specifies that historical importance must be exceptional.	Yes – Same as 2011 proposal verbatim "(vi)(b) the records have *exceptional historical importance*" Specifies that historical importance must be exceptional.	Yes- *Exceptional or significant historical importance*.
Residual or catch-all exception?	Yes – "(vi) on petition of any interested person for reasons of historical *or public interest*" Public interest exception functions like a residual or catch-all. (Same as Reporters Committee)	Yes – "(vi) on petition of any interested person for reasons of historical *or public interest*" Public interest exception functions like a residual or catch-all. (Same as Bell & Shivas)	No – The only explicitly mentioned exception is for exceptional historical importance.	No – The only explicitly mentioned exception is for historical importance.	No – The only explicitly mentioned exception is for exceptional historical importance.	No – The only explicitly mentioned exception is for exceptional or significant historical importance. (Introductory paragraph references "historical value *and interest to the public*" but later refers only to historical value.)
Timeframe?	Somewhat – No specific timeframe but a factor for	Somewhat – No specific timeframe but a factor for	Yes – Uses the framework of the 2011 proposal but	Yes – After 30 years the court may authorize disclosure: "(vi)(c)	Yes – Uses the framework of the 2011 proposal but adjusts the	Yes – The courts may consider petitions for release of grand

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
	consideration is "(vi)(e) how long ago the grand jury proceedings took place" (Same as Reporters Committee)	consideration is "(vi) how long ago the grand jury proceedings took place" (Same as Bell & Shivas)	adjusts the specific timeframes involved and never explicitly references NARA or archival records. After 20 years the court may authorize disclosure: "(vi)(b) at least 20 years have passed since the relevant case files associated with the grand-jury records have been closed" After 60 years the records may be released: "(8) Nothing in this Rule prevents disclosure of grand-jury materials more than 60 years after closure of the case file"	at least 30 years have passed since the relevant case files associated with the grand-jury records have been closed" After 75 years NARA may release archival grand-jury materials in its collections: "(C) Nothing in this Rule shall require the Archivist of the United States to withhold from the public archival grand-jury records more than 75 years after the relevant case files associated with the grand-jury records have been closed." This proposal also recommends defining "archival grand-jury records" in the rules themselves	timeframe for when the courts can authorize disclosure from after 30 years to 50 years and does not set a time at which all archival grand-jury materials may be presumptively released (justification that this is too great a departure from traditional grand-jury secrecy). After 50 years the court may authorize disclosure: "(vi)(c) at least 50 years have passed since the relevant case files associated with the grand-jury records have been closed" This proposal also recommends defining "archival grand-jury records" in the rules themselves	jury information after 25 years following the end of the relevant grand jury. After 70 years, grand jury records would become available to the public in the same manner as other archival records in NARA's collections (requesting access at NARA facility or filling a FOIA request)

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
Incorporates *Craig* factors?	Yes – "in consideration of the following non-exhaustive list of factors" and then includes all 9 *Craig* factors. (some minor formatting differences but same as Reporters Committee)	Yes – "in consideration of the following non-exhaustive list of factors" and then includes all 9 *Craig* factors. (some minor formatting differences but same as Bell & Shivas)	No – Instead, uses the findings that the district court must make from the 2011 proposal with the exception of "(a) the petition seeks only archival grand-jury records" and of changing the timeframe for permissible disclosure from 30 years to 20 years. But in the suggestion, the authors write, "the 'special circumstances' test articulated in *Craig* and applied by district courts in several subsequent cases provides an appropriate starting point." (pg. 8).	No – Acknowledges *Craig* but believes those factors "are better left to elaboration in the Advisory Committee Notes and then to development in the case law" (pg. 7), and provides its own list of findings the district court must make: (a) The petition seeks only archival grand-jury records (b) The records have exceptional historical importance (c) At least 30 years have passed since the relevant case files associated with the grand-jury records have been closed (d) no living person would be materially prejudiced by	No – Acknowledges the relevance of the *Craig* factors for a contextual analysis of what constitutes "exceptional historical significance" but does not include in text of rule. Instead, uses the findings that the district court must make from the 2011 proposal with two alterations. (1) Says, "(a) the petition seeks archival grand-jury records" rather than "(a) the petition seeks *only* archival grand-jury records" in the 2011 proposal. (2) Changes the timeframe for permissible disclosure from 30 years to 50 years.	No – No explicit mention of the *Craig* factors in the memo. The memo does note that the district court must find that (1) No living person would be materially prejudiced by disclosure (or that prejudice could be avoided through redaction or other reasonable steps) (2) Disclosure would not impede any pending government investigation or prosecution. (3) Release should only be authorized when the court finds that the public interest in disclosing outweighs the public interest in secrecy.

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
				disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct (e) Disclosure would not impede any pending government investigation or prosecution and (f) No other reason exists why the public interest requires continued secrecy.		
Codifies the inherent authority of the district courts?	Yes/Somewhat – "(vii) on petition of any interested entity or person for any additional reason presenting exceptional circumstances where disclosure may be authorized *pursuant to the inherent authority of the court*."	Somewhat – "(8) Nothing in this rule shall limit *whatever inherent authority courts possess* to unseal grand jury records in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (8)	Somewhat – "(9) Nothing in this Rule shall limit *whatever inherent authority the district courts possess* to unseal grand-jury records in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (9)	No – Not referenced in the text of the recommended amendment and in suggestion writes, "[t]he Supreme Court has specifically rejected the proposition that a district court has inherent authority to create exceptions to the rules of criminal procedure adopted	No – The DOJ would like the amendment to "contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive" unless the Court addresses that question in *Department of Justice v. House Committee on the Judiciary*. Oral	No – No reference to the inherent authority of the courts.

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
	"(viii) This rule recognizes and codifies the existence of the *inherent authority of the court* to authorize disclosure under exceptional circumstances" "(8) Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (8) leaves how much inherent authority the district courts have up for debate. However, (viii) codifies the existence of an inherent authority to authorize disclosure without the	leaves how much inherent authority the district courts have up for debate. However, the existence of the catch-all exception in the Reporters' Committee suggestion means that courts should not have to rely on inherent authority.	leaves how much inherent authority the district courts have up for debate.	by the Court in its rulemaking capacity." (pg. 4).	argument in this case was postponed and has not been rescheduled.	

Suggestion	**Bell & Shivas** (21-CR-F)	**Reporters Committee** (20-CR-D)	**Public Citizen** (20-CR-B)	**2011 DOJ Proposal** (11-CR-C)	**2020 DOJ Proposal** (20-CR-H)	**2021 DOJ Proposal** (21-CR-J)
	qualification of "whatever", and the existence of the catch-all exception in the Bell & Shivas suggestion means that courts should not have to rely on inherent authority.					
Final decision language?	No – Not discussed.	No – Not discussed.	Yes – "(vi) An order granting or denying a petition under Rule 6(e)(3)(E)(vi) is a final decision for purposes of Section 1291, Title 28."	Yes – "(vi) An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28."	Yes – "(vi) An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28."	No – Not discussed

TAB 6B

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
November 4, 2021

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met in Washington, D.C. on November 4, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Timothy M. Burgess
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr.
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin (via Microsoft Teams)
Angela Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Kenneth A. Polite, Jr., Esq., *ex officio*[1]
Judge Jacqueline H. Nguyen (via Microsoft Teams)
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Brittany Bunting, Administrative Analyst, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Acting Chief Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center (via Microsoft Teams)
S. Scott Myers, Esq., Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)

[1] Mr. Polite and Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers on Microsoft Teams:

Amy Brogioli	American Association for Justice
Joseph J. Bell, Esq.	Bell & Shivas, P.C.
Dr. Robert G. Bell	Professional Associate of Bell & Shivas
Grant Blakenship	Reporter, Georgia Public Broadcasting
Patrick Egan, Esq.	American College of Trial Lawyers
Mimi Ferraioli	Professional Associate of Bell & Shivas
John Hawkinson	Freelance Journalist
Jeffrey S. Katz, Esq.	Professional Associate of Bell & Shivas
Brian C. Laskiewicz, Esq.	Bell & Shivas, P.C.
Maryann Locklin	Professional Associate of Bell & Shivas
James K. Pryor, Esq.	Practitioner
Larry Purpuro	Professional Associate of Bell & Shivas
Judith Ricucci	Professional Associate of Bell & Shivas
Mike Scarcella	Legal Affairs Reporter, Reuters
Ms. Shirley	Professional Associate of Bell & Shivas
Dan Turner	Professional Associate of Bell & Shivas
Kristie M. Ward	Paralegal, Bell & Shivas
Laura M.L. Wait, Esq.	Associate General Counsel, District of Columbia Courts
Laura Wexler	N/A
Allison Zieve, Esq.	Director, Public Citizen Litigation Group

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the members in attendance, noting that many had travelled substantial distances. He also thanked the members of the public who were observing the meeting for their interest and for the proposals some of them had made. He drew attention to the fact that this was the first meeting for several new members: Judge André Birotte, Judge Jane Boyle, Judge Robert Conrad, and Assistant Attorney General Kenneth Polite, and for Angela Noble, the new clerk of court representative. The marshals provided a short security briefing, and Ms. Bunting reviewed best practices for in-person and virtual participants.

Ms. Wilson presented the Rules Committee Staff report, drawing attention to the materials beginning on page 56 of the agenda book. At its June meeting the Standing Committee approved proposed new Rule 62 and the other emergency rules for publication. The proposed emergency rules have been posted online, and copies have been sent to all members of the federal judiciary as well as many other interested parties. Comments are due February 16, 2022. The Standing Committee also transmitted the proposed amendment to Rule 16 regarding expert disclosures to the Judicial Conference, which approved them at its September meeting. The proposed amendment has now been transmitted to the Supreme Court, which has until May 1, 2022 to adopt and transmit to Congress.

Ms. Wilson also drew attention to two charts. The first, on pages 125–29, is a regular feature of each agenda book that tracks the progress of each amendment to the Federal Rules. The second, pages 130–33, describes and tracks all legislation that would directly or effectively amend the Federal Rules. She noted that since her report at the spring meeting there has been no action on the only bill that would affect the Federal Rules of Criminal Procedure, the Sunshine in the Courtroom Act—which would impact Rule 53. Ms. Wilson noted that she and the Rules Law Clerk will continue to monitor all legislation that may affect the Federal Rules.

Judge Kethledge drew the Committee's attention to the draft minutes. Professor King asked members who found any typographical errors that did not affect the substance to notify the reporters. A motion to approve the minutes was made, seconded, and passed unanimously.

Noting that there were many new members, and that it had been two years since the Committee met in person, Judge Kethledge asked each member, as well as those who were participating to support the Committee, to introduce themselves.

Commenting that that this was his ninth year on the Committee and his third as chair, Judge Kethledge made some opening comments about the nature of the Committee's work. He first stressed the importance of meeting in person and the important bonds of trust members have in one another, which transcend the things that often divide people. That trust in one another's integrity, good will, and good faith (along with the members' expertise) is the Committee's core asset. It cannot be developed over Zoom. He expressed gratitude for the many members who had been able to attend in person, but noted the need to understand that given different circumstances not all were able to do so. It is important for members to get to know one another as individuals (not on the basis of geography or other affiliations) in order to trust one another and work together. Judge Kethledge explained that the Committee's role is advisory. Its job is not to reflect public opinion, or to advance the interest of one side or another in criminal litigation. Rather, it is to discern, as well as we can based on our diverse experiences and working together, the best response to issues in the criminal justice system.

Rule 6: Historical Exception to Grand Jury Secrecy

Judge Kethledge introduced the grand jury items on the agenda with comments about the grand jury's importance and its ancient lineage, which traces back to the reign of Henry II. The grand jury provided an important role for citizens and developed into a check on prosecutorial power.

He urged the Committee to listen—but not defer—to the subcommittee. He noted that the Chief Justice's appointment of each member showed his confidence in their perspectives. The Committee should take up each issue in a plenary fashion.

Judge Kethledge noted the deep expertise the subcommittee brought to bear on the first item concerning the grand jury secrecy: proposals for an exception for records of historical or public interest. Judge Garcia, the subcommittee chair, was U.S. Attorney when the disclosure of the records concerning Julius and Ethel Rosenberg was litigated. Professor Beale argued the

government's case in *Douglas Oil v. Petrol Stops*, one of the leading Supreme Court cases on grand jury secrecy. Professor Beale and Dean Fairfax are also noted grand jury scholars, and the other members had seen the grand jury up close in practice, including their work representing witnesses and targets who were not prosecuted.

Judge Garcia presented the subcommittee's report. By a vote of five to two, the subcommittee recommended against proceeding with an amendment to allow disclosure of grand jury records of historical interest. When this issue was last considered in 2012, the Committee concluded that no amendment was needed because the system was working well. But since that time, the *McKeever* and *Pitch* cases created a circuit split, placing the D.C. and Eleventh Circuits on one side, barring disclosure, and other circuits, including the Second Circuit with the *Craig* decision, recognizing an exception to grand jury secrecy that could allow disclosure of records of exceptional historical importance. Additionally, in a statement accompanying the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to look again at the issue. The Committee received multiple proposals for an exception for historical records (including proposals from the Department of Justice), and it referred them to the subcommittee.

Judge Garcia described the subcommittee's process. It reviewed the Committee materials from 2012, as well as the new submissions (some from groups that had previously urged an amendment as well as a proposal from members of the law firm who represented Professor Pitch). It held a miniconference with numerous panels to obtain a wide variety of perspectives. Participants included former U.S. Attorney Patrick Fitzgerald and Beth Wilkinson, former Principal Deputy in the Terrorism and Violent Crime Section, both of whom also had experience representing witnesses in a range of cases, including terrorism, drugs, and special counsel investigations. Other participants included a historian, representatives from Public Citizen and the Reporters Committee, the general counsel of the National Archives and Records Administration, career attorneys from the Department of Justice, and a member of the public who had been injured by grand jury leaks. It was a mix of perspectives, including participants who were working in and with the grand jury, and those who viewed grand jury records as a repository of information of exceptional historical or public importance. The miniconference was exceptionally helpful to subcommittee members.

The subcommittee proceeded first to draft the best possible amendment and committee note, considering the issues that such an amendment would raise before turning to the question whether to recommend pursuing the amendment. Judge Garcia explained that the subcommittee also had to decide what to say about the question of the courts' inherent authority to release grand jury materials. The subcommittee, by a vote of six to one, recommended against wading into that area. In the members' view, this is an Article III issue that is not within the Committee's authority. For the same reason, the subcommittee decided not to address the issue of the exclusivity of the exceptions in Rule 6(e).

Overall, Judge Garcia explained, the subcommittee took a minimalist approach, which he defined as a relatively short textual amendment with more information in the committee note. He

then explained the Committee's thinking on each of the issues noted in the report, beginning on page 137 of the agenda book.

The subcommittee limited the amendment to records of historical interest—rather than the broader criterion of public interest—and it limited the exception further to records of "exceptional" historic interest. It declined, however, the Department's suggestion that the amendment be limited to "archival" grand jury records, as well as Professor Craig's suggestion that the rule provide a special role for historians.

The subcommittee rejected the suggestion in several of the proposals to include in the text the list of factors identified in the Second Circuit's *Craig* decision. Instead, it referred to those factors in the committee note.

The question whether to limit the exception to records only after a stated number of years (a hard floor) was especially difficult. The proposals the Committee received varied widely, from no floor to a floor of 20, 30, or 50 years, with the Department of Justice advocating for each of these at various times. The subcommittee decided the rule should include a floor. Members were influenced by the testimony at the miniconference and the experience of some subcommittee members with witnesses in cases involving terrorism, drugs, and especially sensitive cases. In those cases, witnesses show real hesitation and fear. In the grand jury investigation of the 1993 World Trade Center bombing and other terrorism cases, Judge Garcia recalled seeing that hesitation and fear. He noted that those cases were now more than 20, but less than 30 years ago. He had been thinking of the fear of those witnesses, the role of the grand jury, and the need for it to function effectively.

Judge Garcia explained that the subcommittee settled, uneasily, on a floor of 40 years. The members recognized that any floor could be seen as too low, but also that those who supported disclosure might prefer no rule to one with too high a floor. The floor would be calculated from the closure of the case by the Department of Justice. The Department's procedures for closure are complex, and Judge Garcia noted that members might have questions about that for the Department's representatives.

The subcommittee decided to draft the rule text stating the standard for disclosure in general terms: whether the public interest in disclosure outweighs the need for continued grand jury secrecy. It placed other issues in the note, specifically the impact on any living person or prejudice to an ongoing investigation. The note also emphasizes that this is a narrow exception.

The subcommittee took the same approach to procedural requirements. The text includes only notice to the government and an opportunity to be heard. It leaves flexibility for the court to tailor other procedures to the requirements of an individual case.

The subcommittee rejected proposals to end grand jury secrecy after 60 or 75 years. Like the Advisory Committee in 2012, the subcommittee saw this as too great a departure from the principle of grand jury secrecy.

After it worked though all of these issues and approved the discussion draft on pages 153–55 of the agenda book, the subcommittee took up the question whether to recommend that the Committee move forward with this proposal. Although it was not unanimous, the subcommittee voted to recommend that the Committee not proceed with the amendment.

Judge Garcia described the evolution of his own views. He came in with experience as U.S. Attorney when the court was considering the petition to disclosure the *Rosenberg* records. He felt an interest (as did many others) in the disclosure of the records of such a historically significant case, but also had reservations arising from his experience with grand juries investigating violent crimes, and his representation in private practice of witnesses and targets. But as the subcommittee worked to develop the draft rule, he was increasingly struck by the strangeness of adding a historical exception to the Federal Rules. The existing exceptions to grand jury secrecy in Rule 6(e) all go to investigative and national security interests. An exception for historical interests—even exceptional historical interest—seems unlike the other exceptions recognized in the rule. In 2012, the Committee recognized that the system was working well. Courts were using inherent authority only in truly rare cases, and that led to the decision not to pursue an amendment.

After thanking Judge Garcia for his thorough presentation, Judge Kethledge said he would like comments from other members of the subcommittee first, before calling on other members for their initial thoughts. Then he would open the floor for discussion.

A subcommittee member identified herself as a defense lawyer in Philadelphia. She said her experience had driven her focus. The suggestions we received focused on what she called the "back end"—questions such as how to define historical interest and the factors to be considered. But in her professional experience in two cases (state and federal), the grand jury proceedings were distorted "up front." In a proceeding that involved a participant in the miniconference, the member said she observed the absolutely devastating effect that a leak, a breach of grand jury secrecy, had on the integrity of the grand jury process. So, her focus throughout had been on the "front end": how to maintain the integrity of the process from the outset. Miniconference participants confirmed her view that the protection of the integrity of the process from the outset was more important than considering what might happen after 30, 50, or 70 years. Advising a witness who is about to testify about exceptions to secrecy already undermines the process. Every grand jury witness she represented had asked "who will know what I say?" The more you have to describe exceptions, the more you undermine the process. Her driving principle was to maintain the grand jury's integrity on the front end.

Another subcommittee member emphasized the thoroughness of the subcommittee's process and noted that his views were well described in the third paragraph on page 145 of the agenda book. He commented that not only historians, but also sociologists and others might have scholarly interests and seek grand jury records of historical interest. Another issue of concern was placing the government in the awkward role of serving as the broker of competing interests. Reflecting on his experience giving warnings to witnesses when he was a federal prosecutor and preparing witnesses or targets, he thought having to explain the historical records exception would dilute the security that witnesses, subjects, and targets would feel.

A member of the subcommittee said the miniconference was very helpful and she thanked Judge Garcia for his summary. She ultimately agreed with the recommendation not to amend the rule. The discussion draft was well done, but the more she considered the issues in drafting, the more difficult they became. That was why ultimately she was not persuaded to support an amendment, especially in light of the problem of reassuring witnesses and their families. The historical records exception is qualitatively different than the other exceptions in Rule 6, and it is at odds with the core principle that grand jury secrecy is sacrosanct. And writing a rule for inherent authority doesn't make sense.

Mr. Polite began by noting that although he was a new member, he had had previous contacts with many of the members. He was an undergraduate with Dean Fairfax. He was a fellow AUSA with Judge Furman. He was a fellow U.S. Attorney with Judge Birotte. He was co-counsel with Ms. Recker. And Judge Garcia had hired him as an AUSA.

The Department of Justice appreciated the patience of the subcommittee. The Department's position has changed over the last three administrations, and Attorney General Garland has considered this anew. Despite the changes, there were constants. Mr. Wroblewski had been a pillar upon which the Department relied throughout. The Department consistently urged that the only exceptions to grand jury secrecy were those stated in Rule 6; it has argued for decades in cases across the country that the district courts have no authority to create exceptions beyond the text. There is now a circuit split on that issue. The Department has consistently supported an historical interest exception because it believes Rule 6 covers the waterfront of exceptions, but that in limited circumstances historically important grand jury materials should be made available to historians and others. A well-crafted amendment can preserve the critical tradition of grand jury secrecy and the primacy of the Federal Rules while allowing release in cases where significant time has elapsed and the public interest in the release of historical records outweighs the remaining need for continued secrecy.

The Department's 2011 proposal permitted release after 30 years if specific conditions were met: (1) the grand jury records had exceptional historical interest, (2) no living person would be materially prejudiced by disclosure, and (3) disclosure would not impede any pending grand jury investigation or prosecution. The 2011 proposal also provided blanket authority to the archivist to release grand jury records 75 years after closure of the relevant records without a petition to the courts.

The Department, Mr. Polite said, still believes this is generally the right approach. It recognizes that there is no clear cut or scientific basis for the number of years for the threshold for release, and its proposals have laid out different benchmarks. The Department supports a 25-year time frame if the rule limits release to cases in which the district court finds (1) no living person would be materially prejudiced by disclosure, (2) disclosure would not impede any pending grand jury investigation or prosecution, and (3) the public interest in disclosure outweighs the interest in retaining secrecy. The Department also supports a temporal end to secrecy for materials that become part of the National Archives. The need for secrecy in case of historical importance is eventually outweighed by the public's legitimate interest in preserving and accessing documentary

legacy, and after 70 years the interest in preserving secrecy and in the privacy of living persons normally has faded.

The next speaker identified herself as a Federal Defender and the other subcommittee member who favored adding an exception to Rule 6. She noted that not all defense attorneys were in agreement. All recognized the competing interests in individual privacy versus the value of reviewing the government's use of its authority. From the public interest perspective, the grand jury is a powerful, secret institution the government uses to gather information about people and entities, require testimony, and seek charges. There is a public benefit in some cases in having that information for historians and those who may want to revise how the government works. Sunshine on the use of authority is beneficial.

The member favored an exception for materials of historical interest, and she argued that the split in the circuits made it incumbent on the Committee to decide what the rules do allow. If the Committee takes no action, the district courts and courts of appeal will have to decide how to handle petitions for disclosure. Some circuits (such as the Second and Seventh) now allow disclosure, but others (including the D.C. Circuit and Eleventh) do not, and a case on the issue is now pending in the First Circuit. If we don't come up with a limited exception, courts will continue to review petitions for disclosure, coming to various conclusions, including some with less protection for grand jury secrecy than we might wish. So we should decide what the rule should allow. There is no need to decide the question of inherent authority. We can just say what the rule does allow. She supported a clear rule with disclosure permitted after 25 years. Forty years is excessive.

Judge Kethledge offered his own comments. The question before the Committee is a close one. Thinking of cases like *Rosenberg*, he could see the appeal of disclosure. The interest may be not only historical, but also whether the government's authority was abused, and it has been 40 years since the prosecution. On the other hand, this is like "high neck surgery" on a venerable institution in our criminal justice system. Evolved institutions like this one are distillations of experience and wisdom. They work in ways we are not aware of, and often benefit us in ways we do not understand. The potential for unintended consequences is greater than usual. But, as the last speaker said, the reality is that if our Committee does not act, the courts will. We now have a four to two circuit split, with the issue pending in another circuit, and Justice Breyer urged the Committee to resolve the issue.

The Committee's job, Judge Kethledge said, is to give our best advice on the question whether, as a matter of positive law, we should have an exception in the rule. That's the only decision the Committee has to make, and the only one it has the authority to make. The question of inherent authority—whether the authority to disclose grand jury material inheres in the judicial power vested by Article III—is beyond the Committee's purview. The Committee decides procedural matters, and that is a question of substantive constitutional law. As Justice Barrett wrote as an academic, sometimes courts have inherent authority, but Congress can override that with positive law. So the Committee should decide whether it thinks an exception to grand jury secrecy is a good idea.

Noting that he would not repeat points made in Judge Garcia's excellent summary, a member emphasized the value of the miniconference, especially the statement of Patrick Fitzgerald, who emphasized that the long memories that terrorist and organized crime groups can extend not only to witnesses but also their families.

Judge Kethledge then called on members not on the subcommittee for their initial thoughts.

A member expressed concern about the slippery slope created by adding an exception for historical interest. What, exactly, is historical interest? Disclosure in the interest of "good government" is another very broad concept. The member advocated waiting for the Supreme Court to define the courts' inherent authority, rather than trying to guess or put a floor on it in this context.

Another member agreed it was a difficult issue. He said he had struggled with it, but at the end of the day he was most struck by the concerns about the long memories of some groups, witnesses' fear, and unintended consequences. He had concluded that the preservation of the institution outweighs the potential benefits of greater disclosure. It is better to leave things as they are.

The next member stated that the Department of Justice's comments were lucid and thoughtful, but subject to change. In contrast, the views of line prosecutors were less subject to change, more focused on the ultimate purpose and effect of the grand jury, and weighed heavily in favor of secrecy. The member favored being careful and prudent about change–about both intended and unintended consequences.

Another member characterized his own views as "persuadable." Like Judge Garcia, the member initially felt an historical interest exception would be valuable if it could be put into a rule that would still be protective of the functioning and secrecy of the grand jury and the protection of the participants. He raised a several questions for discussion. First, for those with experience in private practice representing witnesses, wouldn't it be easier to explain an exception in the rule, rather than the effect of a multifactor test set out in cases like *Craig*? And for miniconference participants, since some courts have been considering and granting disclosure of historical records for some years, have there been any adverse effects? Has this impaired the function of the grand jury? Has there been any harm to witnesses, members of grand juries, or others?

A member of the subcommittee who represents witnesses responded that she had never advised those witnesses of the historical interest exception or *Craig* factors. Cases of extreme historical interest like *Nixon* and *Rosenberg* don't come up often enough for her to try to explain issues like inherent authority to lay witnesses, who would not understand if she tried.

On the second question, Judge Garcia said there was no testimony that anyone was hurt by the disclosures in *Rosenberg*, etc. Indeed in 2012 the Committee decided there was no problem with disclosure in these very rare cases. But amending the formal rule to give this authority would change the calculation. Plus the subcommittee did hear that witnesses fear disclosure. He himself had known potential witnesses who were so frightened they left the country to avoid testifying.

Professor Beale noted the second question was asked at the miniconference. Ms. Shapiro, who has for many years litigated these cases for the Department of Justice, stated that as far as the Department knows, no identifiable person has been hurt by disclosure for historical interest. Rather, the harm is to the institution of the grand jury and its functioning in the future. Harm can be cumulative, she said, and in some cases speculative.

A member asked if he was correct in understanding that the Department of Justice had been consistent for the last three administrations on the following points: (1) an exception for historical grand jury records should be recognized, (2) this can be done consistent with the protection of grand jury secrecy and the functioning of the grand jury as an institution, and (3) the rulemaking process is the way to do this.

Mr. Wroblewski said that was correct.

Another member expressed appreciation for the subcommittee's work and explained her own perspective and experience. She was an AUSA for 17 years, working with many grand juries, and has been on the defense side for nearly 10 years, representing witnesses and targets who have not been charged. She is concerned not just with the potential for physical injury from disclosure, but also injury to businesses and personal reputations. She now advises her clients that their testimony cannot be disclosed without a court order. If someone is indicted, the protections for witnesses are greatly reduced. Her main concern is the sanctity of the grand jury and the secrecy that protects those never indicted, who have no forum in which to respond to accusations. The grand jury hears only one side; it never hears the accused person's side.

The member said she was pleased that the discussion draft did not include a broader exception for disclosure in the public interest. Her experience included civil litigants seeking grand jury materials. For example, after a major investigation of the failure of a large financial institution, there were multiple civil lawsuits seeking to obtain all of the grand jury's records. The government prevailed in those cases. Other private litigants were affected by water pollution, and indeed the whole city was affected. One might argue there was a public interest in disclosure because of the sheer number of affected persons. She agreed with the earlier comment about a potential slippery slope starting with historical interest and the interest in government function. She concluded with a question: since the Supreme Court can resolve the circuit split, what is the harm in not taking this up now?

Judge Furman, the Standing Committee's liaison, thanked Judge Garcia and the subcommittee for its work on a close question with strong arguments on both sides. Noting he was speaking only for himself, he said he favored an amendment. Otherwise the Supreme Court will have to resolve the circuit split. If the Court agrees with the Department that the exceptions in the rule are exclusive, then there should be no disclosure in *Rosenberg*, though most of us seemed to favor disclosure (though it should be *very* rare). Alternatively, if the Court decides there is inherent authority, that would leave its development to the common law process, without the thoughtful limits the Committee would design. If we don't adopt a rule, we kick the can down the road to the courts. The rulemaking process would be superior. For some, the most salient concern is the long

memories of certain groups, such as terrorists and drug cartels. Judge Furman noted he had served as a prosecutor and was aware of these concerns, but he saw very little danger that records in these kinds of cases would be released under the proposed rule, though it would allow disclosure in *Rosenberg*.

Judge Furman thought the most salient concerns are about what one member called the "front end." He pointed to two reasons to think a rule would not cause harm at the front end. First, the Department of Justice, which is the most concerned about preserving the functioning of the grand jury, supports a rule. And second, since there are already multiple exceptions in Rule 6(e), one cannot now tell a witness that his or her testimony cannot be revealed. Indeed, a rule would be easier to explain to a witness than the *Craig* factors. Even national security materials are eventually released. On balance he supported a rule.

Judge Bates thanked the subcommittee for its work on a difficult and close question, and stated that he shared many of Judge Furman's views. He asked whether it was the subcommittee's intent to limit disclosure to cases like *Rosenberg*, to that narrow a category. If so, there is less concern about a slippery slope. Judge Bates thought it was hard to imagine that more than one tenth of one percent of cases would fall into that narrow definition of exceptional historical interest *and* the public interest in disclosure outweighs the need for continued secrecy more than 40 years after the case closed. So if the rule is that narrow, perhaps the concerns expressed are not as weighty.

Judge Garcia responded that the subcommittee tried to capture what the Committee in 2012 thought had been working well: disclosure only in truly exceptional cases. But as we tried to put this into a formal exception, it was difficult to replicate that limited approach. Although the discussion draft represents our best effort to do that, subcommittee members still were uneasy that whatever we put in the rule it will not be exactly that.

Judge Garcia thought it was hard to analogize the release of grand jury records to the release of national security materials. Like many of the members, he had dealt with intelligence agencies and national security issues, and he commented that they have their own system to deal with sources and methods, which are different than the grand jury.

So the subcommittee's goal was to bottle those previous inherent power cases in a rule, but the concern is that incorporating it in Rule 6 may change the calculus.

Professor Coquillette commented as a legal historian, noting that he and a coauthor had recently completed a two volume history of Harvard Law School that resulted in the revocation of its shield. Harvard Law School had a 60 year seal on historical records, and a 90 year seal on records concerning tenure and promotion. Professor Coquillette said he and his coauthor were able to work with those limits, finding alternative sources—as there must be for grand jury minutes. On the one hand, he stressed, history is very important for the health of our country. On other hand, historians can work effectively under a rule that precludes disclosure when there would be material prejudice to individuals and would bar disclosure for 60 years.

In response to the question of the breadth of the proposed exception—which might determine how much it would raise various concerns—Professor Beale drew attention to the discussion draft beginning on page 153. The text limits disclosure to cases of "exceptional historical interest," and the note strongly signals this is like the very restricted common law approach, referring to the *Rosenberg* and *Nixon* cases to define exceptional historical interest. The goal was to carry forward that very limited category.

Professor Beale also noted that in some respects the draft rule is *narrower* than the common law precedents because it applies only after 40 years, though some of the cases had allowed disclosure earlier. She thought some proponents of disclosure might prefer no exception in the rule, and the applicability of the *Craig* factors. If disclosure is to be permitted under any circumstances, this rule would arguably cabin it more than the current common law precedents, which in some cases allowed disclosure, for example, after 30 some years. The draft rule also requires the court to find that the public interest in disclosure outweighs the interest in continued secrecy. That should ensure that judges would be made aware of the long memories that are of concern in certain cases. There may still be an unintended signal from adding one more exception of a different kind. But the goal was to write a rule that would be no broader, and in some senses narrower, than what the courts have been doing, and to set clearer boundaries. Some might prefer broader disclosure in circumstances where some courts would permit that now. So it presents a close question.

Judge Garcia had faith that in terrorism cases courts would consider the effect of disclosure on witnesses, but he still had concerns about the "front end" functioning of grand juries. Even if we are confident courts would not release material regarding individuals in investigations concerning violent crimes or drug cartels, there are concerns about how adding an exception would influence the process. In response to a question about the *Rosenberg* case, he explained that it arose in the Second Circuit, where the courts apply the *Craig* factors under their inherent authority outside Rule 6.

A member who had earlier expressed support for the subcommittee's decision not to propose a broader public interest exception commented that she had struggled to understand how to define the concept of public interest for the historical interest exception, and to balance it against the need for continued secrecy. Another member chimed in, agreeing with the concern that private interests could override the need for secrecy.

Judge Kethledge asked for further discussion on the question whether to propose an amendment, focusing on what members had been calling the "front end" concerns. He asked members whether these concerns would be assuaged if we have a *very* narrow protective rule: a threshold of at least 50 years, extraordinary historical interest, and the interest in disclosure outweighs the need for continued secrecy. Or would it still be impossible to reassure witnesses, so that the institution of the grand jury would suffer?

Judge Garcia responded that this issue was critical for many on the subcommittee. The majority wanted to further narrow the rule, for example setting a higher number of years for the

floor. Eventually it was an almost astronomical number, say more than 50 years. At that point, the rule would not capture prior cases where disclosure had been allowed, and it was unclear whether it would make a difference to explain a 50-year versus a 35-year floor to a witness.

The member who first articulated the "front end" concerns said when she talks to witnesses in high profile cases, she doubts they could distinguish between exceptional historical interest and the current case in which they are being called to testify. Instead of thinking about the *Rosenberg* case, they will be thinking of the publicity in the current case. So with even the narrowest and most restrictive rule, she believed an explanation of the exception would undermine the quality of the testimony. No limits on the rule could alleviate her concerns.

Judge Kethledge asked whether a highly restricted rule with a threshold of 60 years would alleviate the concerns. The member responded that she did not know if that would be sufficient. She explained that the leak discussed at the miniconference concerned a towering figure in Philadelphia's civil rights community, whose reputation and legacy were destroyed by misrepresentations concerning a targeted leak. Even after 60 years such revelations would have an impact.

Another member commented that in his youth as a prosecutor, 50 years seemed a long time, but less so now. If a contemporary researcher wanted to explore federal drug policy in the 1980s and 1990s, physical safety could still be an issue for witnesses and their families. Perhaps the judge would take that into account. The member also noted that in the academic world there is now a focus on names and legacies, and names are being removed from buildings and programs. Decades ago, grand jury witnesses were told their testimony would *never* be disclosed. That might make someone think twice if a nebulous historical interest exception is written into the rule. But he also recognized strong arguments the other way. He agreed there was only a remote chance of disclosure in a run of the mill case, but added that the exception would burden the discussion with witnesses, and disclosure could affect their reputations, impacting their children, grandchildren, etc. Judge Kethledge added that the reputation of targets could be affected as well.

Mr. Polite emphasized that the Department of Justice had consistently sought to limit the exception to cases in which the court finds no living person would be materially prejudiced by disclosure and no pending investigations would be prejudiced. These requirements are not in the current Committee discussion draft (though they are in the committee note). The Department continues to support their inclusion in the text.

There was discussion of the question whether adding the historical interest exception would affect the inherent authority issue. Judge Kethledge said it would have no de jure effect, but would have an effect de facto. Professor Beale noted that there have been very few inherent authority cases granting disclosure, and most of them have concerned historical interest. A few, such as the *Hastings* case, could have been decided on alternative grounds; some concurring judges in *Pitch* argued that inherent authority was not needed because disclosure could be made under another exception in Rule 6(e). Mr. Wroblewski pointed out, however, that Chief Judge Howell had raised the use of inherent authority in other grand jury contexts. So even if we resolve historical interest,

there still will be other inherent authority issues. Professor Beale agreed that this was an important qualification to her answer. Judge Kethledge observed that, as Professor Barrett had written, everyone agrees that district courts have some inherent authority, but the courts do not control the grand jury, so their authority over the grand jury may differ from that over other matters.

Judge Kethledge again asked members for any further comments on the question whether even a very narrow rule would still have a negative impact on the "front end," the functioning of the grand jury.

A member who supported an amendment explained that the current rule already provides multiple exceptions to secrecy, including use in a criminal case. Anyone advising a grand jury witness now has to say that if this person is indicted, your testimony may be disclosed. Since there are many other more important factors, such as leaks, she thought the disclosure of the new historical exception would have little impact on the "front end."

Judge Kethledge expressed concern that creating an express exception for historical importance could send a signal to potential leakers that disclosure is not categorically a bad thing. A potential leaker might think, "This is where they draw the line on the public interest in disclosure, but I draw it here."

Professor Beale drew the Committee's attention to another potentially broad exception of which witnesses should be informed: disclosure for use "preliminarily to or in connection with a judicial proceeding." For that exception, the petitioner must show "particularized need" to warrant use in a later civil case. Because there are already multiple exceptions to grand jury secrecy, this brings the Committee back to the question how much difference it would make to add this additional exception.

Following a lunch break, Judge Kethledge reconvened the meeting and asked for discussion regarding the threshold question: Whether the Committee ought to proceed with a new exception to Rule 6. If it the answer was yes, then they would work out the particulars.

A member reiterated her position the Committee should recommend an exception. She said she appreciated the comments about the Department's consistent position on several of these points and that the rulemaking process is the best place to address the issue of releasing matters of historical importance. She said she hoped that the discussion had brought more people around to the idea that this is the right body to add an exception addressing exceptional historical significance. If this Committee does not do so, this important issue will be left to different district courts reaching contradictory positions, and it will leave to the Supreme Court the question of inherent authority. The Committee could sidestep that authority question by a clear rule that tells judges, "This is the floor after which a historical exception can be evaluated, and here are the criteria to use." An exception would create greater consistency and protect the grand jury more than leaving things open to the district courts.

She said the subcommittee took seriously the need to limit the exception. It came up with good language about "exceptional" historical significance. It debated whether the rule should set

a number of years in the rule as a floor, or whether it should say after a sufficient time, and everybody agreed there needed to be a number in the rule. She agreed with the Department of Justice that 25 years is the right number, after which the district court can decide whether the weighing of public interest versus the interest of grand jury secrecy merits disclosure. Putting a hard threshold in the rule, saying exceptional historical importance, and including language in the comments about other factors that the court should weigh, will serve the judiciary by clarifying this. In light of the discussion, she hoped people had been persuaded to agree with adding the exception.

A member clarified that the current draft has a floor of 40 years, not 25.

Judge Kethledge commented on which entity ought to make these decisions, following up on earlier observations about the difference between the rule approach and the common law approach. The rule approach has the benefit of a broadly inclusive deliberative process, involving many people with different experiences. It is a more aggressive process though, designing the entirety and trying to answer all the questions at one swoop. The common law methodology allows courts the option of being very incremental. In the *Rosenberg* case, a court might say we will allow an exception here, and these are the reasons why we think it makes sense here. Then in the next case the court will ask is this like *Rosenberg*? It might conclude the next case is not exactly the same, but that it has some other element the court thinks is important. These refinements accrete and start building out into a rule. It's a slower and different way of doing things. It doesn't have input from the broad group as we do, but it does have its own virtues. And even if the issue goes to the Supreme Court, the Court can do that too.

Judge Kethledge asked for other comments. Hearing none he asked for a roll call vote on whether the Committee thought it was wise to proceed with a new exception to the secrecy requirement in Rule 6. Professor Beale clarified, and Judge Kethledge agreed, that a yes vote would leave open the details of the draft, such as whether the floor is 25 or 50 years. The question is, in principle, if we have the best possible draft should the Committee move forward with it? Or not?

The Committee members voted nine to three not to proceed further with an amendment to Rule 6. (The Department of Justice and two other members voted to proceed.)

Judge Kethledge thanked everyone on the Committee for their careful attention, particularly the members of the subcommittee and Judge Garcia.

Rule 6: Authority to Temporarily Excuse Grand Jurors

Professor Beale turned to the agenda item at Tab 3, a proposal from the former chair of this Committee, Judge Donald Molloy, at page 254 of the agenda book. Judge Molloy suggested that Rule 6 be amended to authorize the grand jury foreperson to give temporary excuses to individual grand jurors. He noted that this worked well in his district, and that he had been surprised to learn that other districts in the Ninth Circuit followed different practices. The proposal had been referred to the Rule 6 subcommittee.

With Judge Molloy's assistance, the subcommittee learned about the wide variation of practices in the districts of the Ninth Circuit, shown on the chart on page 252. Three districts said the foreperson cannot grant temporary excuses. Other districts allow the foreperson to temporarily excuse grand jurors as Montana does. And some districts permit only the jury office, or only the judge to do so.

The subcommittee thought this was sufficient information without surveying the policies in other circuits. Any national rule would require the majority of districts in the Ninth Circuit to change their procedures, even though no one had indicated that the procedures in those districts were unsatisfactory.

Although Judge Molloy reported that what they were doing in Montana worked very well, and other districts may like that approach, those districts could adopt the practice by local rule if they wished to do so. Some districts reported reasons for their different rules. For example, Arizona said they did not want to put this responsibility on the individual jury foreperson, and it was easier for the jury office to handle excuses, as it is looking at the quorums. Other districts prefer to leave this with the presiding judge, who develops a good overview.

The lack of uniformity has not been shown to be a problem. No one thought grand jurors were confused, or that they were concerned that they would have been treated differently in another district. Given the inconsistency, it was appropriate for the subcommittee to review the issue. But we investigated and concluded there was no need to move ahead with proposing a change in the national rules.

Judge Garcia, the subcommittee chair, added that the terrific survey revealed districts were using what worked for them. There is now flexibility that we would be taking away with a one-size-fits-all model. The subcommittee was unanimous. Professor Beale concluded that the subcommittee recommended that no further action be taken and that this item be removed from the agenda.

Judge Kethledge asked for discussion on the subcommittee's recommendation. Hearing none, he determined there was a consensus not to move forward. There was no objection to that conclusion. Professor Beale noted that Judge Kethledge will communicate the decision to Judge Molloy.

Rule 6: Authority to Reveal Grand Jury Information in Judicial Decisions

Professor King introduced the next agenda item, a proposal on page 263 of the agenda book at Tab 4, submitted to the Committee by Chief Judge Howell and Judge Lamberth from the District Court for the District of Columbia. In light of the D.C. Circuit's recent decision holding district courts do not have inherent authority to disclose grand jury information, Chief Judge Howell and Judge Lamberth sought clarification of their ability to publish decisions that include grand jury material. They expressed concern that without inherent authority they would not be able to continue their practice of publishing redacted judicial decisions that might reveal some grand jury matters. In the last paragraph on page 263 that carries over to the next page, they indicated that

this practice is critically important to avoid building a body of secret law in the grand jury context. They want to be able to explain their judicial decisions. In their view, sometimes that requires revealing grand jury information.

The subcommittee took this proposal very seriously. The reporters' memo to the subcommittee that appears on pages 265 through 276 discusses our research on how judges handled grand jury information in their decisions on issues such as motions to quash. We found judges were able to issue opinions on grand jury issues using redaction, sometimes noting that the grand jury material referenced in the opinion had become public and was no longer secret under Rule 6. Some decisions we found were redacted so heavily that it was difficult to tell what the motion was about or what the rationale of the decision was. But most of these opinions provided some information on the matter at hand, with redaction.

The subcommittee considered the memo, deliberated about the proposal, and concluded that an amendment to Rule 6 was not advisable. There were two rationales expressed at the time. One was that the current tools available to judges—particularly redaction—are adequate to allow for sufficient disclosure of their rulings. (Although subcommittee members commented that in some cases redaction had been insufficient and too much was revealed, no one suggested that we codify the rules for redaction.) The second reason that subcommittee members expressed for deciding not to move forward with the Howell/Lamberth proposal was that it was not ripe, and was only a hypothetical problem. There had been no ruling challenging an opinion on the basis that it violated Rule 6, and it was not clear that this would be a problem going forward. A third reason for not attempting to clarify this in Rule 6 was not discussed directly by the subcommittee, but it was addressed by the subcommittee when discussing the historical exception. The judges may have been seeking clarification in Rule 6 of their inherent authority, and the subcommittee was unwilling to add language about inherent authority to the rule. For those reasons, the subcommittee recommended that the proposal not move forward and that it be removed from the Committee's agenda. Professor King reemphasized that no deference whatsoever to the subcommittee's recommendation was expected or required.

Judge Kethledge asked Professor King about the point that the proposal was not ripe and asked what such a challenge would look like. Professor King responded that the government could object to a decision on a motion to unseal a document with redaction. Several cases involved a judicial opinion that had been sealed initially and then someone sought to unseal it. The judge consulted with the parties before unsealing it to see if the redaction in the opinion was adequate. It might come up in that scenario.

Judge Kethledge commented that judges usually don't circulate a draft opinion or tell the parties what they are planning to do. If a party says to the judge you need to do more to avoid revealing matters before the grand jury, and the judge disagrees, how can that be challenged? Mandamus the judge?

Professor King noted that several of the cases in the subcommittee memo did involve opinions in which judges explained that they had consulted with the parties, and that the parties

had agreed to the amount of redaction. She emphasized she did not want to mislead anyone about the weight that this particular concern had in the subcommittee's deliberations. Different members of the subcommittee may have been moved by different reasons. But the subcommittee was unanimous in its conclusion that redaction should be sufficient, and that no amendment was required.

Judge Kethledge opened the floor for comments, noting that it is a serious proposal, and the judges are probably most worried about instances where it appears that redaction would divulge information that does remain protected under Rule 6. What does the judge do in that instance? These judges want to have clarity about the law before they act.

Professor Beale added there could be close questions about whether something is covered by grand jury secrecy and whether the redaction is sufficient to prevent the disclosure. The judges in the D.C. Circuit have felt protected because if some disclosure does cross into that gray area, they believed they had the authority to reveal information as necessary to fully explain their ruling and the law. Their concern is that without clarification of that authority, judges will have to redact more, perhaps making the law less helpful. And we do not want secret law. The concern is this gray area. They were not saying that they could decide that they would release everything.

Judge Bates was asked to comment. He said that in the District of Columbia this is uniquely a chief judge problem. Issues with the grand jury go to the chief judge. That is why Chief Judge Howell, and one of her predecessors (Judge Lamberth) are most concerned. Most of the judges in his district never see this issue, so it is not something that they have experienced.

Judge Kethledge asked for additional comments. Hearing none, he asked if there was any disagreement with the subcommittee's recommendation. When no one responded, he concluded the sense of the Committee was to endorse the subcommittee's recommendation not to proceed further with this proposal.

Rule 49: Pro Se Access to Electronic Filing

Professor Beale introduced the agenda item at Tab 5, starting on page 278, which is a proposal to amend Rule 49 to allow pro se parties to file electronically, instead of prohibiting them from doing so unless the court finds good cause to allow electronic filing. It is a very thoughtful discussion by Sai, an individual who has done a lot of pro se filing. Sai argues it is a huge advantage to be able to use electronic filing and that the system is now stacked against pro se individuals. Sai has presented this argument to the Civil, Appellate, and Bankruptcy Rules Committees and has adjusted it in the context of criminal proceedings, recognizing the unique situation of prisoners. But pro se defendants who are not incarcerated, Sai argues, should have the same access as anyone else.

The reporters' memo explains that when the Committee amended Rule 49 in 2018, it thought a lot about whether, and under what circumstances, pro se defendants and prisoners should be permitted to file electronically. The committee note to Rule 49 recognizes that electronic and filing and service is in widespread use, but also that it is designed for attorneys and not for

laypeople. The Committee's judgment was that the rules must allow ready access to the courts for pro se defendants and incarcerated individuals. Perhaps in the future it would become more feasible for these persons to file electronically, but in 2018 they often lacked reliable access to the internet or email. Accordingly, Rule 49(a)(3) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Sai believes it is time to change that rule and open things up more for pro se parties on the criminal side as well as the civil side. The reporters for the Civil Rules Committee have noted that we are gaining relevant experience in courts that expanded access to electronic in response to COVID-19. But we do not know exactly what changes, including kiosks, are being made in the prisons to make electronic filing more available to individuals there, or more available to pro se criminal defendants. The civil reporters concluded it may be premature to amend the rule. Instead, they suggested, we might place the issue on a study agenda, and the committees could work together to gather information about what's happening, looking towards potential revisions in these parallel interlocking rules about pro se filing. Noting that the Civil Rules Committee had already met, Professor Beale suggested that Professor Struve or Judge Bates could report that committee's discussion of this proposal.

Judge Bates confirmed both the Civil and Bankruptcy Rules Committees had met. He said Sai is a very thoughtful litigant, with a lot of ideas, some of which have been taken up within the rules process. Judge Bates has asked Professor Struve to head up a discussion among all the reporters to identify a wise course forward for joint consideration and potentially for development of more information relevant to this issue. Professor Struve will be getting the reporters together to discuss it sometime in the future.

Professor Struve said she was looking forward to that joint endeavor. She noticed that the advisory committees have very distinct perspectives based on the kinds of things that tend to happen in their particular sets of rules. The bankruptcy folks have a particular perspective based on the hundreds of different kinds of docket events that you could have in a bankruptcy case. The civil rules folks are intrigued by this, and are focusing possibly on the distinction between case initiating filings and other filings, once a case is under way. The appellate folks have been looking with interest at the discussions in other committees and saying maybe we could have an appellate rule on this, even if the trial courts don't go for it yet. So it will be interesting to see how much develops jointly and how much develops in different ways across these sets of rules.

Judge Kethledge asked members for their thoughts, though he noted that the Committee would not be acting on the proposal immediately.

The clerk of court liaison commented that there many logistical issues involved in putting something like this together, including, for example, what version of CM/ECF each district uses, and attorney admissions issues, which limit the options now in the member's district. It is going to be very difficult. The member was not opposed to a rule like this, but to have uniformity is going

to be a tremendous task. She welcomed the idea of putting a subcommittee together to discuss it or to have further discussion on it, and thought it was worth exploring.

Judge Furman stated he was in favor of providing electronic access to those who are able to use it and do not abuse it, and that he supported a joint venture to explore it further. He was curious about how much of an issue or a problem it is. In his district there is a form to apply for ECF privileges as a pro se litigant, and the applicant must attest to certain things. That conveys a sense of seriousness about it, but he said he basically grants any application of that sort. In the pandemic his district has allowed people to email things to be filed. It might be better putting the onus on a pro se litigant who wants this privilege to request it, but maybe it is a problem elsewhere. This is an empirical question to investigate.

A member noted that there are very few pro se defendants who are not in prison in her district. She also noted that where there is a 2255 motion, there is a criminal case and a civil case going along together. She did not know if this pro se filing would count for the 2255's, too. She had no opinion about the proposal.

Judge Kethledge said because this is a reporters' task at the moment, he would not be convening a subcommittee. Professor Beale confirmed that was her understanding. If the reporters determine they need responses from each advisory committee on particular questions, then a subcommittee might be needed. But it is too early to say.

Time Limits on Habeas Dispositions in Appellate Courts

Professor King introduced the proposal at Tab 6, page 308, which is a suggestion for time limits for courts of appeal to decide matters in habeas cases. This is another proposal from Mr. Gary Peel who came to the Committee a few years ago proposing that something be done to speed up district court rulings in habeas cases. At that point, there was evidence of significant delays in district court disposition of habeas cases, enough to concern the Committee. The Committee referred the issue to the Judicial Conference Committee on Court Administration and Case Management ("CACM") for study. This proposal concerns courts of appeal, which are not in this Committee's bailiwick. Also, the proposal was not accompanied by any evidence that there is a systemic problem at the courts of appeal. The reporters recommend that the Committee decline to take further action on the suggestion and remove it from the Committee's agenda.

Judge Kethledge asked a member to comment. The member said he totally agreed that this suggestion should be removed from consideration. He said his court does not have a backlog in these cases, and he was not aware of a problem that warrants further study.

Judge Kethledge agreed these cases are not held up in his circuit. Hearing no other comments, he concluded that the Committee will not take action on that proposal.

Rule 59: Add Text Noting a 14-day Period for Reply to Objections

Professor King introduced the proposal at Tab 7, page 316: a suggestion from Judge Barksdale to add to Rule 59 text noting a 14-day period to respond to another party's objections.

The civil and the criminal provisions on responding to objections to magistrate judge rulings are not identical. The sentence noting a 14-day period to respond to another party's objections appears in Civil Rule 72 but not in Criminal Rule 59. Judge Barksdale commented that the reason for the difference is unclear, and that briefing from both sides is helpful in both contexts.

In preparing the memo in the agenda book, the reporters asked Judge McGiverin for his views on the proposal and the concern that the absence of the language in the criminal rule may lead judges to bar responses that would otherwise be allowed if there was some reference to a deadline for a reply. He responded that he has never seen a judge take a position that the rules do not allow a party to respond to the other side's objection. The reporters concluded that no change is needed because the existing rule is not broken, and suggested that this does not warrant a subcommittee. But of course it is up to the Committee to decide whether a subcommittee should look into this further.

Jonathan Wroblewski said he found it comforting that there was someone else out there who is bothered by asymmetry. But other than that, he agreed with the reporters' judgment.

Judge McGiverin added that parties should be allowed to respond to the other side's objection to a magistrate judge's decision, but at least in his district they are allowed to do so, with or without leave of the court. On the other hand, he noted his observation might not be representative, and that if other judges or practitioners find that this has created a problem, then it might be something to look into. He added that 28 U.S.C. § 636 includes only the 14-day period to object. He guessed that when the Committee drafted the criminal rule, they followed the statute, which includes nothing about a date for a reply. He also noted that other parts of the criminal rules, such as Rule 12, talk about different motions that a defendant can file. There is nothing in those rules about the government's ability to respond to the motion, although he would be very surprised if any court held the government could not respond to a motion to suppress evidence or other such motions.

Professor Beale added that Judge Barksdale does not say the omission in Rule 59 has caused a problem. It was more a concern on her part of a difference in the two civil and criminal rules.

With no more comments, Judge Kethledge confirmed that the Committee did not wish to take further action on this suggestion at this time.

Amending Rule 49.1 to Delete CACM Guidance from Committee Note

Professor Beale turned to Tab 8, page 319: a suggestion from Judge Furman to amend Rule 49.1. Judge Furman had occasion to rule on whether a defendant's CJA application and related affidavits were judicial documents that must be disclosed, with appropriate redactions, under the common law or First Amendment rights of access. The issue prompted him to examine Rule 49.1 and the committee note that was adopted as part of the cross-committee effort in response to the E-Government Act of 2002. The committee note includes guidance for implementation concerning privacy and public access to electronic criminal case files. It says the

"following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and the list that follows includes financial affidavits filed in seeking representation pursuant to the Criminal Justice Act. Professor Beale noted that the guidance in the note was essentially reaffirmed by the Judicial Conference when it added to its list victim statements, subsequent to the adoption of the committee note. Judge Furman found the guidance problematic, if not unconstitutional, as well as contrary to the views taken by most courts that have ruled on the issue.

Professor Beale said that the problem, if the Committee agrees with Judge Furman's analysis, is that the committee note is pointing courts in a direction that seems inconsistent with the First Amendment and the common law right of access. This Committee cannot amend a committee note without amending the rule itself. So, as noted on page 320, Judge Furman suggests that we add to the text, "subject to any applicable right of public access." That would signal that there are potentially applicable rights of public access and allow the Committee to write a new committee note explaining why that language was added.

The question before the Committee, she continued, is whether to have a subcommittee work on this. If so, that subcommittee would probably need to contact the Civil and Bankruptcy Rules Committees because Rule 49.1 was adopted as part of a cross-committee, parallel action. Another question would be how to work with the CACM Committee and the Judicial Conference to obtain clarification of the guidance. Although that is outside of our realm as a rules committee, it might be part of the interaction and outreach.

Judge Furman said Professor Beale did an amazing job laying the issue out, but if one wants a more thorough discussion of the particulars and is having trouble sleeping, his opinion was attached. He conducted a survey of the law and found that the relevant case law varies a little bit by circuit and in terms of whether and when the documents can be kept under seal or have to be released. But most courts have generally taken the view that under some circumstances they are subject to release. This rule and committee note language seems contrary to that, which struck him as problematic.

He recognized that one might ask whether there is a problem if courts are generally reaching the right result. He provided two reasons it is still desirable to amend the rule and note. First, neither the Criminal Rules nor the committee notes should be inconsistent with the Constitution or the common law. Second, courts may be misled. He found at least one decision from a judge in the Eastern District of New York that relied on the committee note to reject a disclosure motion, simply saying the note says it is not to be released, therefore it is not released.

Recognizing that any amendment to the committee note requires amending the rule itself, Judge Furman proposed an amendment. The amendment does not say these are judicial documents, but only makes a minimal change to avoid leading people astray and to signal to judges that they need to be mindful and engage in analysis, rather than blindly following the old committee note.

Judge Kethledge agreed that there is a problem. He described a 2014 case addressing the requirements for sealing documents that are part of the record. If documents are in the judicial

record and the court makes a decision, the public has a very strong presumptive right of access to review those documents to be able assess the court's opinion. In his circuit, sealing was wildly overused in that particular case. It was a class action, with serious allegations of wrongdoing by the defendant that affected millions of people in Michigan in a serious way. The plaintiffs retained an expert witness at the expense of $3 million, which would come out of a significant class recovery. Class members who were not named parties were barred from reviewing that expert's report to determine whether to object to the settlement because the district court said it was subject to a protective order. The court conflated the Rule 26 protective order standard with the sealing standard. So members of the class could not review most of the documents in the record in that case before deciding whether to object to the settlement. He said he had seen casual use of sealing in motion practice, which is a problem. He thought Judge Furman might have a point that this language in the rule or in the note could be making a small contribution to this mindset among the judiciary.

A member added that in her district, CJA financial affidavits are considered judicial documents and are not disclosed. There is probably a reason the Judicial Conference wrote that policy statement many years ago. Indigent defendants have a privacy interest in not having their personal financial information disclosed. A person who has enough money to retain counsel retains those privacy rights, and indigent defendants should not have that privacy violated. The CJA form asks for a list of dependents, debts, and other information that might be considered personal. That is one reason it is considered a private document.

There is also the Sixth Amendment right to counsel. Defendants should not be in the position of having to weigh giving up privacy in order to get a court appointed attorney, and the Judicial Conference likely thought that was too big a burden. The member said she was dismayed to hear that in some districts, the documents are considered public. A subcommittee on this topic would be worthwhile, and she requested being on it, but she would be taking the alternative approach of how to shore up this rule so that these documents are not revealed in other circuits.

Judge Kethledge noted the member made an interesting point that perhaps these forms even under the appropriate standard are just categorically not subject to disclosure. It is kind of a strict scrutiny standard once it is a judicial record; show a compelling interest to seal, and then the sealing has to be very narrowly tailored.

Mr. Wroblewski asked whether a subcommittee would be asked to determine whether this particular document is subject to public disclosure or whether presentence reports are subject to public disclosure or any other document. He did not think Judge Furman was asking for that, and Mr. Wroblewski expressed the hope that we would not have a Committee debate on the First Amendment right of access to every possible document.

Judge Furman agreed with Mr. Wroblewski's understanding that his proposal was limited. In response to the concerns about privacy he also agreed there are some serious issues and arguments may vary case by case. His point was simply that (other than perhaps one case from the Eastern District of New York) the courts have not generally taken a categorical approach that these

are not public documents. They have tended to analyze the facts and circumstances of the case, the possibilities for redactions and so forth. And that is not consistent with what the note says. He expressed concern that the note creates a trap for the unwary. It is inconsistent with what the law is. The First Circuit expressed doubt as to whether the CJA forms are judicial documents. Then in the alternative they equivocated a little bit on that and said, even if they are, we think the magistrate judge here weighed the balancing properly in not disclosing them. In the Second Circuit, you cannot reach that conclusion. They are clearly judicial documents, but in a particular case how that weighs and whether they should be public is a different story. His point was not to wade into that so much as to not have a note that is inconsistent with the law in some circuits, and that would lead people astray.

Judge Kethledge said the note seems to say that these CJA documents are categorically not available to the public. The question for a subcommittee is whether the rule or the note should instead allow that issue to be decided on a case-by-case basis. A subcommittee should address this. He asked Judge Birotte to chair the subcommittee, and Judge Birotte agreed to do so. Judge Kethledge said he would announce the other members of the subcommittee later. Judge Kethledge also stated he would follow up with Judge Bates on the suggestion to coordinate with civil and bankruptcy since they have similar language, and to advise the CACM Committee that this Committee is looking at the issue.

Rule 45(a)(6): Juneteenth National Independence Day

Professor King introduced the proposed addition of Juneteenth to Rule 45(a)(6). She noted the other advisory committees are considering the same addition and that the reporters recommend that the Committee approve an amendment that would insert the words "Juneteenth National Independence Day" immediately following the words Memorial Day. Professor Struve confirmed that that is entirely consistent with what other advisory committees are doing.

Judge Furman asked about the need for (a)(6)(A). On the theory that all of those holidays are declared a holiday by the President or Congress and therefore encompassed within (a)(6)(B), why have a rule that we have to update every time?

Professor Beale suggested that it may have been a belt and suspenders approach. Once a national holiday is declared, it should click in right away, but it would be easier for people to see it listed there and not have to try to look up if Juneteenth had been declared, or to find the legislation.

Professor Struve said this particular structure was carried forward when we did the time computation project back in 2009. And it is a handy reference. But that was still a good question.

Judge Kethledge commented that it is much clearer once it is listed in the rule. Professor Coquillette agreed that belt and suspenders is the correct explanation.

A member asked why the memo has the date June 19 added after the holiday name, but other holidays do not. Professor Beale clarified that the recommendation is to add "Juneteenth National Independence Day" without the date.

A motion to recommend the amendment was made and seconded, followed by a unanimous voice vote in favor.

Next Meeting and Adjournment

Judge Kethledge reminded everyone that the next meeting is scheduled for April 28, 2022, in Washington, D.C., thanked the Committee members, and adjourned the meeting.

TAB 7

TAB 7A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2021

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met at the Administrative Office in Washington, D.C., on November 5, 2021. The Committee reviewed the proposed amendments to Rules 106, 615, and 702 that are out for public comment. It also tentatively agreed upon possible amendments to Rules 611, 613, 801(d)(2), 804(b)(3), and 1006. These proposals will be reviewed by the Committee at the Spring, 2022 meeting, to determine whether they will be recommended for release for public comment. Finally, the Committee rejected possible amendments to Rules 407 and 806.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Proposed Amendments Released for Public Comment

The Evidence Rules Committee has three proposed amendments out for public comment. At this point, only a few comments have been received, but of course most comments are received toward the end of the comment period, and the Committee expects to receive a large number of comments especially on Rule 702. The Committee has also scheduled a hearing for January. This section reports on the individual proposals and the Committee's discussion of them at the Fall meeting.

1. Rule 106

The Committee proposes two amendments to Rule 106, the Rule of Completeness. First, if the strict standards for completion are met, the rule would provide that the statement that is necessary to complete would be admissible over a hearsay objection. Second, unrecorded oral statements would be covered by Rule 106.

At the meeting, the Committee considered an informal comment that the amendment's reference to "written or oral" statements should be changed to add coverage of statements made through conduct or otherwise without words. The Committee tentatively agreed to delete the term "written or oral" so the amended rule would cover all "statements" that meet the standard for completion. The Committee also reviewed the proposed Committee Note to assure that the citations to cases in the note are helpful to understanding the amendment. The Committee determined that all of the citations were useful.

2. Rule 615

The proposed amendment to Rule 615 would clarify that an order invoking the Rule operates only to exclude witnesses from the courtroom --- but that the court may in its discretion provide additional restrictions to prevent excluded witnesses from obtaining trial testimony.

At the meeting, the Committee considered several questions that were raised about the proposal at the Standing Committee meeting. After discussion, the Committee determined that the rule should not require an order extending outside the courtroom to be in writing (because, among other reasons, there is no order referred to in the Evidence Rules that must be in writing); that the amendment should not set forth the criteria necessary for an order that extends outside the courtroom; and that the existing proposal adequately indicates that the court can combine an order excluding witnesses and an order extending outside the courtroom.

3. Rule 702

The proposed amendment to Rule 702 makes two changes to the existing rule: 1) It emphasizes that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence; and 2) It provides that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed.

The Committee has received a handful of public comments on Rule 702. All are supportive of the change, but some suggest that the rule explicitly state that it is the *court* that must determine that the admissibility requirements are established by a preponderance of the evidence. The Committee discussed that suggested change at the meeting and has determined for now not to implement it, but rather to await further public comment. Other comments suggest that the Committee Note be toughened up, to state that the amendment has "rejected" contrary authority and to single out some offending cases. At the meeting the Committee concluded that it is unnecessary and probably counterproductive to single out offending cases. As to a statement explicitly rejecting prior authority, the Committee decided to wait for further public comment.

B. Rule 611 --- Illustrative Aids

The Committee is unanimously in favor of adding a provision to Rule 611 that would regulate the use of illustrative aids at trial. Illustrative aids are used in almost every trial, and one of the biggest problems seen in the cases is that courts and litigants have trouble distinguishing between illustrative aids and demonstrative evidence offered to prove a fact. The Committee has tentatively approved an amendment that would provide standards for allowing the use of illustrative aids, along with a Committee Note that would emphasize the distinction between illustrative aids and demonstrative evidence. The text tentatively agreed upon is as follows:

Illustrative Aids. The court may allow a party to present an illustrative aid to assist the factfinder in understanding evidence or argument if:

(1) its utility in helping the jury to understand the evidence or argument is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time;[1]

(2) all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use;

(3) it is not provided to the jury during deliberations over a party's objection unless the court, for good cause, orders otherwise; and

(4) it is entered into the record.

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

C. Rule 1006

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The Committee has found that courts have frequently misapplied Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence under Rule 1006 and summaries of evidence that are illustrative aids (and not evidence themselves). The most common errors under Rule 1006 are: 1) requiring limiting instructions that Rule 1006 summaries are "not evidence" (when in fact they are an admissible substitute of the underlying voluminous records); 2) requiring all underlying voluminous materials to be admitted into evidence; 3) refusing to allow resort to a Rule 1006 summary if any underlying materials have been admitted into evidence; 4) allowing Rule 1006 summaries to include argument and inference not contained in the underlying materials; and 5) allowing testifying witnesses to convey oral summaries of evidence and argument not within Rule 1006 requirements.

At the meeting, the Committee unanimously determined that Rule 1006 should be amended to address the mistaken applications in the courts, and that an amendment would be especially useful in tandem with the amendment to Rule 611 to govern illustrative aids. After extensive discussion, the Committee tentatively approved the following text:

[1] Rule 403 also refers to "needlessly presenting cumulative evidence" but that phrase would be confusing here, because what is being offered is not evidence.

RULE 1006. SUMMARIES TO PROVE CONTENT

(a) The ~~proponent~~ court may admit as substantive evidence ~~use~~ a non-argumentative written summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court whether or not they have been introduced into evidence. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(b) An illustrative aid that summarizes evidence or argument is governed by Rule 611(d/e).

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

C. Rule 611 --- Safeguards to Apply When Jurors are Allowed to Pose Questions to Witnesses

The practice of allowing jurors to ask questions of witnesses is a controversial one, but all courts agree that if the practice is allowed, safeguards must be in place to protect the parties against prejudice. The Committee has unanimously determined that it would be helpful to courts and parties to amend Rule 611 to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses. While another alternative might be proposing some best practices outside the rulemaking process, the Committee concluded that a new Evidence Rule would have a stronger impact, and it would be user-friendly as it would collect in one place the necessary safeguards that are currently strewn through the case law.

The Committee tentatively approved the following language for a new provision to be added to Rule 611:

(d) Juror Questions of Witnesses.

(1) Instructions to Jurors if Questions are Allowed. If the court allows jurors to ask questions of witnesses during trial, then before any witnesses are called, the court must instruct the jury that:

(A) any question must be submitted to the court in writing;

(B) a juror must not disclose a question's content to any other juror;

(C) the court may rephrase or decline to ask a question posed by a juror;

(D) if a juror's question is rephrased or not asked, the juror should not draw any negative inferences;

(E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and

(F) the jurors are factfinders, not advocates.

(2) Procedure When a Question is Submitted. When a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it is appropriate under these rules; and

(B) allow a party to object to the question.

(3) Reading the Question to a Witness, When the court determines that a juror's question may be asked, the question must be read to the witness by the court.

It is important to note that the Committee does not to take any position on whether jurors should be permitted to pose questions to witnesses --- and the Committee Note will emphasize that the rule is neutral on the practice. The goal of the amendment is to provide a structure for the court to follow if it decides to allow jurors to pose questions to witnesses. The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

D. Rule 801(d)(2) --- Hearsay Statements by Predecessors

Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. The Committee has analyzed this conflict in the courts and has determined that it is an important one to rectify, and that the

proper solution is that if a party stands in the shoes of the declarant, then the statement should be admissible because it would be admissible against the declarant.

The Committee has tentatively approved an addition to Rule 801(d)(2) that would provide as follows:

> A statement that would be admissible under this rule if the declarant or the declarant's principal were a party, is admissible when offered against a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal.

The Committee Note to the proposed change would emphasis that to be admissible, the declarant must have made the statement before the transfer of the claim or defense. The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

E. Rule 804(b)(3) and the Corroborating Circumstances Requirement

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest and independent evidence corroborating the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807, the residual exception, which requires courts to look at corroborative evidence in determining whether a hearsay statement is sufficiently trustworthy under that exception. That rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

The Committee tentatively approved an amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist. The proposed language for the amendment is as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

F. Prior Inconsistent Statements ---- Rule 613(b)

Rule 613(b) permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. But the courts are in dispute about the timing of that opportunity. Rule 613(b) by its terms permits a witness's opportunity to explain or deny a prior inconsistent statement to happen *even after* extrinsic evidence is admitted. But presenting extrinsic evidence of a witness's prior inconsistent statement *before* giving him an opportunity to explain or deny it may cause problems if the witness has been excused or has become unavailable. And it also is inefficient because if the witness is given a prior opportunity, she may just admit that she made the statement, rendering extrinsic proof unnecessary. For these reasons, many federal courts reject the flexible timing afforded by Rule 613(b) and *require* that a witness be given an opportunity to explain or deny *first* during cross-examination before extrinsic evidence of the statement may be offered.

The Committee unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). The practice of the judges on the Committee is to require an opportunity to confront the statement

before extrinsic evidence is introduced, and the Committee concluded this is a superior procedure. Accordingly, the Committee tentatively approved the following change to Rule 613(b):

Extrinsic Evidence of a Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted unless the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about ~~it~~ the statement before extrinsic evidence is introduced, ~~or if justice so requires~~ unless the court orders otherwise. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

G. Rule 407 --- Subsequent Remedial Measures

The Committee considered proposed amendments to Rule 407, the rule providing protection from admission of subsequent remedial measures. The proposal was addressed to two separate conflicts in the courts. First, courts are in dispute about whether the rule applies only when there is some causative relationship between the injury and the subsequent measure. Because the policy of the rule is that without it, some defendants will not make improvements, some courts accordingly do not apply the rule unless the measure was a response to the plaintiff's injury. Other courts, applying the text of the rule, hold that subsequent measures are excluded whether or not in response to the plaintiff's injury. Second, some federal courts have extended Rule 407 protection to contracts cases when a subsequent change in a contract provision is offered to show the meaning of a predecessor provision. Other courts find Rule 407 wholly inapplicable in contracts disputes.

After extensive discussion, the Committee decided to table the proposed amendments. Most of the discussion was about the proposal to require a cause and effect relationship between the plaintiff's injury and the defendant's change. Committee members concluded that such a rule would require difficult factual determinations, and extensive hearings. It would also require an expenditure of substantial resources in discovery. And it would probably lead to many claims of privilege, and review by the courts of those claims. On the other hand, Committee members were not in favor of an amendment that would preclude a court from requiring a showing of a cause and effect relationship between the plaintiff's injury and the defendant's change. Many courts are imposing such a requirement and the Committee saw no reason to preclude courts from doing so.

As to application of the rule to contracts, while many members believe that the rule is based on weak policy grounds that should not be extended to contract cases, the Committee was concerned that it would be difficult to craft language that would preserve protection in breach of warranty, products-type cases, while excluding the contract actions that should not be covered. Because there are very few cases that apply Rule 407 to contract situations, the Committee determined that the best course was to drop the proposal from the agenda, and to continue to monitor the case law under the rule.

H. Rule 806 --- Impeachment of Hearsay Declarants

Rule 806 allows the impeachment of hearsay declarants as if they were trial witnesses and seeks to equate hearsay declarant impeachment with traditional impeachment of witnesses. The challenge for the rule is that one form of impeachment essentially requires the declarant to be present at trial --- that is impeachment for bad acts offered to show character for untruthfulness under Rule 608(b). Under that rule, a witness can be asked about a bad act pertinent to a character for untruthfulness, but no evidence of that act can be introduced; if the witness denies the act, the inquiry is ended. Rule 806 makes no special accommodation for Rule 608(b) impeachment, and while there is not much case law on the subject, there is a dispute in the courts about whether extrinsic evidence of a bad act can be introduced when a hearsay declarant is being impeached under Rule 608(b).

The Committee considered two options: 1) that the impeaching party could introduce extrinsic bad act evidence; and 2) that the bad act could somehow be announced to the jury. The Committee found that the problem with the extrinsic evidence solution was that it would put the impeaching party in a *better* situation than if the declarant were to testify. Moreover, that rule would undermine the policy of Rule 608(b), which is to avoid distracting and complicated minitrials into whether the witness actually committed the bad act. The Committee also found that the remedy of announcing the bad act to the jury would also be problematic. Announcements of a bad act by the court or by the impeaching party would not really be the same as asking the witness about the bad act. Accordingly, after discussion, all Committee members agreed that it was best not to pursue an amendment to Rule 806, and the matter was dropped from the Committee's agenda.

IV. Minutes of the Fall, 2021 Meeting

The draft of the minutes of the Committee's Fall, 2021 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB 7B

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 5, 2021
Thurgood Marshall Federal Judiciary Building
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 5, 2021 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Traci L. Lovitt, Esq.
Arun Subramanian, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Bridget M. Healy, Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Burton DeWitt, Rules Clerk

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Roslynn R. Mauskopf, Director Administrative Office of the Courts
Timothy Lau, Esq., Federal Judicial Center
Reshmina William, Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Amy Brogioli, Associate General Counsel American Association for Justice
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
John G. McCarthy, Esq., Federal Bar Association
Susan Steinman, Senior Director of Policy & Sr. Counsel American Association for Justice
Lee Mickus, Esq., Evans Fears & Schuttert LLP

Andrea B. Looney, Executive Director Lawyers for Civil Justice
Mark Cohen, Esq., Cohen & Gresser LLP
John Hawkinson, Freelance Journalist
Angela Olalde, Chair, Texas Committee on the Administration of the Rules of Evidence
Christine Zinner, AAJ
Johnathan Stone, Assistant Attorney General, Texas AG
Joshua B. Nettinga, Lt. Colonel, Judge Advocate General's Group
Madison Alder, Bloomberg Law
Mike Scarcella, Reuters Legal Affairs
Nate Raymond, Reuters Legal Affairs

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting, noting that it was the first in-person meeting in two years. He thanked everyone in the judiciary and at the AO who spent countless hours preparing for the in-person gathering. The Chair asked that all in-person participants keep their masks on throughout the meeting.

The Chair welcomed Judge Conrad who will serve as the liaison from the Criminal Rules Committee. He also noted that Kathy Nester, the former representative from the Federal Defender's Office, had left the Committee and that a replacement would be made for the Committee's spring meeting.

The Chair reported on the June, 2021 Standing Committee meeting, reminding the Committee that it had sought approval to publish proposed amendments to Federal Rules of Evidence 106, 615, and 702. The Chair informed the Committee that all three proposals were unanimously approved by the Standing Committee. He explained that the Committee received no comments on the proposed amendment to Rule 702, but did receive praise for the proposal from the Standing Committee. He noted that there was a bit more discussion of the proposals to amend Rules 106 and 615, and that the Reporter would provide specifics during the discussion of those Rules. He noted that there was unanimous support for both proposals.

The Chair also informed the Committee that it was time for the Committee's self-evaluation that is completed every five years. He explained that he and the Reporter had already filled out a self-evaluation questionnaire for the Evidence Advisory Committee and that drafts had been provided to all Committee members. He asked that each Committee member look over the evaluation and offer feedback, if any, at the conclusion of the meeting.

Finally, Burton DeWitt informed the Committee that the "Justice in Forensic Algorithms Act of 2021" was a piece of pending legislation that could affect the Federal Rules of Evidence. He explained that the bill remained in the legislative committee process and that the Committee would be kept updated concerning its progress.

Approval of Minutes

A motion was made to approve the minutes of the April 30, 2021 Advisory Committee meeting that was held via Microsoft Teams. The motion was seconded and approved by the full Committee.

II. Rules 106, 615 and 702 Published for Comment

The Reporter opened a discussion of the three Rules out for public comment, explaining that the Committee would wait to vote on any changes to the proposed Rules until its spring meeting, following the close of the public comment period.

A. Rule 106

The Reporter reminded the Committee that a proposed amendment to Rule 106 would allow a completing statement to be admitted over a hearsay objection and would expand the Rule to cover unrecorded, oral statements. He explained that at the Standing Committee meeting, Judge Bates had questioned the inclusion of one sentence in the proposed Advisory Committee note, expressing concern that it might be too broad. The sentence provides that "The amendment, as a matter of convenience, covers these questions [of completion] under one rule." The Reporter acknowledged that the sentence might be too broad because Rule 410 and 502 also include completion concepts. Furthermore, he explained that the sentence was unnecessary to explain the proposed amendment. Accordingly, the Reporter recommended deletion of that sentence from the Advisory Committee note and Committee members tentatively agreed.

The Reporter next noted that the proposed amendment to Rule 106 uses the modifiers "written or oral" to describe the statements that may be completed. He reminded the Committee that Judge Schroeder had suggested earlier in the process dropping those modifiers from rule text so that amended Rule 106 would simply cover *all statements*, in whatever form. Because Rule 106 is currently limited to written or recorded statements, the Committee was concerned that lawyers might not recognize that oral statements had been added by the amendment if the amendment language removed all modifiers and failed to signal the addition of oral statements expressly in rule text. But the Reporter noted that including the modifiers "written or oral" could exclude completion of statements made purely through assertive non-verbal conduct (like nodding the head or holding up fingers to communicate a number). Although the completion of such a non-verbal statement would be rare, the Reporter opined that an amended Rule 106 should cover all statements. He explained that this could be done by removing the modifiers from rule text and modifying the Committee note. One Committee member expressed support for this idea, noting that hearing-impaired witnesses make statements via American Sign Language, which could be subject to completion. Judge Bates noted that the Committee would need to determine whether any changes to any of the proposed amendments would require that the Committee send the amendment out for a new round of public comment. The Chair noted that the changes being discussed were not substantive, but that the Committee would keep in mind the possible need to resubmit changes amendments at its spring meeting. The Chair also expressed support for modifying the Committee note with a brief reference to the possibility of assertive conduct, stating that a full sentence devoted to such a rare possibility did not seem necessary.

The Reporter next noted that the proposed Committee Note to Rule 106 contained a number of case citations, which led to a short discussion at the Standing Committee meeting regarding the used of case citations in Committee Notes. He explained that there has been a longstanding debate about the practice, but the Standing Committee has never formally discussed or ruled upon the practice. As to the Rule 106 Note, the Reporter provided a justification for each case citation as part of the agenda materials. He noted that the original Advisory Committee notes were rife with case citations to help lawyers and judges understand the Rules and invited a discussion of the practice. The Chair opined that case citations shouldn't be banned in Committee notes by any means, but that each citation should be examined to ensure it wouldn't cause trouble if, for example, the case cited was overturned. He suggested that citing a case as an *example* of how a rule should operate would be helpful and run no overruling risk. One Committee member agreed that case citations could be very helpful in certain contexts. Judge Bates asked Professor Coquillette his view. Professor Coquillette agreed with the Reporter's discussion of case citations in the agenda materials, opining that case citations should not be banned and can be helpful when they serve as an example. He noted that Professor Struve had done some research on the use of case citations in Committee notes. Professor Struve explained that she had studied the incidence of case citations in the Federal Rules of Civil Procedure, noting that her research revealed that case citations were frequent in the original notes to the Civil Rules, but that they had declined significantly in recent years.

B. Rule 615

The Reporter reminded the Committee that the proposed amendment to Rule 615 provides that a court's order of exclusion operates only to exclude witnesses physically from the courtroom, but also authorizes the court to enter additional orders prohibiting witnesses from being provided or accessing testimony from outside the courtroom. He informed the Committee that the Standing Committee discussed this proposal at length, offering three comments or questions. First, the Standing Committee queried whether an additional order extending protection beyond the courtroom would have to be in writing. The Reporter noted that courts routinely issue sequestration orders orally on the record and that there would seem to be no good reason for requiring a written order for exclusion --- and therefore it might be odd to require that the order extending outside the courtroom must be written. He further noted that there was no other "written order" requirement in the Rules and that even Rule 502(d) orders are not required to be in writing (though they usually are). One Committee member noted that such orders are directed to third party witnesses who may not be in the courtroom when they are entered. He queried whether a written order was necessary to satisfy the notice and due process rights of those third-party witnesses. The Reporter explained that it would be the obligation of counsel calling the witnesses to notify them of the order and that a writing was not necessary to that process. He also pointed out that it may well happen that most orders will be issued in writing, but requiring that in a rule is a different matter. The Chair further explained that sequestration orders are often entered during a pre-trial conference or from the bench on the first day of trial when the judge and parties are very busy with a million details. He opined that a trial judge should be free to enter a written order but should not be required to. The Reporter suggested that the Committee could await public comment in February to see whether there was any concern about a writing requirement.

The second question raised by the Standing Committee was whether the rule or note should list criteria to be used to determine whether sequestration protection should be extended outside the courtroom. The Reporter explained that such criteria would be difficult to identify and might be underinclusive. He suggested that the better approach might be to leave it to the discretion of the trial judge to decide which factors in a particular case warranted such extra-tribunal protections. No Committee members suggested that criteria should be added to the rule.

The third and final question raised by the Standing Committee was whether the proposed amendment required a trial judge to enter two *separate* orders – one excluding witnesses from the courtroom and a second preventing access to testimony outside the courtroom. The Reporter opined that there was absolutely no reason for a judge to have to enter separate orders and that the amendment is not intended to propose such a requirement, but he queried whether the rule text was clear on that point. He noted that a sentence could be added to the Committee note to clarify that one order could do both. Committee members agreed that one order was sufficient and all thought that the existing text was clear on that point. Committee members also rejected the idea of adding a sentence to the Committee note concerning the number of orders necessary for fear that it would cause needless confusion.

C. Rule 702

The Reporter informed the Committee that some comments had been received on the proposed amendment to Rule 702, including one concerning misapplication of the current rule in the Tenth Circuit, and another with a case digest of numerous recent Rule 702 opinions that were allegedly incorrect. One concrete suggestion from the public comment received thus far was to reinsert "the court determines" into the preponderance standard provided in the text of the amendment. The reference to the "court" making "findings" was removed by the Committee prior to publication of the proposed amendment due to concerns that courts might think they need to make Rule 702 "findings" even in the absence of any objection to expert opinion testimony. But the Reporter pointed out that the problem justifying the proposed amendment is that some courts let juries decide questions of sufficiency of basis and reliable application that are for the *court*. He explained that expressly noting that it is *the court* and not *the jury* that makes these crucial preliminary findings could be important in serving the goal of the amendment. The Reporter suggested that the Rule could provide that the "court determines" instead of "finds" to assuage concerns about the need for findings in the absence of objection.

Some Committee members explained that they would *not* favor reinserting the term "court finds" or "court determines" into the proposed amendment. These Committee members noted that the issue had already been discussed and decided by the Committee and that the concern about findings even in the absence of objection was a valid one.

The Reporter next described commentary seeking to have note language "rejecting" federal cases holding that questions of sufficiency of basis and reliability of application are matters of weight for the jury re-inserted. Such language was deleted from the Committee note before it was published. The Reporter opined that the amendment does "reject" the cases that give such Rule 702 questions to the jury and that it might make sense to reinsert that language into the Committee note. He noted that the Fourth Circuit recently relied upon the proposed amendment and

specifically quoted the language about rejecting incorrect case law on Rule 702. One Committee member stated a preference for adding the "and are rejected" language back into the note. But another member thought the language was unnecessary. Committee members agreed that the language about rejection could be reevaluated in light of the public commentary that will be received.

Finally, the Reporter explained that some commenters also wanted three particular federal cases singled out in the note as improper applications of Rule 702. The Reporter and the Committee members were not inclined to call out particular federal cases, noting that some portions of the cases, and the results in those cases, were not necessarily incorrect.

III. Rule 407

The Reporter reminded the Committee that there are two splits of authority in the federal courts concerning Rule 407, the rule governing subsequent remedial measures. First, some federal courts prohibit evidence of a subsequent measure that would have made the plaintiff's injury less likely, even if the defendant's decision to implement that measure had nothing to do with the plaintiff's injury. For example, these courts might exclude measures that were implemented by the defendant just hours after the plaintiff was injured and before the defendant had even learned of that injury. Other courts require some causative connection between a plaintiff's injury and a subsequent remedial measure in order to further the policy of the Rule to encourage safety measures that might not otherwise be taken for fear of liability to the plaintiff. Second, some federal courts have extended Rule 407 protection to contracts cases when a subsequent change in a contract provision is offered to show the meaning of a predecessor provision. Other courts find Rule 407 wholly inapplicable in contracts disputes.

The question for the Committee is whether to proceed with an amendment proposal that would address these splits of authority. The Reporter suggested that there might be little reason to amend Rule 407 if the Committee were not inclined to impose a causative connection limitation. Broadening an exclusionary rule beyond its policy justification would seem ill-advised. The Chair explained that he thought the agenda materials were high quality and very thorough and that he was interested in many of the proposals on the agenda, but that a Rule 407 amendment was one he was not inclined to pursue. He noted that the policy rationale for the existing Rule was weak and that he would be open to abolishing the Rule, but not to amending it to require more work for judges and lawyers in applying it. The Chair detailed the extensive work involved for a trial judge if a causative connection between a plaintiff's injury and a subsequent measure were to be required, explaining that the judge would need to determine the subjective intent of a corporation in making a change. He noted that there could be dozens of engineers involved in making a single change at different times and that there could be a bundle of changes adopted at once. The Chair cautioned against adding a limitation to Rule 407 that would require three-day minitrials to administer. One Committee member expressed an interest in learning more about the legislative history behind Rule 407 and about whether Congress intended that there be a causation requirement.

Ms. Shapiro also noted that a Rule 407 amendment proposal was the only one in the agenda that drew a strong negative reaction from the Justice Department. She explained that lawyers don't want to expend the significant resources necessary to litigate causation. Furthermore, she

explained that already costly discovery obligations could be multiplied by inserting a causation requirement into Rule 407. Another Committee member noted that questions about the rationale for a particular change and its connection to an injury are often reflected in materials protected by the attorney-client privilege. This would add costly privilege review to the price tag of an amendment requiring a causative connection.

The Reporter inquired whether an amendment proposal addressing the contracts question alone was worth it if the Committee was not inclined to pursue a causative connection amendment. One Committee member opined that it would be simple to restrict Rule 407 protection to torts or criminal cases and to eliminate its use in contract actions. Professor Struve explained that eliminating contract actions could prove problematic given that breach of warranty theories may be used in product liability actions that *are* covered by Rule 407. Another Committee member opined that it would be very difficult to craft language that would preserve protection in breach of warranty, products-type cases, while excluding the contract actions that should not be covered. That Committee member suggested it was not worth it to try to micromanage Rule 407, recommending that the Committee should leave Rule 407 as is or abolish it and allow judges to regulate such evidence through Rules 401 and 403. Multiple Committee members disapproved of abolishing Rule 407, noting that it was a longstanding rule that was of significance to the Bar and that abolition would cause significant disruption. Another Committee member noted that abolition of Rule 407 could have an impact on removal to federal court in cases where the state evidence counterpart to Rule 407 remained. The Reporter noted that the Committee had proposed abolition of the Ancient Documents hearsay exception in 2015 and that the abolition proposal created a firestorm, including letters from Senators in opposition.

The Chair then asked the Committee members to support one of three options for Rule 407: 1) leaving Rule 407 alone; 2) pursuing narrow amendments to deal with splits of authority; or 3) pursuing abolition of Rule 407. All Committee members voted against abolishing Rule 407. All, but one, voted to leave the Rule alone and to revisit Rule 407 in a few years to see how the caselaw developed. One Committee member favored a narrow amendment to reject the application of Rule 407 in breach of contract cases. The Chair observed that there was overwhelming support for leaving Rule 407 as it is and for abandoning any attempt to amend it. He noted that Rule 407 would be dropped from the agenda and could be revisited in future years if the Committee was inclined to revisit it.

IV. Rule 611(a) Illustrative Aids/Rule 1006 Summaries

The Reporter explained that the Committee was also considering whether to propose an amendment to Rule 611 akin to the Maine Evidence Rule that distinguishes illustrative aids used to assist the jury in understanding evidence or argument from demonstrative evidence offered as proof of a fact. He noted that an amendment could also provide requirements for the proper use of illustrative aids. The Reporter explained that some of the confusion surrounding illustrative aids was caused by courts conflating illustrative summaries authorized by Rule 611(a) with summaries offered pursuant to Rule 1006 to prove the content of writings, recordings, and photographs too voluminous to be conveniently examined in court. He explained that Professor Richter would present a companion proposal to amend Rule 1006 to alleviate the confusion in the courts.

A. Illustrative Aids and Rule 611

The Reporter directed the Committee's attention to a draft of a proposed amendment to Rule 611 governing illustrative aids on page 182 of the agenda materials. He noted that an open question in the draft was whether a proposed amendment should prohibit trial judges from sending illustrative aids to the jury room in the absence of consent by both parties, or whether an amendment should give trial judges discretion to send illustrative aids to the jury room for good cause in the absence of consent.

The Chair explained that illustrative aids are used in every trial, that issues surrounding their use come up regularly, and that trial judges really crave clarity about the proper approach to illustrative aids. He queried whether Committee members thought that an amendment proposal concerning illustrative aids was worth pursuing. The Committee unanimously agreed that a proposal to amend Rule 611 to control and clarify the use of illustrative aids would be a worthwhile project.

The Chair then noted that the current draft amendment provided that "The court may allow a party to present an illustrative aid to assist the factfinder in understanding a witness's testimony or the proponent's argument if…" He suggested that the use of an illustrative aid might be broader; it may help the jury understand other "evidence," some of which may be testimony, some of which may be documents or recordings or other exhibits. Another Committee member agreed that the draft language should be made broader, suggesting that it might read: "The court may allow a party to present an illustrative aid to assist the factfinder in understanding *evidence or argument*…" Another Committee member queried whether the language should be changed to "previously admitted evidence or argument." But in response to that argument other members noted that litigants often use illustrative aids during opening statements before *any evidence* has been admitted, so that the modifier "previously" would not work. Another Committee member suggested using the term "admissible evidence" to reflect that illustrative aids are not evidence and are only used to illustrate other evidence that is admitted. The Reporter agreed to redraft that language to make it broader along the lines suggested and noted that subsection (1) of the draft would also need to be modified to match any terminology change.

The Chair next noted that subsection (2) of the draft on page 182 of the agenda materials required that "all adverse parties" be notified in advance of the intended use of an illustrative aid. He explained that co-parties would not be considered "adverse" but should also be entitled to advance notice and recommended elimination of the modifier "adverse" from subsection (2). Another Committee member noted that some parties do not want to share their illustrative aids before they are shown at trial and that there might be objection to an advance notice requirement from some segments of the Bar. In response to that comment, several Committee members opined that advance notice is critical in order for the judge to make an informed ruling on an illustrative aid, and that if an improper or prejudicial illustrative aid is shown to the jury before opposing counsel has an opportunity to object, it is impossible to erase it from the jury's mind. Committee members suggested that mandating advance notice would be an important safeguard introduced by an amendment. The Chair agreed, explaining that most trial judges already require advance notice, such that an amendment would be reinforcing existing best practices. Judge Bates inquired whether the advance notice requirement would apply to illustrative aids used during opening

statements. The Chair replied that the advance notice requirement would apply to illustrative aids used during opening statements. He noted that the notice might come shortly before use of the aid, but that the aid would have to be disclosed to other parties prior to its publication to the jury.

The Reporter explained that there was a split of authority concerning whether a trial judge possesses the discretion to send an illustrative aid to the jury room or whether it is prohibited in the absence of consent by all parties. He inquired whether the Committee wished to consider a draft prohibiting transmission to the jury room without consent or one that allowed the judge to do so over objection for "good cause." The Chair suggested that it would be helpful to include the discretionary "good cause" option, at least for a public comment phase to see what input the Committee might receive about that issue. Ms. Shapiro agreed, noting that if an illustrative aid is helpful to the jury in open court, it might be helpful during deliberations. The Reporter noted that the Advisory Committee note should provide that a trial judge who elects to send an illustrative aid to the jury room should provide a limiting instruction informing the jury that such an aid is "not evidence." All Committee members agreed to retain the "good cause" option and the corresponding paragraph in the Committee Note, with the addition of a comment about a limiting instruction. The paragraph in the draft Committee note prohibiting the trial judge from sending an illustrative aid to the jury without consent from all parties will be eliminated.

A Committee member called attention to the last paragraph in the draft Committee note regarding which party owns the illustrative aid and about preservation for the record upon request. The Committee member queried whether the proprietary comment was necessary and also opined that an illustrative aid should be preserved for the record even without a request. The Committee ultimately agreed to eliminate the proprietary language from the final paragraph and to include the following language: "Even though the illustrative aid is not evidence, it must be marked as an exhibit and be made part of the record." Committee members, in conclusion, expressed satisfaction about the possibility of an illustrative aid amendment, noting that it would offer really helpful guidance for the Bar. The Chair explained that the amendment proposal would be an action item at the spring meeting.

B. Rule 1006 Summaries

Professor Richter introduced Rule 1006, reminding the Committee that it provides an exception to the Best Evidence rule allowing a summary chart or calculation to prove the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. She explained that federal courts have frequently misapplied Rule 1006 due to confusion concerning the differences between a summary offered as an illustrative aid pursuant to Rule 611(a) and a true Rule 1006 summary. Professor Richter outlined the most common Rule 1006 missteps: 1) requiring limiting instructions cautioning the jury that Rule 1006 summaries are "not evidence" (when they are admissible alternative evidence of the content of the underlying voluminous records); 2) requiring all underlying voluminous materials to be admitted into evidence; 3) refusing to allow resort to a Rule 1006 summary if any underlying materials have been admitted into evidence; 4) allowing Rule 1006 summaries to include argument and inference not contained in the underlying materials; and 5) allowing testifying witnesses to convey oral summaries of evidence and argument not within Rule 1006 requirements. Professor Richter explained that the Committee could consider amendments to Rule 1006 that would address these problems and that

would clarify the distinction between Rule 611(a) illustrative summaries and Rule 1006 summaries. She noted that such an amendment could be a useful companion amendment to the illustrative aid project. Finally, Professor Richter noted that Rule 1006 uses the terminology "in court" in two places and that the Committee might consider modifying that terminology to accommodate the possibility of virtual trials post-pandemic if other amendments were proposed. She directed the Committee's attention to a draft amendment and Committee note on page 208 of the agenda materials.

The Chair first highlighted the draft language changing "in court" to "during court proceedings." He expressed concern that "during court proceedings" could be construed too broadly and recommended leaving the existing "in court" language and adding a sentence to the Committee note emphasizing that the Rule applies similarly in virtual proceedings. The Reporter agreed, noting that the same approach to application in virtual trials (including a reference to virtual trials in the Committee note) was taken in the proposed amendment to Rule 615. The Chair then inquired why the draft added the requirement that a summary be "accurate." Professor Richter explained that Rule 1006 summaries were permitted as substitute evidence of voluminous content and, as such, must accurately summarize that content. They may not draw inferences not in the original materials nor add argument. Still, some federal courts (again confusing Rule 611(a) summaries with Rule 1006 summaries) have allowed such argumentative content. The Chair suggested adding a sentence to the third paragraph of the note explaining that courts have mistakenly allowed argumentative material and that the amendment is designed to correct those holdings. Another Committee member expressed concern about an amendment requiring an "accurate" summary, suggesting that it might require a trial judge to vouch for one side's evidence. The Chair also thought that an accuracy requirement could cause mischief and suggested replacing "accurate" with "non-argumentative" in the rule text.

Another Committee member opined that subsections (b) and (c) of the draft amendment on page 208 of the agenda seemed unusual in that they told the judge what instructions *not to give* to the jury about a Rule 1006 summary and explained that illustrative summaries are *not admissible* through Rule 1006 (but must be admitted through Rule 611(a)). The Committee member expressed support for the draft amendment proposal on page 206 of the agenda materials that did not include such subsections in rule text, but made the same points via Committee note. The Chair agreed that he had the same concern about subsection (b), which would prohibit the judge from instructing the jury that the summary is not evidence. Another Committee member suggested that subsection (c) concerning the interaction between Rule 1006 and Rule 611(a) could go into the note if subsection (b) concerning jury instructions was eliminated. The Reporter responded that having subsections cross-referencing Rule 611(a) and cautioning trial judges not to give limiting instructions with Rule 1006 summaries was important to include in rule text due to the pervasive confusion in the caselaw. Professor Coquillette agreed, explaining that many lawyers do not read Committee notes and that if something is important to the operation of a rule, it should be included in rule text. Another Committee member suggested that if subsection (c) were to remain, it could be redrafted slightly to read: "An illustrative aid that summarizes evidence and argument is governed by Rule 611(d/e)."

Another Committee member also suggested adding the word "substantive" to the rule text in subsection (a) just before "evidence" such that the text would read "The proponent may offer as

substantive evidence." Judge Bates called attention to the fact that the draft amendment would require a "written" summary and inquired whether a definition of "written" to include electronic evidence was necessary. The Reporter noted that the definitions in Rule 101 would cover electronically stored information but suggested an addition to the Committee note to emphasize that point.

The Chair concluded the discussion by noting that an amendment to Rule 1006 would be an action item for the spring, 2022 meeting. He explained that the first sentence of subsection (a) would be altered to read: "The court may admit as substantive evidence a non-argumentative written summary……" Subsection (a) would retain the original "in court" language with a Committee note devoted to application in virtual trials. Subsection (b) from page 208 of the agenda materials would be eliminated, with the sentence about limiting instructions included in the Committee note. Subsection (c) would become subsection (b), but would be reworded: "An illustrative aid that summarizes evidence and argument is governed by Rule 611(d/e)." Finally, the Committee note would discuss the cases improperly allowing argumentative summaries, as well as the definition of "written" in Rule 101.

V. Jury Questions: Safeguards and Procedures

The Reporter explained that the practice of allowing jurors to ask questions of witnesses is a controversial one, but that the courts that do allow it impose many safeguards to protect against prejudice. The Committee turned its attention to a draft amendment that would add a new subdivision to Rule 611 to set forth safeguards that must be in place if a judge decides to let jurors pose questions to witnesses. The draft was on page 219 of the agenda book. The Reporter stated that the draft amendment to Rule 611 was designed to remain scrupulously neutral on whether courts should or should not allow juror questions. Still, he emphasized that the draft would collect all the procedures and safeguards scattered throughout the cases and provide trial judges inclined to allow the practice helpful guidance. He noted that the question for the Committee is whether such safeguards belong in the Evidence Rules and, if so, whether the draft captures the safeguards optimally.

One Committee member expressed support for adding the provision, noting that there are rules about lawyers asking questions and the court asking questions and that it would be helpful to address the issue of juror questions in the Rules, especially given the high potential for errors without such safeguards. Another Committee member agreed but opined that adding a provision on jury questions would undoubtedly lead to more judges allowing juror questions, notwithstanding an attempt to keep the rule neutral on that point. He queried whether the Committee was comfortable with that likely effect of adding such a provision. Another member noted that juror questions are used most often in civil cases when all parties consent. She suggested that the safeguards and procedures were helpful but might be better placed in a bench book. Another Committee member thought that judges were more likely to allow the practice of juror questions if a provision governing them were added to the Rules themselves. Ms. Shapiro agreed that juror question procedures and safeguards might be better left to a best practices pamphlet like the one prepared by the Committee on authenticating electronic evidence. But in response, the Reporter noted the distinction between authentication and juror questions --- the Rules already provide baseline provisions for authentication and the manual was designed to offer examples and

training beyond the Rules. Because there is currently *no* provision in the Rules governing jury questions, the Reporter opined that the jury question safeguards were distinct, and argued that an evidence rule would have much greater impact than a best practices manual. Professor Coquillette agreed with the Reporter, suggesting that it would be helpful to add the safeguards to the Rules themselves.

Because all Committee members were willing to move forward with a draft amendment, the Chair suggested looking at the draft on page 219 of the agenda book. The Chair suggested that subsection (d)(1)(B) of the draft should read: "a juror must not disclose a question's content," replacing "its" with "a question's" for clarity. He also proposed that subsection (C) read: "the court may rephrase or decline to ask a question." The Reporter suggested that subsection (d)(1)(D) would also need to be rephrased to read: "if a juror's question is rephrased or not asked, the juror should not draw negative inferences." The Chair also suggested tweaking section (d)(2)(A) to read: "review the question" instead of "review each question." He also noted that section (d)(2)(B) should also read "the question" instead of "a question" and that the reference to objections being made "outside the hearing of the jury" was not necessary because that limitation was included in the section (2) language that applies to (2)(B). The Chair also noted that section (d)(3) could be concluded after "court," such that it would read: "When the court determines that a juror's question may be asked, the question must be read to the witness by the court." The Reporter agreed with all these suggestions and will implement them in the draft amendment that the Committee reviews at the next meeting.

A Committee member inquired about the timing for juror questions, assuming that they would be asked after all lawyer questioning of the witness was concluded. She then queried what would happen if a judge rejected a juror question, but a lawyer then decided to ask it of the witness. All Committee members agreed that a lawyer would not be permitted to ask a juror question rejected by the trial judge, if the rejection was on the ground that the question was not permissible under the rules of evidence. Committee members suggested that something be added to the note to clarify that point. Other Committee members noted that a question that might be inappropriate of one witness could be proper for another and that rejection of a question for one witness should not necessarily preclude an attempt to ask the same question of another witness. All Committee members agreed that a judge might reject a question for a variety of reasons and that the note should so provide without attempting to micromanage judges' decisions regarding particular juror questions.

Judge Bates asked about the lawyers' right to reopen questioning of a witness after a juror question was asked. The Reporter explained that Rule 611 gives the trial judge the discretion to reopen questioning and that a provision regarding juror questions specifically would seem superfluous. Another Committee member noted that it would be a good idea to give lawyers a right to request an opportunity to reopen questioning following a juror question, explaining that there may not be a need for more questioning but that lawyers should be entitled to ask. The Chair suggested that the Committee note might include a sentence about allowing lawyers to request an opportunity to reopen questioning of a witness after a juror question is asked. Judge Bates noted that the draft Committee note was light on substance and did not explain the rationale for each of the safeguards in the Rule. Professor Coquillette suggested that it was good rulemaking practice to avoid simply repeating requirements set forth in rule text and that the brief note was helpful.

Another Committee member suggested that some guidance about the timing of juror questions at the conclusion of a witness's testimony in the note could be helpful. The Reporter also suggested that the note might be even more aggressive about not taking any position on the propriety of juror questions. Another Committee member asked whether the amendment should prohibit the court from revealing *which juror* asked a particular question. Other members suggested that it will often be obvious which juror asked a question because the juror will have handed the question to the court and that all will realize which juror asked it if it is permitted. Still, the Reporter suggested that a prohibition on actively revealing the identity of a juror whose question is asked could be added to the Committee note. The Reporter also recommended that the last sentence of the draft Committee note be slightly modified to read: "Courts are free to impose additional safeguards *or to provide additional instructions*, when necessary …" The Chair concluded the discussion by explaining that the amendment, with the changes discussed, will be an action item for the spring meeting.

VI. Party Opponent Statements Made by Predecessors in Interest

The Reporter directed the Committee's attention to Tab 6 of the agenda materials, explaining that federal courts have split concerning the admissibility of hearsay statements that would have been admissible against a party-opponent, after that party's interest is transferred to another party. He offered the example of statements made by a decedent that would have been admissible against him had he lived and filed suit, but that are instead offered against his estate who sues in his stead. The Reporter noted that some federal courts find the decedent's statement admissible against the estate because the estate stands in the shoes of the decedent for purposes of the lawsuit, while others reject admissibility based upon the absence of "privity" based admissibility language in Rule 801(d)(2). The Reporter explained that fairness concerns point toward admissibility of all statements made by such a predecessor prior to the transfer of his litigation interest. He directed the Committee's attention to a proposed amendment to Rule 801(d)(2) on page 236 of the agenda materials that would make such statements admissible against parties like the estate in the above example, as well as to a draft amendment on page 4 of the supplemental materials supplied to the Committee prior to the meeting.

The Chair first noted that the supplemental draft changed tense to read: "A statement that *is* admissible under this rule." He opined that the tense should be changed back so it would read: "A statement that *would be* admissible…" The Chair also noted the difficulty in characterizing the relationship between the declarant and the party justifying admissibility, explaining that terms like "privity" or "predecessor in interest" can be vague and can cause mischief in application. He expressed support for the functional terminology employed in the draft: "a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal." Professor Struve suggested that the language might be tweaked to say that a party's *liability* is derived form the declarant, rather than that its *defense*. The Reporter opined that defenses are also derived from predecessors and that the existing language accurately captures the intended relationship.

Professor Coquillette noted the importance of the timing of the declarant's hearsay statement; it must be made before the transfer of rights to the successor. (This will always be the case in a decedent/estate scenario but may not be in an assignor/assignee situation to which the

amendment would also apply). He inquired whether a timing limitation should be included in the text of an amended rule. The Reporter replied that such a limit was inherent in the provision and was also emphasized in the Committee note in the event that there was any confusion on that score.

The Chair asked Committee members whether they were in favor of proceeding with a proposed amendment to Rule 801(d)(2) to address the predecessor/successor scenario. All favored continuing work on the proposal. The Chair noted that the amendment would be an action item for the spring meeting with draft language reading: "A statement that would be admissible under this rule if the declarant or the declarant's principal were a party, is admissible when offered against a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal." The Reporter noted that the proposal would be reviewed by stylists in advance of the spring meeting.

VII. Declarations Against Interest and the Meaning of "Corroborating Circumstances"

Professor Richter directed the Committee's attention to Tab 7 of the agenda and the issue of the meaning of the "corroborating circumstances" requirement in Rule 804(b)(3) governing declarations against penal interest in criminal cases. She explained that most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest, as well as independent evidence, if any, corroborating the accuracy of the statement in applying the corroborating circumstances requirement. That said, some courts do not permit inquiry into independent evidence and limit judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. Professor Richter explained that, as detailed in the agenda memo, the Committee could consider an amendment to resolve this split of authority in favor of permitting both independent corroborative evidence and inherent guarantees of trustworthiness to be considered under Rule 804(b)(3). She emphasized that the limitation to inherent guarantees of trustworthiness was based on now defunct 6th Amendment precedent in *Idaho v. Wright;* that restricting what trial judges may consider in determining admissibility is at odds with Rule 104(a); and that the residual exception found in Rule 807 was amended in 2019 to permit consideration of corroborating evidence in determining the reliability of hearsay offered under that exception. Thus, an amendment bringing Rule 804(b)(3) and Rule 807 into line could be beneficial. She directed the Committee's attention to a draft amendment on page 249 of the agenda materials, that would require consideration of corroborating evidence, using language that parallels the amended residual exception.

The Chair inquired whether the Committee thought the meaning of "corroborating circumstances" under Rule 804(b)(3) was a problem worth solving. All agreed that it was. The Chair noted that an amendment to Rule 804(b)(3) would also be an action item for the spring meeting.

VIII. Rule 806 and Impeachment of Hearsay Declarants with Prior Dishonest Acts

The Reporter introduced the topic of Rule 806 and the impeachment of hearsay declarants, explaining that hearsay declarants act as witnesses when their statements are introduced for their truth. For this reason, Rule 806 allows the impeachment of hearsay declarants as if they were trial witnesses and seeks to equate hearsay declarant impeachment with traditional impeachment of witnesses. Rule 806 specifically addresses foundation requirements for impeachment with prior inconsistent statements, providing that a hearsay declarant need not receive an opportunity to explain or deny an inconsistency uttered either before or after the admitted hearsay statement. Rule 806 makes no express provision for Rule 608(b) impeachment, however, in which a trial witness may be asked on cross-examination about her own prior dishonest acts. Rule 608(b) allows a cross-examiner to ask the witness about dishonest past acts, but requires the impeaching party to take the answer of the witness; it prohibits extrinsic evidence proving the dishonest act even in the face of a denial by the witness. A hearsay declarant whose statement is offered into evidence may not be a trial witness at all. If the declarant is not a trial witness, she cannot be asked on cross-examination about her prior dishonest acts, leaving the availability of impeachment through prior dishonest acts in question. The Reporter explained that federal courts have resolved this conundrum differently, with some allowing extrinsic evidence of a hearsay declarant's prior dishonest acts notwithstanding the extrinsic evidence prohibition in Rule 608(b). Others have refused to allow impeachment of hearsay declarants with prior dishonest acts, thus enforcing the Rule 608(b) prohibition on extrinsic evidence and eliminating this method of impeachment for hearsay declarants. The question for the Committee is whether to explore an amendment to Rule 806 to address how to impeach a hearsay declarant with her prior dishonest act.

The Reporter acknowledged difficulty in crafting a solution to this problem, however. He noted that if extrinsic proof of a hearsay declarant's prior dishonest act were permitted, a party impeaching a hearsay declarant would be in a *better position* than a party impeaching a trial witness, instead of in the equal position contemplated by Rule 806. He explained that he had thought of allowing the trial judge simply to "announce" a hearsay declarant's prior dishonest act to try to equate the procedure with a cross question of a witness, but that this was not necessarily a replication of what happens with a trial witness. He noted that the original Advisory Committee may not have provided a procedure for Rule 608(b) impeachment of a hearsay declarant in Rule 806 because of the impossibility of translating the method to absent hearsay declarants. Finally, the Reporter explained that he had discovered another issue with Rule 806 in his research – the possibility that a criminal defendant's conviction could be offered to impeach his admitted hearsay statement through a combination of Rules 609 and 806 even if the defendant chose not to testify. The Reporter noted that this scenario arises very infrequently when the hearsay statement of one co-defendant can be offered against another defendant. In such a case, the confrontation rights of one criminal defendant must be balanced against the other defendant's right not to testify. Given the difficult balancing required and the infrequency with which this scenario arises, the Reporter suggested that the Committee might leave this issue out of an amendment, and to leave the solution to trial judges balancing the competing interests on a case-by-case basis.

The Chair opened the discussion by expressing his preference for leaving Rule 806 alone. He opposed allowing proof of dishonest acts through extrinsic evidence, as that would put the impeaching party in a superior position not an equal one. He also noted efficiency concerns given

that allowing extrinsic evidence could open up the need for mini-trials to allow the proponent of the hearsay declarant's statement to disprove the dishonest act. In fact, this was the reason for the ban on extrinsic evidence in Rule 608(b). All Committee members agreed that it was best not to pursue an amendment to Rule 806, and the matter was dropped from the Committee's agenda.

IX. Rule 613(b) and the Timing of a Witness's Opportunity to Explain or Deny a Prior Inconsistency When Extrinsic Evidence is Offered

Professor Richter introduced Rule 613(b) regarding extrinsic evidence of a witness's prior inconsistent statement. She reminded the Committee that Rule 613(b) permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. Although that opportunity had to be offered on cross-examination of the witness *before* extrinsic evidence could be presented at common law, the drafters of Rule 613(b) decided to abandon a *prior* foundation requirement in favor of flexible timing. Rule 613(b) permits a witness's opportunity to explain or deny a prior inconsistent statement to happen before *or even after* extrinsic evidence is admitted. Professor Richter explained that the original Advisory Committee chose to keep the timing flexible in case a prior inconsistent statement was discovered only after a witness had left the stand or in case there were multiple collusive witnesses a party wanted to examine before revealing the prior inconsistent statement of one. She noted, however, that presenting extrinsic evidence of a witness's prior inconsistent statement *before* giving him an opportunity to explain or deny it may cause problems if the witness has been excused or has become unavailable. For these reasons, many federal courts reject the flexible timing afforded by Rule 613(b) and *require* that a witness be given an opportunity to explain or deny *first* during cross-examination before extrinsic evidence of the statement may be offered.

Professor Richter noted that having a disconnect between the Rules and practice can be problematic and can be a trap for the unwary litigator who correctly reads Rule 613(b) to reject a prior foundation requirement only to learn – too late after cross of the witness is over – that the trial judge imposes her own prior foundation requirement outside the Rule. Professor Richter explained that there are two amendment possibilities to remedy this situation. The first would emphasize the flexible timing allowed by Rule 613(b) to bring *courts* into alignment with the Rule. The other would reinstate the prior foundation requirement, while affording discretion for the trial judge to forgive it in appropriate cases, thus bringing the *Rule* into alignment with the courts. Professor Richter suggested that the latter approach would appear optimal for several reasons. First, Rule 613(b) would clearly direct lawyers to give witnesses an opportunity to explain or deny a prior inconsistency on cross *before* offering extrinsic evidence, eliminating any trap for the unwary. Second, a prior foundation requirement would be efficient: if a witness admits a prior inconsistent statement on cross, there may be no need to introduce extrinsic evidence of the statement at all. Third, a prior foundation eliminates pesky issues concerning a witness's availability to be recalled only to explain or deny a prior inconsistent statement. Finally, preserving a trial judge's discretion to forgive the prior foundation requirement would still allow judges to deal with the rare situations identified by the original Advisory Committee. If the prior inconsistent statement was not discovered until after a witness left the stand, a court could allow extrinsic evidence and a later (or no) opportunity for the witness to explain. Professor Richter directed the Committee's attention to a draft amendment on page 283 of the agenda materials along these lines.

The Chair opened the discussion of Rule 613(b) by inquiring of other judges how they handle prior inconsistent statements. The Chair noted that he makes lawyers ask witnesses about their prior inconsistent statements on cross-examination because 90% of the time, witnesses admit their prior inconsistencies, eliminating any need for extrinsic evidence. All judges at the meeting agreed that their practice was consistent with the Chair's and that requiring a prior foundation was a superior procedure. All Committee members also agreed that the better Rule 613(b) amendment would be to bring the Rule into alignment with the pervasive practice.

The Chair then stated that the draft amendment language provided that extrinsic evidence "should not" be admitted but that it should read "may not." Other Committee members agreed that "may not" would be superior so long as the Rule preserved trial judge discretion by stating "unless the court orders otherwise." The Reporter suggested that the discretionary language from the original provision that allows deviation "if justice so requires" could be clarified and improved by simply stating "unless the court orders otherwise." The Chair agreed and noted that the draft language reading "before it is introduced" should be changed to "before extrinsic evidence is introduced" to add clarity. The Chair also suggested that bracketed language in the draft Committee note – "[in the typical case]" – should be eliminated with the change to "may not" in rule text. The Chair closed the discussion of Rule 613(b) by informing the Committee that they would see the Rule as an action item at the spring meeting.

X. Closing Matters

The Chair raised the issue of the Evidence Advisory Committee's self-evaluation and solicited feedback from the Committee. Judge Bates noted that the self-evaluation suggested that the Committee was "too small" and inquired how big it should be. Both the Chair and the Reporter explained that the Committee is a good size and that they are not in favor of growing it, but that the Evidence Advisory Committee has had a position for an academic member vacant for twenty years. Both the Chair and Reporter advocated for adding one academic member to fill that position. With that addition, both felt that the Committee would be the perfect size. Both also commented on the valuable contributions received from the liaisons from other committees, that helps produce outstanding work product. The Chair promised to send the self-evaluation to the Standing Committee.

The Chair thanked all participants for their valuable contributions and thanked Professor Capra and Professor Richter for the outstanding agenda materials. He extended a warm thanks to all of the AO staff members who were responsible for putting together an in-person meeting. The Chair closed by informing the Committee that the next meeting would be on May 6, 2022, in Washington, D.C.

Respectfully Submitted,

Liesa L. Richter
Daniel J. Capra

TAB 8

TAB 8A

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.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.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee • 3/22/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates • 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology • 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Co-Sponsors:* Buck (R-CO) Perlmutter (D-CO) Neguse (D-CO) Cooper (D-TN) Thompson (D-CA) Burgess (R-TX) Bishop (R-NC) **S. 2827** *Sponsor:* Cornyn (R-TX) *Co-sponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving "no effect" for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities.	• 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee • 9/23/21: S. 2827 introduced in Senate; referred to Judiciary Committee

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21: Introduced in Senate, Referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Co-Sponsors:* [168 co-sponsors] **S. 2921** *Sponsor:* Klobuchar [D-MN] *Co-Sponsors:* Blumenthal [D-CT] Coons [D-DE] Feinstein [D-CA] Hirono [D-HI] Merkley [D-OR] Sanders [I-VT] Warren [D-MA] Wyden [D-OR]	CR 6; CV	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including: • Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President • Requiring the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House Judiciary Committee • 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs • 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838 • 12/9/21: H.R. 5314 passed by House • 12/13/21: House bill received in Senate

Legislation that Directly or Effectively Amends the Federal Rules
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(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Co-Sponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** The bill directs the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 11/26/21: Introduced in House; referred to Judiciary Committee

TAB 8B

JUDICIARY STRATEGIC PLANNING

At its February 11-12, 2021 meeting, after considering a proposal by the Judiciary Planning Coordinator in the context of the ongoing COVID-19 pandemic, the Executive Committee agreed that "the strategic planning process is one effective mechanism for coordinating Conference committee planning to prepare the judiciary for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts." Of particular concern is ensuring the uninterrupted delivery of, and access to, fair and impartial justice, notwithstanding substantially reduced access over extended periods of time to court buildings, federal defender offices, and the Administrative Office of the U.S. Courts. The Executive Committee further approved the topic as an agenda item for discussion at the September 27, 2021 Long-Range Planning meeting. Recommendations from Conference committee chairs led to expanding the topic to include potential efficiencies and cost containment measures learned from the COVID-19 pandemic, and the judiciary's continued reliance on technology to enable and potentially improve access to justice, post-pandemic. Attachment 1 is a summary report of the Conference committee chairs' discussion at the Long-Range Planning meeting. Attachment 2 is a list of the issues and lessons learned that were raised during the discussion.

ISSUES FOR EXECUTIVE COMMITTEE CONSIDERATION (ACTION)

At its February 10-11, 2022 meeting, the Executive Committee will consider which issues or lessons learned, since March 2020, would be best explored through the judiciary's strategic planning process, and in so doing, would help to ensure committees move forward in a coordinated manner in addressing pandemic and post-pandemic issues. Committee input is critical to the Executive Committee's deliberations.

Action Requested: On or before January 11, 2022, the Committee is asked to provide suggestions to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (First Circuit), regarding issues or lessons learned, since March 2020, that might be addressed through the judiciary's strategic planning process. Specifically, the Committee is asked to:

1. Identify issues on the attached list that are already being addressed by the Committee; and

2. Identify issues on the attached list – or from other sources – that the Committee recommends for further exploration and discussion through the judiciary's strategic planning process.

Attachments

Excerpt from the Summary Report of the September 27, 2021 Long-Range Planning Meeting

Preparing for Future Pandemics, Natural Disasters, and Other Crises

Chief Judge Howard reminded participants that the impetus for the discussion was the Executive Committee's decision in February 2021 "that the strategic planning approach would be one effective mechanism for coordinating conference committee planning to prepare the judiciary for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts." Recommendations from committee chairs led to expanding the topic to include the judiciary's continued reliance on technology to enable and potentially improve access to justice, and potential efficiencies and cost containment measures learned from the COVID-19 pandemic. Referencing other suggested discussion topics submitted by committee chairs, Chief Judge Howard commented that he proposed following up on those suggestions at the March or September Long-Range Planning meetings in 2022.

Long-Range Planning meetings provide some of the few opportunities for committee chairs to be in one room at the same time -- albeit a virtual room. As such, Chief Judge Howard hoped committee chairs would value time being set aside to talk about how the judiciary might best make use of lessons learned, since March 2020, in ongoing operations and in long-range planning. His personal goal was to use this discussion for issue-spotting, that is, to prepare a list of issues that might help all participants better understand what work needs to be done and how best to address the work together. As an example, Chief Judge Howard referenced vaccine mandates and required testing as issues around which there are many different perspectives and concerns. He also noted that he was speaking from his home today because the courthouse of the U.S. Court of Appeals in New Hampshire does not have the bandwidth to conduct an extended virtual meeting.

To help guide discussion, Chief Judge Howard introduced five speakers who had agreed to share their perspectives: Chief Judge Scott Coogler, Executive Committee; Judge Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management; Judge John W. Lungstrum, Chair, Committee on the Budget; and Mr. John S. Cooke, Director, Federal Judicial Center (FJC). Chief Judge Howard also extended an invitation to other participants to comment.

Chief Judge Coogler prefaced his remarks by noting that necessity is very often the mother of invention, and the collective response of the courts to the COVID pandemic underlined the validity of this truism. The courts took on the myriad of issues and challenges they faced as a result of the COVID pandemic; addressed challenges; identified problems, and found ways to solve those problems.

Chief Judge Coogler referenced the Judiciary COVID-19 Task Force (Task Force), formed by the Director of the Administrative Office of the U.S. Courts (AO), and led by the AO's Facilities and Securities Office. The Virtual Judiciary Operations Subgroup (VJOS) grew out of the Task Force, led by Chief Judge Coogler (a member of the Task Force). VJOS was tasked with identifying how the courts responded to the pandemic, and collecting and collating that information in a usable form so that practical lessons learned could be shared. VJOS worked closely with the Federal Judicial Center (FJC) to develop a plan for reaching out to courts and IT experts. The courts were initially hesitant about using remote technologies, but given the imperative to deliver justice courts are now embracing remote technologies. The court system found ways to have hearings and meetings, and also found ways for attorneys to meet

with their clients. VJOS identified eight courts of different sizes and locations, and with different challenges. With the assistance of the FJC, VJOS is now documenting those courts' experiences and innovations in a series of Play Books. Each Play Book sets out the challenges, what needed to be fixed, what worked, how the IT was set up, how the budget was orchestrated, and many other practical lessons learned. These Play Books will be available for reference if COVID or some other crisis happens in the future. While commending the continuously improving capabilities of remote technologies to support virtual meetings, Chief Judge Coogler commented that it may not be desirable to hold all meetings remotely – that decision is with each judge. To that point, Chief Judge Coogler emphasized that VJOS is not a policy making body. VJOS documents what has happened in the past, and its purpose going forward is to serve as a resource.

Judge Fleissig proposed breaking into three separate categories consideration of lessons learned during the pandemic: 1) ways to transition back to normal; 2) how to plan for the next pandemic or emergency to be better prepared to meet it; and 3) how to use the lessons learned from the pandemic to improve court operations when there is no emergency. Under the first category, Judge Fleissig noted a number of issues, including potential masking and vaccination requirements, space utilization, and the extent to which court staff might be allowed to continue working remotely. Under the second category, Judge Fleissig noted the Rules Committee's proposed modifications to the Federal Rules of Criminal Procedure, which, consistent with the Coronavirus Aid, Relief, and Economic Security (CARES) Act, are undergoing public notice and comment. Judge Fleissig also commented that, on the civil side, several courts have been conducting proceedings using remote technology, including civil jury trials. Under the third category, Judge Fleissig noted that the court community has done a remarkable job continuing to provide access to justice during the pandemic. Given these positive results, it is important that due consideration be given to the lessons learned, and how they can be used to improve court operations and procedures in a non-pandemic environment. Judge Fleissig referenced Strategy 5.1 in the *Strategic Plan for the Federal Judiciary*, which calls for harnessing "the potential of technology to identify and meet the needs of court users for information, service, and access to the courts," and noted that technology is at the center of courts' ability to operate effectively, remotely or otherwise. During the pandemic, many civil and criminal proceedings have been conducted remotely, and, subject to certain restrictions, remote public access has been allowed. In addition, pursuant to the broadcasting pilot launched in February 2021, audio of certain proceedings in district and bankruptcy courts were livestreamed to participating pilot courts' YouTube pages.

In summary, significant opportunities for delivering justice remotely have already been identified with concomitant cost savings, such as reduced travel costs, and probably time savings with some meetings with the court or between attorneys and clients perhaps occurring in a timelier manner than would be the case if travel were required for attendance. Judge Fleissig noted that while FJC and VJOS are providing courts with a lot of information to leverage technology in ways that improve access to justice, the question remains whether the use of technology for the delivery of justice should be expanded, or whether the judiciary should return to its pre-pandemic, in-person, normal. Many in the public and within the courts have argued that the judiciary should continue and expand remote proceedings. However, there are clearly some proceedings that should not occur remotely, such as grand jury proceedings and criminal jury trials. Having the capability to conduct a proceeding remotely does not mean that it should be conducted remotely. Remote proceedings can be impersonal, while original appearances in court may offer an important opportunity to confer with counsel and personally address issues early in the case. In another example, while it may be cheaper for defense counsel to meet with

clients remotely, those in the defender community have indicated that face-to-face meetings are critical for building trust. Judge Fleissig acknowledged that the issue of expanded use of remote technologies post-pandemic is a critical issue to be considered by the Committee on Court Administration and Case Management, and concluded that the judiciary must take stock of its capacities, and understand the pros and cons of the various platforms and their use in different contexts. The availability of technology does not insist that it must be adopted. Rather, Judge Fleissig emphasized, it is imperative to ensure the integrity of the court process.

Responding to Judge Fleissig's remarks, Judge Randolph D. Moss noted that reliance on technology to communicate with people who are incarcerated could be problematic. The issue is limited technology capacity at Bureau of Prison's (BOP) facilities and at local jails. Significant additional funding to support technology upgrades would require outreach to Congress. Judge Moss co-chairs, with BOP, the Judiciary, Department of Justice, and BOP Work Group which is identifying and facilitating solutions to issues impacting district courts, probation/pretrial, federal defender, and BOP operations.

Judge Lungstrum acknowledged that the judiciary was not fully prepared for how to deal with the pandemic when it hit. The systemic inability to conduct court in courthouses meant the judiciary had to "invent the wheel" as it went along – and did it well. However, as the judiciary had not seen the pandemic or its consequences coming, the judiciary's initial request to Congress for additional funding under the CARES Act was less than would ultimately be required. Bandwidth presented a big issue with IT capacity suddenly required to support remote work across the judiciary. When the judiciary turned to Congress for additional funds, Congress was focused on the public, not on how the government was coping. The judiciary's requests for additional supplemental funding were not met, falling tens of millions of dollars short. The judiciary absorbed the shortfall from within its operating budget, but not without significant costs to the courts and probation offices. Opportunities for cost savings also arose during the pandemic from innovations in leveraging technology for virtual meetings and court appearances, and from many of the examples already outlined by Judge Fleissig. Judge Lungstrum noted that Judge Fleissig had also outlined many of the trade-offs and underlined some serious policy issues. While virtual judges meetings have functioned well to fill a gap during the pandemic, the question remains whether all judges meetings should be held remotely in the future. Remote work and saving space may work for some offices but not for others – these are policy issues. Judge Lungstrum concluded with two lessons learned which he posed as questions: 1) Can the judiciary be better prepared in advance of a pandemic or other crisis to quickly make the case for supplemental funding to Congress? 2) Can the judiciary take some cost-saving innovations forward to improve post-pandemic operations?

Chief Judge Howard invited Ms. Dana Yankowitz Elliott, Senior Attorney, Judicial Services Office, to share a perspective from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). Speaking on behalf of the committee chair, Chief Judge Sara Darrow, and looking ahead to the post-pandemic operating environment, Ms. Elliot emphasized the committee's interest in exploring how to expand and improve technology to support remote bankruptcy proceedings and to better share educational resources. Remote proceedings have increased access to justice for many parties during the pandemic. This was especially the case for debtors located in rural areas and for whom in-person meetings often incur significant travel and accommodation costs. Taking these lessons learned into account, the Bankruptcy Committee had raised the question: should bankruptcy proceedings continue remotely and thereby increase access to justice for debtors? Ms. Elliot concluded by noting that Chief Judge Darrow and the Bankruptcy Committee would continue to consider this question.

At the invitation of Chief Judge Howard, Ms. Lee Ann Bennett, Deputy Director, AO, reflected briefly on lessons learned by the AO over the past 18 months. Ms. Bennett highlighted the formation of the Judiciary COVID-19 Task Force and the engagement of its members to the tasks at hand as probably the most significant lesson learned. The Task Force demonstrates what can be achieved when many people are involved representing diverse perspectives from throughout the judiciary and beyond the judiciary. Emphasizing this point, Ms. Bennett noted that the Task Force is comprised of a mix of judiciary employees including chief judges, court unit executives, and executive agency partners including the United States Marshals Service, Federal Protective Service, the Department of Justice, and the General Services Administration. Ms. Bennett also commented that the success of the Task Force underlines another important lesson learned: regular communication and coordination. Ms. Bennett referenced not only communication within the Task Force, or between the AO and the courts, but also communication that occurs court to court, circuit to circuit, and the willingness, more generally, of judiciary employees to share best practices. Ms. Bennett concluded by noting that Judge Roslynn R. Mauskopf, Director, AO, would want to thank committee chairs for being involved and, looking forward to a post-pandemic operating environment, would likely raise a double-sided question for consideration: what to change, and what not to change?

Mr. Cooke began by noting the profound effects of the pandemic on the judiciary and the wider community, personally and professionally. He also emphasized that the FJC's mission was to help courts get through the pandemic and to prepare for the post-pandemic future. At the outset of the pandemic, the FJC began immediately to collect and archive information on the pandemic from every federal court's public website in the country. The FJC worked with VJOS gathering information on remote proceedings and dealing with pro se litigants. The FJC created a COVID case map covering every federal district in the country and continues to update the map each week. Focus groups were conducted with 13 district courts, and 75 district, magistrate and bankruptcy judges, and other court personnel focusing on how courts responded to the pandemic, including the challenges they addressed and the procedures they developed. This information was supplemented by VJOS surveys on how courts used technology more generally in their day-to-day operations. CM/ECF data also continues to be collected. Mr. Cooke assured committee chairs that the FJC is a resource and is ready to discuss pandemic lessons learned at their convenience. Mr. Cooke also referenced the FJC's educational activities which have continued throughout the pandemic. With all trainings being delivered remotely, the content of training programs for leaders also shifted to focus on stress, change management, and communications in a remote court environment. Mr. Cooke concluded by noting that, in addition to its devastating physical consequences, the human impact of the pandemic would not go away soon. It is important that the judiciary preserve what is valued, and make changes to adapt.

Chief Judge Howard extended a special thanks to speakers for their insightful perspectives of the challenges faced by the judiciary in the pandemic operating environment, and also the opportunities that had surfaced. He noted in particular the opportunities to integrate many of the innovations already adopted by the courts and other areas of the judiciary into regular operations. Returning to his goal to use the meeting for issue spotting, Chief Judge Howard commented that a number of issues had been identified that could potentially be taken forward as a group for further review and discussion.

LIST OF ISSUES

Summarized below are issues raised during the September 27, 2021, Long-Range Planning discussion on: Preparing for Future Pandemics, Natural Disasters, and Other Crises – including the judiciary's continued reliance on technology to enable and potentially improve access to justice, and potential efficiencies and cost containment measures learned from the COVID-19 pandemic. *See* Attachment 1.

The issues are notionally grouped under three categories. Note that some of the issues could fit under more than one category.

1. *Issues related to transitioning back to normal*
    - Vaccine mandates
    - Required testing
    - Masking protocols
    - The extent to which to allow remote work for court employees
    - Policies regarding potential space savings
    - The extent to which remote technologies might be used for civil, criminal, and grand jury proceedings
    - How to ensure committees move in a coordinated manner in addressing pandemic and post-pandemic issues
    - What to change and what not to change
    - How to ensure the integrity of judicial process
2. *Issues related to planning for the next pandemic or crisis*
    - Additional funding to support upgrading and expanding the IT capacity of many courthouses
    - Additional funding for BOP facilities and local jails to support expanding the remote delivery of justice
    - Funding shortfalls in the absence of supplemental funding from Congress – how to ensure the judiciary is prepared to quickly respond to a crisis with the necessary funding
3. *Issues (or opportunities) related to lessons learned from improved court operations to take forward*
    - Increased access to justice for debtors through remote proceedings – should bankruptcy proceedings continue remotely
    - Virtual versus in-person meetings – impersonal versus personal
    - The COVID-19 Task Force – coordination
    - Court to court, circuit to circuit communication and coordination
    - Accessing VJOS and FJC resources to leverage technology in ways that improve access to justice