COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

January 4, 2023

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JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2023

AGENDA

1. Opening Business

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

B. **ACTION:** The Committee will be asked to approve the minutes of the June 7, 2022, Committee meeting.

C. Status of Rules Amendments

- Report on proposed rules amendments approved by the Judicial Conference and transmitted to the Supreme Court on October 19, 2022 (potential effective date of December 1, 2023).

2. Joint Committee Business

A. Report on pro se electronic filing project.

B. Update on a suggestion to change the presumptive deadline for electronic filing.

3. Report of the Advisory Committee on Appellate Rules – Judge Jay S. Bybee, Chair

A. Information Items

- Update on possible amendments to Rule 29 (Brief of an Amicus Curiae) in response to a suggestion received regarding amicus disclosures.

- Report on consideration of possible amendments to Rule 39 (Costs) regarding costs on appeal in response to comments in the *Hotels.com* decision.

- Update regarding possible amendments to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) in response to several suggestions regarding regularizing IFP standards.

- Report on possible amendments to Rule 6 (Appeal in a Bankruptcy Case) to conform with proposed amendments to Bankruptcy Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) regarding direct appeals in bankruptcy.

- Report on new suggestion regarding disclosure of third-party litigation funding.

- Report on decision to remove a suggestion regarding striking amicus briefs from the agenda.

- Report on inter-committee consideration of possible amendments in response to the *Hall v. Hall* decision.

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Rebecca Buehler Connelly, Chair

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

- Amendment to Official Form 410A (Proof of Claim, Attachment A).

B. Information Items

- Report concerning proposed amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals), and work with Appellate Rules Committee concerning possible amendment to Appellate Rule 6.

- Update concerning work on proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and related forms.

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

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

- Proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs.

B. Information Items

- Report on inter-committee consideration of possible amendments in response to the *Hall v. Hall* decision.

- Report on consideration of possible new rule for MDL cases.

- Report on consideration of possible amendment to Rule 41(a) (Dismissal of Actions).

- Report on consideration of suggestions to amend Rule 7.1 (Recusal Disclosure Requirement).

- Report on consideration of possible amendment to Rule 45(b)(1) (Hand Delivery of Subpoenas).

- Report on consideration of possible amendment to Rule 55 (Default; Default Judgment).

- Report on other items considered and retained on the Advisory Committee's agenda (jury demands, *in forma pauperis* standards and procedures, "incentive awards" for class representatives, and filings under seal).

- Report on items considered and removed from the Advisory Committee's agenda.

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

A. Information Items

- Report on decision to remove a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) from agenda.

- Report on consideration of possible amendment to Rule 17 (Subpoena).

7. Report of the Advisory Committee on Evidence Rules – Judge Patrick J. Schiltz, Chair

A. Information Items

- Update on the consideration of a proposed amendment to Rule 611(e) (Mode and Order of Examining Witnesses and Presenting Evidence) regarding juror questions, including a report on a panel discussion held in connection with the fall meeting.

- Update on a proposed amendment to Rule 611(d) (Mode and Order of Examining Witnesses and Presenting Evidence) published for public comment regarding illustrative aids, including a report on the panel discussion held on the topic in connection with the fall meeting.

- Update on other rules published for public comment, including Rule 613(b) (Prior Inconsistent Statements), Rule 801(d)(2) (Hearsay Statements by Predecessors), Rule 804(b)(3) (Corroborating Circumstances Requirement), and Rule 1006 (Summaries of Evidence).

8. Other Committee Business

A. **ACTION:** Strategic Planning. The Committee is being asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary (Plan)*. At its February 2023 meeting, the Executive Committee will consider the recommendations from committees as it determines which strategies and goals from the *Plan* should receive priority attention over the next two years.

B. Next Meeting – June 6, 2023 (Washington, D.C.)

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

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

Secretary to the Standing Committee

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

Advisory Committee on Appellate Rules

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

Associate Reporter

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

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA

Advisory Committee on Criminal Rules

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

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable 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 Gary Feinerman United States District Court Chicago, IL
Robert J. Giuffra, Jr., Esq. Sullivan & Cromwell LLP New York, NY	Honorable William J. Kayatta, Jr. United States Court of Appeals Portland, ME
Honorable Carolyn B. Kuhl Superior Court of the State of California, County of Los Angeles Los Angeles, CA	Dean Troy A. McKenzie New York University School of Law New York, NY
Honorable Patricia A. Millett United States Court of Appeals Washington, DC	Honorable Lisa O. Monaco Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Andrew J. Pincus, Esq. Mayer Brown LLP Washington, DC	Honorable Gene E.K. Pratter United States District Court Philadelphia, PA
Honorable D. Brooks Smith United States Court of Appeals Duncansville, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
Honorable Jennifer G. Zipps United States District Court Tucson, AZ	

Consultants

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

Consultants (continued)

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

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

Secretary to the Standing Committee

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Washington, DC

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
Gary Feinerman	D	Illinois (Northern)	2022	2025
Robert J. Giuffra, Jr.	ESQ	New York	2017	2023
William J. Kayatta, Jr.	C	First Circuit	2018	2024
Carolyn B. Kuhl	JUST	California	2017	2023
Troy A. McKenzie	ACAD	New York	2021	2024
Patricia Ann Millett	C	DC Circuit	2020	2025
Lisa O. Monaco*	DOJ	Washington, DC	----	Open
Andrew J. Pincus	ESQ	Washington, DC	2022	2025
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2019	2025
D. Brooks Smith	C	Third Circuit	2022	2025
Kosta Stojilkovic	ESQ	Washington, DC	2019	2025
Jennifer G. Zipps	D	Arizona	2019	2025
Catherine T. Struve				
Reporter	ACAD	Pennsylvania	2019	2023

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

* Ex-officio - Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. 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	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Gary Feinerman (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck *(Civil)*

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

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Senior Research Associate
(Standing)

TAB 1

TAB 1A

This item will be an oral report.

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 7, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met in a hybrid in-person/virtual meeting in Washington, DC on June 7, 2022, with the public and certain members attending by videoconference. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

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 B. Bartell,
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 Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

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

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Rules Committee Chief Counsel-Designate; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Scott Myers and Allison Bruff, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the

* 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 for a portion of the meeting.

Draft

Standing Committee; Dr. Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He noted that Deputy Attorney General Lisa O. Monaco would not be able to attend, but he welcomed Elizabeth Shapiro and thanked her for attending on behalf of the Department of Justice (DOJ). He thanked several members whose terms were expiring following this meeting, including Standing Committee members Judge Frank Hull, Peter Keisler, and Judge Jesse Furman. Judge Bates also thanked Judge Raymond Kethledge and Judge Dennis Dow for their service as chairs of the Criminal Rules and Bankruptcy Rules Advisory Committees respectively. He welcomed Tom Byron, who would be joining the Rules Office as Chief Counsel in July, and Allison Bruff, who had joined as counsel. Judge Bates congratulated Professor Troy McKenzie on his appointment as Dean of New York University Law School. In addition, Judge Bates thanked the members of the public who were in attendance by videoconference for their interest in the rulemaking process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the January 4, 2022 meeting.**

JOINT COMMITTEE BUSINESS

Emergency Rules

Judge Bates introduced this agenda item, which concerned final approval of proposed new and amended rules addressing future emergencies. Specifically, the Appellate, Bankruptcy, Civil, and Criminal Advisory Committees were requesting approval of amendments to Appellate Rules 2 and 4, as well as promulgation of new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62.

Professor Struve thanked all the chairs and reporters of the Advisory Committees for their extraordinary work on this project, and especially Professor Capra for leading the project. This project was in response to Congress's mandate to consider rules for emergency situations. In regard to the uniform aspects of these rules (*i.e.*, who declares an emergency, the basic definition of a rules emergency, the duration of an emergency, provisions for additional declarations, and when to terminate an emergency), most of the public comments focused on the role of the Judicial Conference in declaring a rules emergency. One commentator supported the decision to centralize emergency-declaration authority in the Judicial Conference; others criticized the decision in various ways. The Advisory Committees carefully considered this both before and after public comment. The uniform aspects remain unchanged post-public comment.

Professor Capra noted two minor disuniformities that remained within the emergency rules. Proposed Appellate Rule 2(b)(4), concerning additional declarations, was styled differently than the similar provisions in the proposed Bankruptcy, Civil, and Criminal emergency rules. And proposed Civil Rule 87(b)(1), concerning the scope of the emergency declaration, was worded differently than the similar provisions in the proposed Bankruptcy and Criminal emergency rules.

Draft

Proposed Civil Rule 87(b)(1), as published, stated that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed Bankruptcy and Criminal 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.

Appellate Rules 2 and 4. Turning to the point raised by Professor Capra, Professor Hartnett noted that proposed amended Rule 2(b)(4), as set out on lines 27 to 29 of page 89 of the agenda book, used the passive voice ("[a]dditional declarations may be made") instead of the active voice used by the other emergency rules ("[t]he Judicial Conference … may issue additional declarations"). He stated that the Appellate Rules Advisory Committee agreed to change the language to bring it into conformity with the other emergency rules.

A judge member focused the group's attention on proposed Appellate Rule 2(b)(5)(A) (page 90, line 36). In the event of a declared emergency, this provision would authorize the court of appeals to suspend Appellate Rules provisions "other than time limits imposed by statute and described in Rule 26(b)(1)-(2)." The member asked whether the "and" should be an "or." The rule, as drafted, could be read as foreclosing suspension of only those time limits that are both imposed by statute and described in Rule 26(b)(1) or (2). Professor Hartnett stated that the use of "and" was intentional. Current Appellate Rule 2 permits suspension (in a particular case) of Appellate Rules provisions "except as otherwise provided in Rule 26(b)," and Appellate Rules 26(b)(1) and (2) currently bar extensions of the time for filing notices of appeal, petitions for permission to appeal, and requests for review of administrative orders. The proposed Appellate emergency rule, by contrast, is intended to permit extensions of those deadlines, so long as they are set only by rule and not also by statute. Changing "and" to "or" would eliminate that feature of the proposed rule. Professor Struve noted that she is unaware of any deadline set by both statute and an Appellate Rule other than those referenced in Rule 26(b).

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Appellate Rules 2 and 4, with the revision to proposed Appellate Rule 2(b)(4) (lines 27-29) as discussed above.**

New Bankruptcy Rule 9038. Judge Dennis Dow introduced proposed new Bankruptcy Rule 9038. The proposed new rule would authorize extensions of time in emergency situations where extensions would not otherwise be authorized. The Bankruptcy Rules Advisory Committee received only one relevant public comment, which was positive and not specific to the Bankruptcy rule. He requested the Standing Committee give its final approval to proposed new Rule 9038 as published.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Bankruptcy Rule 9038.**

New Civil Rule 87. Judge Robert Dow introduced proposed new Civil Rule 87. The Civil Rules Advisory Committee received a handful of comments. The CARES Act Subcommittee considered these comments and determined that no changes were necessary, and the Advisory Committee agreed. The Advisory Committee made some small changes concerning bracketed

language in the committee note, but otherwise the rule looks similar to the language that came before the Standing Committee prior to publication for public comment.

Professor Cooper noted a pair of changes to the portion of the committee note shown on page 124 of the agenda book. Emergency Rule 6(b)(2)(A) authorizes a court under a declared rules emergency to "apply Rule 6(b)(1)(A) to extend" the deadlines for post-judgment motions. (Ordinarily, Civil Rule 6(b)(2) forbids a court from extending those deadlines.) Rule 6(b)(1)(A) authorizes a court, "for good cause, [to] extend the time … with or without motion or notice if the court acts, or if a request is made, before the original time *or its extension* expires." (emphasis added.) Prior to the Standing Committee meeting, a judge member had pointed out that, as published, the text of the rule, by referring to Rule 6(b)(1)(A), authorizes sequential extensions (that is, a court could grant an extension under Rule 6(b)(1)(A) and, before time expired under that extension, grant a second extension). But, the member observed, the committee note did not reflect this possibility. Professor Cooper agreed with this assessment of the committee note. The Advisory Committee therefore agreed to add language (in the first and fifth sentences of the relevant committee note paragraph) clarifying that such further extensions were possible. Separately, the Advisory Committee had decided to delete the first sentence of the next paragraph of the committee note, and to combine the remainder of that paragraph with the following paragraph to form one paragraph.

Discussion then turned to the wording of proposed Civil Rule 87(b)(1). A practitioner member noted that as he read the proposed Criminal and Bankruptcy emergency rules, if the Judicial Conference failed to specify which emergency provisions it was invoking or exempting, the default was that all the emergency provisions would go into effect. However, proposed new Civil Rule 87(b)(1)(B) by its terms worked differently: "The declaration must … adopt all the emergency rules … unless it excepts one or more of them." Under this wording, the member suggested, if the declaration did not specify which provisions it was adopting, it would be an invalid declaration. Professor Cooper stated that, originally, the relevant portion of Rule 87(b)(1) had said simply that "[t]he declaration *adopts* all the emergency rules unless it excepts one or more of them," thus setting the same default principle as the proposed Bankruptcy and Criminal rules. But in the quest for uniformity in wording across the three proposed emergency rules, the word "must" had been moved up into the initial language in Rule 87(b), which had the effect of inserting "must" into proposed Rule 87(b)(1)(B). Professor Cooper explained that (for the reasons set forth on page 111 of the agenda book) it was not possible for Civil Rule 87(b)(1)(B) to use identical wording to that in the proposed Bankruptcy and Criminal emergency rules. The Bankruptcy and Criminal provisions directed that the emergency declaration "must … state any restrictions on" the emergency authority otherwise granted by the relevant emergency rule—a formulation that would not be appropriate in the Civil rule given the indivisible nature of each particular Civil emergency rule. Professor Cooper expressed the hope that the Judicial Conference would remember to specify which courts were affected and which rules it was adopting by its emergency order. Judge Bates added that if the rule would require the Judicial Conference to make a specific declaration for Civil that need not be made for the other emergency rules, members should consider whether it would cause any problems.

Professor Struve suggested that there were actually two uniformity questions at issue—stylistic uniformity, and a deeper uniformity as to the substance. Uniformity on the substance, she

offered, could be achieved through revisions to Civil Rule 87(b)(1) (on pages 116-17)—namely, deleting the word "must" from line 10 and instead inserting it at the beginning of lines 11 and 15, and changing "adopt" at the beginning of line 12 to "adopts." Under that revised wording, if the declaration failed to specify any exceptions, it would adopt all the emergency rules in Rule 87(c)—thus achieving the same default rule as the Bankruptcy and Criminal provisions.

Professor Capra, however, stated that this proposed revision would deepen rather than alleviate the uniformity problem. He predicted that the good sense of the Judicial Conference would surmount any problem with the language of the rule as published. Professor Coquillette agreed that the Judicial Conference would know what it needed to do to declare a Civil Rules emergency. Judge Bates added that he believed the Rules Office would inform the Judicial Conference of the procedures it needed to follow to declare a Civil Rules emergency. Professor Struve expressed her confidence in the meticulousness of the Rules Office, but she questioned why the rulemakers would want to impose an additional task on the Rules Office in the event of an emergency. Making it as simple as possible for all actors to act in an emergency situation seemed desirable.

Judge Bates highlighted two goals: First, the desire for uniformity. Second, the desire to not have to ask the Judicial Conference to do something unique with respect to the Civil Rules. Judge Bates thought that Professor Struve's suggestion would accomplish the second goal, although it would offend uniformity. And, he suggested, the proposed rule as published already offended uniformity. Therefore, the question under debate was not about *creating* disuniformity but rather fixing one issue while continuing the lack of uniformity.

A practitioner member stated that she agreed with the proposed change. The change would make the rule read more clearly while also safeguarding against something being overlooked in an emergency. Professor Marcus said that the goal of the Advisory Committee was to make it as easy as possible for the Judicial Conference to declare a rules emergency, with all the emergency rules going into effect unless the Judicial Conference explicitly excluded a rule. To the extent the rule as written did not do so, it would be good to make changes to get there. A judge member agreed that the rule should not create more work for people to do in order to declare a rules emergency.

Judge Robert Dow stated that he believed Professor Struve's proposed change was friendly and therefore acceptable to the Advisory Committee. While it would add a disuniformity to the proposed new Rule 87, that disuniformity occurred in a place where the rule already was not uniform in relation to the other emergency rules. He asked the Standing Committee to grant final approval to proposed new Civil Rule 87, with the noted changes both to the committee note and to lines 10 through 15 of the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Civil Rule 87.**

New Criminal Rule 62. Judge Kethledge introduced proposed new Criminal Rule 62. The Criminal Rules Advisory Committee received ten or so public comments, some of which were overlapping. He highlighted one change to the committee note plus two of the public comments.

Draft

First, the change to the committee note concerned a passage addressing proposed Rule 62(d)(1)'s requirement that courts provide "reasonable alternative access" to the public when conducting remote proceedings. The note as published stated that "[t]he rule creates a duty to provide the public, including victims, with 'reasonable alternative access.'" DOJ requested that the note be revised to mention the Crime Victims' Rights Act (CVRA). A pair of comments opposed this suggestion, and one of those comments requested deletion of the phrase "including victims." The latter phrase had been included to ensure that district courts did not overlook the requirements of the CVRA when holding remote proceedings, not to suggest an order of priority among observers of remote proceedings. Accordingly, the Advisory Committee revised the note as shown on page 161 of the agenda book by deleting the phrase "including victims" and by adding a sentence directing courts to "be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act." This language reminds courts to consider both the First and Sixth Amendments' guarantees of public access, in addition to any statutory rights, such as the CVRA. Later in the meeting, an attorney member suggested changing "be mindful of" to "comply with," and Judge Kethledge (on behalf of the Advisory Committee) acquiesced in that change.

Second, one of the public comments concerned proposed new Rule 62(d)(2), which provides that, if "emergency conditions limit a defendant's ability to sign[,] defense counsel may sign for the defendant if the defendant consents on the record." A district judge suggested that this language be revised to allow the court to sign for the defendant as well. The Advisory Committee did not support this suggestion. There was no demonstrated need to have the court sign for the defendant when counsel would be perfectly able to do so. The Advisory Committee was particularly concerned that this would infringe upon the attorney-client relationship. And the Advisory Committee was concerned that this would allow the court to sign a request to hold felony plea or sentencing hearings remotely under proposed new Rule 62(e)(3)(B).

Third, the Advisory Committee received public comments regarding proposed new Rule 62(e)(3)(B), which addresses holding felony plea or sentencing hearings remotely. This is by far the most sensitive subject that Rule 62 addresses. A defendant's decision to plead guilty and the court's decision to send a person to prison are the most important proceedings that happen in a federal court. The Advisory Committee has an institutional perspective that remote proceedings for pleas and sentencing truly should be a last resort; holding such a proceeding remotely is always regrettable, even if it is sometimes necessary. A court does not have as much information when proceeding remotely as it would have in a face-to-face proceeding. The Advisory Committee has a strong concern that there are judges who would want to hold remote sentencing proceedings even when not necessary. These concerns underpinned Rule 62(e)(3)(B), which set as a requirement for a remote felony plea or sentencing that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." The goal of this language was to make sure the decision was unpressured and therefore truly the decision of the defendant. Comments from some judges argued, on logistical grounds, that this provision should be revised to allow the court to sign for the defendant. However, the Advisory Committee rejected those suggestions, noting that counsel for the defendant could sign the request on the defendant's behalf.

Draft

At the Advisory Committee meeting, the liaison from the Standing Committee had suggested that the committee note be revised to make clear that the requisite writing could be provided at the outset of the plea or sentencing proceeding itself. Judge Kethledge invited this member of the Standing Committee to discuss his suggestion. The member observed that Rule 62(e)(3)(B) required a "request" from the defendant, but he did not think that the rule required the request be made at any specific time. However, he suggested, it was possible to read the rule as requiring that the request be made *before* the hearing, and the note should be revised to resolve this ambiguity. He suggested (based on the challenges of arranging opportunities for counsel to confer with their clients during the pandemic) that the note say that, while it was preferable to provide the request in advance of the hearing, it could be provided at the hearing if the defendant had an opportunity to confer with counsel.

Judge Bates questioned the use of "requests" in Rule 62(e)(3)(B). If that language required that the idea of proceeding remotely must originate with the defendant, he suggested that could cause practical problems in cases where the remote option is first mentioned by the judge or the prosecutor.

A judge member stated that requiring the request in advance of the hearing could create logistical problems: a need to monitor the docket to check for the required request, and potential last-minute cancellations for lack of the required request. Also, this member suggested, the focus should be on whether the defendant freely consented to the remote proceeding, not on whether it was the defendant who had requested the remote proceeding. Later, Professor Beale stated that the Advisory Committee members recognized that requiring the request in advance of the hearing might not be efficient and could slow things down, but members felt strongly that it was important to protect the ability of the defendant to consult freely with counsel before making the decision to proceed remotely. As to the challenges presented by districts that cover large areas, Professor Beale recalled that the Advisory Committee was persuaded by a member's argument that the rules should not relax standards to accommodate infrastructure failures.

Judge Kethledge noted that the Advisory Committee was not unanimous regarding whether the request in writing must precede the proceeding, although most members of the Advisory Committee (including Judge Kethledge) thought that the request to hold the proceeding remotely must precede the plea or sentencing proceeding. The rule requires that the request be effectuated by a writing—which can only be true if the court has received the writing. Furthermore, another prerequisite for remote proceedings (including felony pleas and sentencings) is Rule 62(e)(2)(B)'s requirement that the defendant have an "opportunity to consult confidentially with counsel both before and during the proceeding." If Rule 62(e)(3)(B) permitted a request to be made midstream in a proceeding (rather than only beforehand), in such midstream instances there would have been no opportunity for consulting prior to the proceeding. Additionally, the contrast between Rules 62(e)(1) and 62(e)(2)(B) (which both require an opportunity for the defendant to consult with counsel "confidentially") and Rule 62(e)(3)(B) (which makes no mention of confidentiality) suggests that the consultation and request under Rule 62(e)(3)(B) must come before the proceeding.

The practical concern, Judge Kethledge explained, was that allowing mid-proceeding requests would open the door to exactly the type of judicial pressure that the request-in-writing

requirement was meant to prevent. During a remote proceeding, the judge could solicit from the defendant a request for the plea or sentencing to proceed remotely. A resulting request from the defendant would not be the unpressured, deliberate decision that the Advisory Committee insisted upon before the defendant gives up the very important right to an in-person proceeding. Permitting the request to occur during rather than before the hearing could greatly undermine the purpose of the writing requirement—namely, to ensure that the emergency rule permits only a narrow exception to the normal in-person requirement. The Advisory Committee was therefore opposed to such a change, which had not been requested by the DOJ and which was opposed by the defense bar.

Professor King reported that defense counsel members of the Advisory Committee had recounted pressure during the pandemic to get their clients to consent to proceed remotely. One noted that two judges in her district had expressed frustration regarding defendants who refused to proceed remotely. Another member reported that CJA members in her district themselves felt pressure to proceed remotely, and having a barrier between the court and the client was important. Another stressed the need for distance between the request in writing and the plea hearing, to give the attorney time to explain the choice to the defendant. It would not be fair to the defendant to be sent to a breakout room with everyone waiting in the main room for the defendant to come back with a "yes," after being asked to proceed remotely by the person with sentencing authority. Not a single member of the Advisory Committee was interested in advancing the proposal to revise the committee note (*i.e.*, to state that the requisite writing could be provided at the outset of the plea or sentencing).

Professor Beale added that to hold a felony plea or sentencing proceeding remotely under Rule 62(e)(3)(C), the court would need to find that "further delay … would cause serious harm to the interests of justice." This would happen only rarely, such as where the defendant faced only a very short sentence.

Judge Bates reiterated his concern that the meaning of "requests" was not entirely clear. Did it require the court to make a finding that the idea of proceeding remotely originated from the defendant and not, for example, some comment the court may have made at a prior proceeding?

Noting that the Standing Committee's membership did not include any criminal defense lawyers, a practitioner member stated that he found compelling the real-world concerns of the defense bar that were credited by the Advisory Committee and expressed by Judge Kethledge, Professor King, and Professor Beale. So he favored requiring that the request come from the defendant before the proceeding begins. But he did not think the rule as drafted was clear on this point, and he stressed the need for clarity so as to avoid future litigation.

Another attorney member agreed as to the timing question, and advocated adding the words "in advance" to reflect that. But, he argued, in the real world the idea will usually not come from the defendant, so he advocated saying "consents" instead of "requests." A judge member predicted that the term "requests" would generate litigation due to the dearth of caselaw on point; by contrast, he said, much caselaw addressed the meaning of "consent." He also suggested that promulgating a form would help to forestall litigation over what was required.

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The judge member who had suggested that the committee note be revised to state that the writing could be provided at the outset of the proceeding acknowledged that judges had in the past advocated the use of remote proceedings for what the Advisory Committee had found to be insufficient reasons. He noted, however, that Rule 62 would be in effect only during an emergency—which diminished his concern over the possible misuse of remote proceedings under it. As a data point, this judge member stated he was more often rejecting requests from defendants to proceed remotely than approving them. The member clarified that his concern was not with scenarios in which the idea of holding the plea proceeding comes up midstream during another remote proceeding. Rather, the member's concern was with another possible scenario that was based on his own experiences early in the pandemic: A plea allocution is scheduled to take place remotely, but just prior to the hearing, counsel asks to go into a breakout room to speak with the defendant in order to get the not-yet-provided signature on the request to proceed remotely. The judge does not join the main hearing room until after defendant and counsel return from the breakout room. The member argued that the rule appears to permit the proceeding to go forward in this circumstance, and that this avoids the significant delay that could be entailed in scheduling a new proceeding.

Another judge member noted that defense counsel, not solely judges, may sometimes pressure a defendant to consent to a remote plea or sentencing hearing. Judges, this member suggested, should be alert to this risk. The member noted the difficulty of drafting rules to address emergencies, which may present strange circumstances.

A practitioner member said that the Standing Committee should not make changes that would not have made it through the Advisory Committee. If the Standing Committee wished to make such a change, it should consider remanding the proposal to the Advisory Committee—but that would prevent Rule 62 from proceeding in tandem with the other proposed emergency rules. Both for that procedural reason and on the substance, this member supported the position taken by the Advisory Committee. As to adding language to require that the request in writing occur "in advance," the practitioner member suggested that no such language could foreclose a judge from attempting to streamline the process. For example, a requirement of a request "in advance" could be met by making the request during a status conference in the morning, and reconvening later that day for the plea or sentencing.

A judge member emphasized that judges vary in their ability; in her circuit, there were sometimes even defects in plea colloquies. Given the critical nature of plea and sentencing proceedings, this member thought that the request needs to be in advance of the proceeding. If the request need not be made in advance, it will become routine. The rule should say "in advance," and possibly even state *how far* in advance, such as seven days. She acknowledged, however, that answering the how far question would likely require sending the rule back to the Advisory Committee, so she was not making that suggestion.

A practitioner member agreed with the proposal to insert "in advance." It is inherently important to the integrity of the criminal justice system that plea changes and sentencing hearings be done in-person. As a civil practitioner, this member periodically witnesses criminal sentencing proceedings that occur before the civil matters. The very best judges are those who take the most

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care with sentencing proceedings. It gives dignity to the individuals involved in the process, including their families. This does not translate well to videoconferencing.

A judge member who had earlier stated that requiring the request in advance of the hearing could create logistical problems suggested that the rule should be clear about what it requires and that, in her view, it should permit bringing the document to the hearing itself. This member pointed out that efficiency is also important for defendants; a more cumbersome process (requiring a request in advance) may delay closure (and release) for defendants who will receive time-served sentences.

Judge Bates stated that he counted four proposed changes. First, to change "requests" to "consents." Second, to specify that the requisite writing must be signed by the defendant "in advance." Third, and contrary to the second suggestion, to revise the committee note to say that the writing could, if necessary, be provided at the outset of the proceeding. Fourth was the suggestion that the rule be clarified—a suggestion that might be addressed by the decision on the other proposed changes. Judge Bates suggested that it would be helpful to learn the sense of the committee on these proposals. He was not inclined to suggest remanding the proposal to the Advisory Committee unless the latter thought a remand was a good idea—and even then, he surmised, the Advisory Committee would want to know what the Standing Committee thought on each of these issues. Judge Kethledge said he believed the Advisory Committee would be fine with the second suggestion (inserting "in advance"). As to the first suggestion, the Advisory Committee's choice of "requests" would not foreclose situations where the idea itself came from someone other than the defendant, it simply required that the defendant come forward to trigger the remote proceeding—that is, the rule was meant to protect against situations where the decision to proceed remotely came after a discussion with the *judge*.

Professor Capra suggested that a compromise might be to insert "in advance" but also change "requests" to "consents." He urged the Standing Committee not to remand the entire proposal over this issue, and he suggested that his proposed compromise would not require republication. Professor Coquillette agreed with Professor Capra concerning the lack of need for republication.

A judge member noted that during the colloquy at the start of the hearing, the judge will make sure the defendant consents to proceeding remotely. Therefore, she recommended keeping the word "requests." The request would come in advance, and the consent would be confirmed via the colloquy at the hearing. Citing a recent example of a case in which the defendant challenged the voluntariness of his consent to proceed remotely, Judge Kethledge reiterated the importance of foreclosing the option of deciding midstream in a remote proceeding to convert the proceeding into a remote plea or sentencing proceeding.

Upon motion by a member, seconded by another: **The Standing Committee voted 10-3 to insert "before the proceeding and" in proposed new Criminal Rule 62(e)(3)(B)** on line 109 (page 154 in the agenda book). ("Before" and "proceeding" were substituted for "in advance of" and "hearing" for reasons of style and internal consistency.)

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Upon motion by a member, seconded by another: **The Standing Committee voted 7-6 to change "requests" to "consents" in proposed new Criminal Rule 62(e)(3)(B) (p. 154, line 110), with conforming changes to be made to the committee note (p. 168).**

Judge Bates then invited the Standing Committee to vote on whether to give final approval to proposed new Criminal Rule 62, with the changes to Rule 62(e)(3)(B) that the Committee had just voted to make, conforming changes to the committee note (p.168), and the substitution of "comply with" for "be mindful of" in the Advisory Committee's revised note language concerning Rule 62(d)(1) (p.161).

Upon motion by a member, seconded by another: **The Standing Committee unanimously approved proposed new Criminal Rule 62.**

Judge Bates thanked the Standing Committee and the Advisory Committees, including the chairs and reporters, and specifically thanked Professor Capra and Professor Struve, for their work on all the emergency rules. He noted that the rules have now reached the Judicial Conference, and have done so particularly quickly.

Due to scheduling constraints, the Criminal Rules Advisory Committee provided its report (described infra p. 13) prior to the lunch break. After the lunch break, the Standing Committee resumed its discussion of joint committee business.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerned the proposal to add Juneteenth National Independence Day to the lists of specified legal holidays in Appellate Rules 26(a)(6)(A) and 45(a)(2), Bankruptcy Rule 9006(a)(6)(A), Civil Rule 6(a)(6)(A), and Criminal Rules 45(a)(6)(A) and 56(c).

A practitioner member suggested that the semi-colon in the proposed amendment to Bankruptcy Rule 9006 was a typo, and the Bankruptcy Rules Advisory Committee agreed to substitute a comma.

Professor Capra noted that the committee notes were not uniform between the rule sets. He suggested that the reporters confer after the meeting to achieve uniformity.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform.**

Pro Se Electronic Filing Project

Professor Struve introduced this item. She thanked the Federal Judicial Center (FJC) for its superb research work and its report ("Federal Courts' Electronic Filing By Pro Se Litigants") which was available online. Judge Bates had asked Professor Struve to convene the reporters for

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the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees, along with members from the FJC, to discuss suggestions relating to electronic filing by self-represented litigants, and this working group had met in December 2021 and March 2022. One issue is whether self-represented litigants have access to the court's case management / electronic case filing ("CM/ECF") system. Among the findings by the FJC is that such access varies by type of court, with the courts of appeals most willing to grant such access to self-represented litigants, the district courts less so, and the bankruptcy courts least of all. On the other hand, a number of bankruptcy courts are using an "electronic self-representation" system. This raises the question of whether the four Advisory Committees may select different approaches for differing levels of courts.

Another question is that of service on persons who receive notice through CM/ECF. When a non-CM/ECF user files a document, the clerk's office will subsequently enter it into CM/ECF; the system then sends a notice of electronic filing to parties that are CM/ECF users. Yet many courts continue to require the non-CM/ECF filer to nonetheless serve the filing on other parties, whether or not those parties are CM/ECF users.

Professor Struve noted that the working group was planning a further discussion sometime in the summer with the hope of teeing up topics for discussion by the four Advisory Committees at their fall meetings.

Dr. Reagan noted that in the civil context there are two different groups of self-represented people who file—prisoners and non-prisoners—and these groups represent significantly different concerns and challenges. Additionally, the concept of electronic filing does not necessarily mean using CM/ECF; other methods include email or electronic upload, but these methods can pose cybersecurity issues. CM/ECF is difficult even for attorneys to use, and at least one district requires attorneys to initiate cases via paper filings rather than via CM/ECF.

Electronic Filing Deadline Study

Judge Bates provided a brief introduction to this information item concerning electronic filing times in federal courts. He noted that an excerpt from the FJC's recently-completed report on this topic appeared in the agenda book starting at page 185. The report had not yet been reviewed by the subcommittee that had been formed to consider whether the time-computation rules' presumptive electronic-filing deadline of midnight should be altered.

Dr. Reagan noted that the FJC studied the frequency of filings at different times of day. While results varied from court to court, the FJC found that most filing occurred during business hours, but that a significant amount did occur outside of business hours. He noted that in the bankruptcy courts, there were a significant number of notices filed robotically overnight.

The FJC began a pilot survey of judges and attorneys, but it gathered limited data because it closed the survey due to the pandemic. Continuing the survey under current conditions would be unproductive because opinions and experiences during the pandemic would not be representative of future non-emergency practice. But the limited pilot-study data did show a distinction between the views of sole practitioners and those of big-firm lawyers. The latter were more likely to favor moving the presumptive deadline to a point earlier than midnight.

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REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge provided the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on April 28, 2022. For the sake of brevity, Judge Kethledge highlighted only the Juneteenth-related amendments to Criminal Rules 45 and 56 (pp. 11–12, supra) and one other technical amendment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 810.

Action Item

Final Approval

Rule 16(b)(1)(C)(v). Judge Kethledge introduced the only action item, which was a proposed technical amendment (p. 814) to fix a typographical error in a cross-reference in Rule 16(b)(1)(C)(v), addressing defense disclosures. The version of the rule with the typo is set to take effect on December 1, 2022, absent contrary action by Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval to the proposed amendment to Rule 16(b)(1)(C)(v) as a technical amendment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which met in Washington, DC on May 6, 2022. The Advisory Committee presented nine action items: three rule amendments for which it was requesting final approval and six rule amendments for which it was requesting publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 866.

Action Items

Final Approval

Rule 106. Judge Schiltz introduced the proposed amendment to Rule 106 shown on page 879 of the agenda book. Rule 106 is the rule of completeness. When a party introduces part of a statement at trial, and that partial statement may be misleading, another party can introduce other parts of the statement that in fairness ought to be considered. The proposed amendment would fix two problems with the existing rule.

First, suppose a prosecutor introduces part of a hearsay statement and the completing portion does not fall within a hearsay exception. There is a circuit split as to whether the completing portion can be excluded under the hearsay rules. This amendment would resolve the split by making explicit that the party that introduced the misleading statement could not object to

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completion on grounds of hearsay. But the completing statement could still be excluded on other grounds.

Second, current Rule 106 only applies to "writings" and "recorded statements," not oral statements. This means that for an oral statement, the court needs to turn to the common law. Unlike other evidentiary questions, here the common law has only been partially superseded by the Federal Rules of Evidence. This is particularly problematic because completeness issues will generally arise during trial when there is no opportunity for research and briefing.

The Advisory Committee received a handful of comments, all but one of which were positive. One public comment spurred a change to the rule text. The proposal as published would have provided for the completion of "written or oral" statements, a phrase that the Advisory Committee had thought would cover the field. But as a public comment pointed out, that phrase failed to encompass statements made through conduct or through sign language. As a result, the Advisory Committee decided to delete the current rule's phrase "writing or recorded" so that the rule will refer simply to a "statement."

A judge member asked whether there would be Confrontation Clause issues if a criminal defendant introduced part of a statement and the government was allowed to introduce the completing portion over a hearsay objection. Professor Capra stated that for a Confrontation Clause issue to arise the completing portion would have to be *testimonial* hearsay, which would be quite rare. If the issue did arise, the Supreme Court in *Hemphill v. New York*, 142 S. Ct. 681, 693 (2022), left open the possibility a forfeiture might apply. The idea would be that the rule of completeness might be applicable as a common law rule incorporated into the Confrontation Clause's forfeiture doctrine. Judge Schiltz added that the proposed amendment did not purport to close off a potential Confrontation Clause objection.

Another judge member stated that the proposed amendment was helpful because a judge at trial should not have to look to the common law to resolve issues of completion.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 106.**

Rule 615. Judge Schiltz introduced the proposed amendment to Rule 615. Rule 615 requires that upon motion, the judge must exclude from the courtroom witnesses who have yet to testify, unless they are excepted from exclusion by current subdivisions (a) through (d). Rule 615 is designed to prevent witnesses who have not yet been called from listening to others' testimony and tailoring their own testimony accordingly. The current rule does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries. Thus, in some circuits, if the court enters a Rule 615 order without spelling out any additional limits, the sole effect is to physically exclude the witness from the courtroom. But other circuits have held that a Rule 615 order automatically forbids recounting others' testimony to the witness, even when the order is silent on this point. In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order. The proposed amendment would add a new subdivision (b) stating that the court's order can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice).

The proposed amendment also makes explicit that when a non-natural person is a party, that entity can have only one representative at a time excepted from Rule 615 exclusion under the provision that is now Rule 615(b) and would become Rule 615(a)(2). This would put natural and non-natural persons on an even footing. Under the current rule, some courts have allowed entity parties to have two or more witnesses excepted from exclusion under Rule 615(b). The amended rule would not prevent the court from finding these additional witnesses to be essential (see current Rule 615(c)), or statutorily authorized to be present (see current Rule 615(d)).

The Advisory Committee received only a handful of public comments on the proposal, all of which were positive.

Focusing on proposed Rule 615(b)(1)'s statement that "the court may … by order … prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom," a judge member asked whether there was any consideration of specifying whom the prohibition runs against? Judge Schiltz answered that trial testimony might be disclosed by a range of people, such as an attorney, a paralegal, or even the witness's spouse. It would be tricky to delineate in the rule. Professor Capra added that it would be a case-by-case issue, and the judge would specify in the Rule 615 order who was subject to any Rule 615(b)(1) prohibition.

A practitioner member noted that in longer trials, there may be situations where a corporate party needs to change who its designated representative is. Professor Capra responded that the committee note recognizes the court's discretion to allow an entity party to swap one representative for another during the trial.

The same practitioner member echoed the judge member's previous suggestion that Rule 615(b)(1) should explicitly state who is prohibited from disclosing information to the witness. Professor Capra stated that the rule does not need to say that; rather, that is an issue that the court should address in its order. Judge Schiltz added that the judge in a particular case is in the best position to determine in that case who must not disclose trial testimony to a witness.

The practitioner member turned to a different concern, focusing on the portion of the committee note (the last paragraph on page 888) that dealt with orders "prohibiting counsel from disclosing trial testimony to a sequestered witness." The committee note acknowledged that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions" of professional responsibility, assistance of counsel, and the right to confrontation in criminal cases. The member expressed concern that the proposed rule would permit such orders without setting standards or limits to govern them. The member acknowledged that this vagueness was a conscious choice, but argued that it gave the judge too much discretion. Judge Schiltz responded that such discretion already exists today under the current rule. And specifying standards for such orders in the rule would be nightmarishly complicated. Judge Bates added that all the proposed rule would do is tell judges that if they want to do anything more than exclude a witness from the courtroom, the order needs to explicitly spell that out.

Another practitioner member stated he supports the proposed rule change. The proposal gives clarity, while leaving discretion to the judge to tailor an order on a case-by-case basis.

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However, he questioned whether the language in the committee note was too strong in stating that an order governing disclosure of trial testimony "raises" the listed issues. Based on suggestions from this member and the other practitioner member who had raised concerns about the passage, Professor Capra agreed to redraft the paragraph's second sentence to read: "To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis."

Ms. Shapiro turned the Committee's attention to the committee note's discussion (page 889) of proposed Rule 615(a)(3). She suggested that the words "to try" be removed from the note's statement that an entity party seeking to have more than one witness excepted from exclusion at one time is "free to try to show" that a witness is essential under Rule 615(a)(3). "Free to try" suggests that the showing is a difficult one, when really it is routine for courts to allow the United States to except from exclusion additional necessary witnesses such as case agents. A judge member questioned whether "is free to show" is the correct phrase. Should the note say "must show" or "may show" instead? Discussion ensued concerning the relative merits of "must," "may," "should," and "needs to." Professor Capra and Judge Schiltz agreed to revise the note to say "needs to show."

Professor Bartell suggested that a committee note reference to "parties subject to the order" (page 888) be revised to say "those" instead of "parties" (since a Rule 615(b) order can also govern nonparties). Professor Capra agreed and thanked Professor Bartell.

The Advisory Committee renewed its request for final approval of Rule 615, with the three amendments to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 615.**

Rule 702. Judge Schiltz introduced this action item. Rule 702 deals with expert testimony and the proposed amendment would address two problems. The first relates to the standard the judge should apply when deciding whether to admit expert testimony. Current Rule 702 sets requirements that must be met before a witness may give expert testimony. It is clear under the caselaw and the current Rule 702 that the judge should not admit expert testimony until the judge—not the jury—finds by a preponderance of the evidence that the requirements of Rule 702 are met. However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether *a jury* could find by a preponderance of the evidence that the requirements of Rule 702 are met. As a result, very often jurors are hearing expert testimony that they should not be permitted to hear. Under a correct interpretation of current Rule 702, the proposed amendment does not change the law; it merely makes clear what the rule already says.

Second, the proposed amendment addresses the issue of overstatement, *i.e.*, where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow. Overstatement issues typically arise with respect to forensic testimony in criminal cases. For example, the expert may say the fingerprint on the gun *was* the defendant's, or

the bullet *came from* the defendant's gun, when that level of certainty is not supported by the underlying science. For some time, the Advisory Committee has been debating and considering whether to address this issue via a rule amendment. Some members thought current Rule 702 gives attorneys all the tools they need to attack issues of overstatement, but that they were not using them. Other members thought that amending the rule would serve an educational goal and draw attention to this problem. After considerable debate, the Advisory Committee decided to amend Rule 702(d). Currently, the subdivision requires that "the expert has reliably applied the principles and methods to the facts of the case." The proposed amendment would require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The hope is that this change in rule language, alongside the guidance in the committee note, will shift the emphasis and encourage judges and parties to focus on the issue of overstatement, particularly concerning forensic evidence in criminal cases.

The Advisory Committee received over 500 public comments regarding the proposed amendments to Rule 702. Additionally, about two dozen witnesses spoke on the proposal at the Advisory Committee's hearing.

Professor Capra summarized the public comments. Viewed quantitatively, they were mostly negative. There was a perceptible difference of opinion between plaintiffs' and defendants' lawyers. Many comments used identical idiosyncratic language. If commenters were copying and pasting language from others' comments, that could explain some of the volume. A number of comments evinced a misunderstanding of current law. For example, many comments said the proposed amendment would shift the burden from the opponent to the proponent—an assertion premised on the incorrect idea that the burden is now on the opponent to show that proposed expert testimony is unreliable. Such misunderstandings support the need for the proposed amendment.

Additionally, many comments criticized the published proposal's use of the "preponderance of the evidence" standard. Particularly, parties were concerned that the standard meant that judges could only rely on *admissible* evidence. However, Rule 104(a) explicitly states that the court can consider inadmissible evidence. The Advisory Committee therefore did not think that these critiques had merit. Nonetheless, because the published language had proven to be a lightning rod, the Advisory Committee chose to change the language, but not the meaning, of the proposed rule text, which (as presented to the Standing Committee) requires that the "proponent demonstrates to the court that it is more likely than not" that the Rule's requirements are met.

The phrase "to the court" in that new language responded to another set of concerns voiced in the comments—namely, *who* needed to find that the preponderance of the evidence standard was met. The proposed Rule 702 as published for public comment did not specify who—whether the judge or the jury—was tasked with making this finding. Implicitly, the judge must make the finding, as all decisions of admissibility under the Federal Rules of Evidence are made by the judge. However, because of all the uncertainty in practice as to who has to make this finding, there was significant sentiment on the Advisory Committee to specify in the rule text that it is the court that must so find. The Advisory Committee explored various ways to phrase this before landing on "if the proponent demonstrates to the court that it is more likely than not" that the checklist in Rule 702 is met.

Judge Schiltz noted a change the Advisory Committee would like to make to the committee note (page 893). At the Advisory Committee meeting, a member expressed concern that the rule could be read as requiring that the judge make detailed findings on the record that each of the requirements of Rule 702 is met, even if no party objects to the expert's testimony. To alleviate that concern, the Advisory Committee added a statement in the note that "the rule [does not] require that the court make a finding of reliability in the absence of objection." Prior to the Standing Committee meeting, a judge member had expressed concern that this statement in the note was problematic. Judge Schiltz shared this concern. On the one hand, judges typically do not rule on admissibility questions unless a party objects. But on the other hand, judges are responsible for making sure that plain error does not occur. So it was not exactly right to say that "the rule" did not require a finding. Judge Schiltz accordingly proposed to change "rule" to "amendment" so that the note would say, "Nor does the amendment require that the court make a finding." Thus revised, the note would observe that the amendment was not intended to change current practice on this issue but would avoid taking a position on what Rule 702 already does or does not require. Professor Capra agreed that it was better to skirt the topic; if one were to state in Rule 702 that "there must be an objection, but even if not, there's always plain error review," then one might also need to add that caveat to all the other rules.

A judge member stated her appreciation for the changes: although they are somewhat minor, they help clarify perennial issues.

Judge Bates noted that the language regarding the preponderance of the evidence standard ("more likely than not") comes from the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987). It therefore is already the law.

A practitioner member asked why the statement "if the proponent demonstrates to the court that it is more likely than not" was written in the passive tense, as opposed to active tense language, such as "if the court finds that it is more likely than not." Judge Schiltz stated that some members of the Advisory Committee were concerned that if the rule used the word "finding," that could be read as requiring the judge to make findings on the record even in the absence of an objection. The language may be awkward, but the Advisory Committee arrived at it as consensus language after years of debate.

A judge member raised a question from a case-management perspective: whether there is any difficulty combining a Rule 702 analysis with a Daubert hearing, and in what sequence these issues would arise. Professor Capra responded that the overall hearing should be thought of as a Rule 702 hearing. Rule 702 is broader than *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which only concerned methodology. Methodology falls under current Rule 702(c). The judge member thanked Professor Capra for his answer and emphasized the importance of educating the bar and bench about that fact. Citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), Professor Marcus observed that Rule 702 issues can come up at junctures prior to trial, such as in connection with class certification.

A judge member applauded the Advisory Committee for drafting a very helpful amendment that does exactly what the Advisory Committee said it was trying to do: not change anything, but rather make clear what the law is.

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Professor Capra thanked Judge Kuhl for formulating the language in proposed amended Rule 702(d). The Advisory Committee then renewed its request for final approval of Rule 702, with the one change to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 702.**

Judge Bates thanked—and members of the Standing Committee applauded – Professor Capra, Judge Schiltz, and the Advisory Committee for all their work on the proposed amendments to Rules 106, 615, and 702.

Publication for Public Comment

Judge Schiltz stated that the Advisory Committee had six proposed amendments that it was requesting approval to publish for public comment. Every few years, usually coinciding with the appointment of a new Advisory Committee chair, the Advisory Committee reviews circuit splits regarding the Federal Rules of Evidence. The Advisory Committee lets most of those splits lie, but it found that these six proposed amendments—which came as a result of that study—were worth pursuing.

Rule 611(d)—Illustrative Aids. Judge Schiltz introduced this action item. Illustrative aids are used in almost every jury trial. Nonetheless, there is a lot of confusion regarding their use, especially as to the difference between demonstrative evidence and illustrative aids; the latter are not evidence but are used to assist the jury in understanding the evidence. There also are significant procedural differences in how judges allow illustrative aids to be used, including (i) whether a party must give notice, (ii) whether the illustrative aid may go to the jury, and (iii) whether illustrative aids are part of the record. This proposed new rule, which would be Rule 611(d), was designed to clarify the distinction between illustrative aids and demonstrative evidence. The Advisory Committee is hoping that the public comments will assist it in refining the proposal. It is likely impossible to get a perfect dictionary definition of the distinction, but the Advisory Committee hoped to end up at a framework that would assist judges and lawyers in making the distinction.

The proposed new rule sets various procedural requirements for the use of illustrative aids. It would require a party to give notice prior to using an illustrative aid, which would allow the court to resolve any objections prior to the jury seeing the illustrative aid. It would prohibit jurors from using illustrative aids in their deliberations, unless the court explicitly permits it and properly instructs the jury regarding the jury's use of the illustrative aid. Finally, it would require that to the extent practicable, illustrative aids must be made part of the record. This would assist the resolution of any issues raised on appeal regarding use of an illustrative aid.

Professor Capra noted a few changes to the rule and committee note. First, Professor Kimble had pointed out that by definition notice is in advance. Therefore, the word "advance" was deleted from line 13 of the rule text (p. 1010). Second, Rule 611(d)(1)(A) sets out the balancing test the court is to use in determining whether to permit use of an illustrative aid. The provision is

intended to track Rule 403 but is tailored to the particularities of illustrative aids. In advance of the Standing Committee meeting, a judge member asked why the proposed rule in line 9 said "substantially outweighed," as opposed to just "outweighed." "Substantially outweighed" is the language in Rule 403, but the member questioned why there should be such a heavy presumption in favor of permitting use of illustrative aids. The Advisory Committee welcomes public comment on this question, and thus proposes to include the word "substantially" in brackets. Third, the same judge member had pointed out prior to the Standing Committee meeting that the committee note was incorrect in saying that illustrative aids "ordinarily are not to go to the jury room unless all parties agree" (p. 1014). Rather, he suggested "unless all parties agree" be changed to "over a party's objection." The Advisory Committee agreed to this change. Finally, Professor Capra stated that the "[s]ee" signal at the end of the carryover paragraph on page 1013 of the agenda book should be a "[c]f." signal. Rule 105 deals with evidence admitted for a limited purpose, and therefore is not directly applicable since illustrative aids are not evidence. A further change was made to the sentence immediately preceding the citation to Rule 105. Because Rule 105 does not apply, the statement that an "adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used" is not correct. Rather, the adverse party "may ask to have the jury" so instructed. Professor Capra expressed agreement with this change. Later in the discussion, an academic member asked why a judge would refuse a request for such an instruction. Judge Schiltz suggested, for example, that if the judge has already given the jury many instructions on illustrative aids, she may feel that a further instruction is unnecessary. But he agreed that almost always the judge will give a limiting instruction.

Judge Bates asked about a comment in the Advisory Committee's report that it was "important to note" that the proposed rule "was not intended to regulate" PowerPoint slide presentations or other aids that counsel may use to help guide the jury in opening or closing arguments. This topic, Judge Bates noted, was a particular focus in the Advisory Committee's discussions, and he asked why it was not mentioned in the committee note. Judge Schiltz stated that the Advisory Committee was aware that likely more language would need to be added to the note, but that it wanted to receive public comments first. The debate at the Advisory Committee meeting centered around whether opening or closing slides even are illustrative aids. Participants asserted that such PowerPoints are just a summary of argument. But the rejoinder was, what if a party builds an illustrative aid into its slide presentation? Professor Capra added that the problem with adding a sentence that says that the rule does not regulate materials used during closing argument is that where an illustrative aid is built into the slide presentation, this would not be an accurate statement.

A judge member suggested that Rule 611(d)(2) should set a default rule as to whether the illustrative aid should go to the jury. As currently worded, that provision only addressed what would happen in the event of an objection. Judge Schiltz suggested setting as the default rule that it does not go to the jury. Based on this suggestion, Rule 611(d)(2) was revised to provide that "[a]n illustrative aid must not be provided to the jury during deliberations unless: (A) all parties consent; or (B) the court, for good cause, orders otherwise." Professor Capra undertook to make conforming changes to the relevant portion of the committee note.

A practitioner member stated that this proposal could turn out to be one of the most important rule changes during his time on the Standing Committee. Trials nowadays are as much

a PowerPoint show as anything else. If you are going to address the jury in opening or closing, you should be forced to share the PowerPoints in advance. Most judges require this because, otherwise, an inappropriate statement in a slide presentation could cause a serious problem. But also, slide presentations are being used in direct and cross-examination of witnesses, and with expert witnesses sometimes the entirety of the examination is guided by the slide presentation. In listing categories covered by the proposed rule, the note refers to blackboard drawings. Blackboard drawings are often created on the fly based on the answers the witness gives. There is no way to give the other party the opportunity to review such a drawing in advance. Taken literally, the member suggested, the proposed rule would basically require the judge to preview the trial testimony in advance of trial because the whole trial is being done with PowerPoints. Summing up, the member stressed the real-world importance of the proposed rule. He advised giving attention to the distinction between experts and fact witnesses. A requirement for notice would play out differently as applied to openings and closings, versus direct examination, versus cross-examination. If a lawyer must give opposing counsel the direct-examination PowerPoints in advance, opposing counsel can use those slides in preparing the cross-examination. The rulemakers should think about how that would change trials. The member advocated seeking comment from thoughtful practitioners such as members of the American College of Trial Lawyers.

Professor Capra agreed that these are important questions, and he hoped that practitioner input at the upcoming Advisory Committee meeting and hearings will provide guidance. He stated that the goal of the rule is not to touch on every issue that may come up but rather to create a framework for handling illustrative aids. How far to go into the details is still an open question. Judge Schiltz acknowledged that the proposal presents challenging issues, and observed that the Advisory Committee's upcoming fall symposium would provide helpful input. He noted that the notice requirement can be met by disclosing the illustrative aid minutes prior to presenting it to the jury. This allows the court to resolve any objections before the jury sees the aid. The same practitioner member reiterated that although opening and closing slides should be disclosed before use, he does not think that will work with illustrative aids used with witnesses. Judge Schiltz said the views of practitioner members of the Advisory Committee were the exact opposite: opening and closing slides are sacrosanct, but items to be shown to a witness can be disclosed prior to use.

Another practitioner member agreed with the description of current trial practice provided by the first practitioner member. He stated that the broader the scope of the rule, the more the word "substantially" needs to be retained. Additionally, when you use a slide presentation with a witness, you are trying to synthesize what you think the witness will say. When you use a slide presentation for opening or closing, it is in essence your argument. Disclosing that feels strategically harmful. Once the Advisory Committee receives the public comments, it will be critical to explain when the rule applies and when it does not. For example, the rule refers to using illustrative aids to help the factfinder "understand admitted evidence." Judges who think that PowerPoints are illustrative aids might bar their use in opening arguments because no evidence has yet been admitted.

The Advisory Committee requested approval to publish for public comment proposed new Rule 611(d), with the changes as noted above to both the rule and committee note.

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Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 611.**

Rule 1006. Judge Schiltz introduced this action item as a companion item to the Rule 611(d) proposal. Rule 1006 provides that a summary of voluminous records can itself be admitted as evidence if the underlying records are admissible and too voluminous to be examined in court. Many courts fail to distinguish between summaries of evidence that are themselves evidence, which are covered by Rule 1006, and summaries of evidence that are merely illustrative aids. Judges often mis-instruct juries that Rule 1006 summaries are not evidence when they are in fact evidence. And some courts have refused to allow Rule 1006 summaries when any of the underlying records have been admitted as evidence, while other courts have refused to allow Rule 1006 summaries *unless* the underlying records are also admitted into evidence, neither of which is a correct application of the rule. Rather, Rule 1006 allows parties to use these summaries in lieu of the underlying records regardless of whether any of the underlying records have been admitted in their own right.

A practitioner member stated he thought this was a good rule. He queried whether the rule should mention "electronic" summaries, but he concluded that it was probably unnecessary because that would be covered by the general term "summary." Professor Capra noted that under Rule 101(b)(6), the Rule's reference to "writings" includes electronically stored information.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006.**

Rule 611(e)—Juror Questions. Judge Schiltz introduced this action item. This proposed new rule subdivision does not take a position on whether judges should permit jurors to ask questions. Instead, the rule sets a floor of protection that a judge must follow if the judge determines that juror questions are permissible in a given case. These protections were pulled together from a review of the caselaw regarding juror questions.

A practitioner member stated that he cannot recall ever having a jury trial where a judge permitted juror questioning. He asked whether there is a sense as to how prevalent the practice is. He noted that once this is in the rulebook, it has the potential to come in in every case, and that could transform the practice in the country. Judges who do not allow the practice may feel compelled to permit it. Judge Schiltz stated that he does not permit juror questions but another judge in his district does so in civil cases. Another district judge reported that some judges in the Northern District of Illinois permit the practice, though he does not, and it is controversial. Judge Bates reported similar variation in the District of Columbia, although he does not permit juror questions. Judge Schiltz acknowledged that having a rule in the rulebook would appear to give an imprimatur to the practice. But the practice is fairly widespread and is not going away.

A judge member stated that the practice is prevalent in her district, in part because many of the judges previously were state-court judges and Arizona allows juror questions. She did not take a position on whether to adopt the rule, but she offered some suggestions on its drafting. She

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thought proposed Rule 611(e)(1) did an excellent job of covering instructions to the jurors. However, Rule 611(e)(1)(F)'s requirement of an instruction that "jurors are neutral factfinders, not advocates," gave her pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask. She suggested that this might be explained in the committee note. Additionally, she suggested considering whether the rule should address soliciting the parties' consent to jurors asking questions. Finally, she noted that Rule 611(e)(3) uses two different verbs: the judge must *read* the question, or allow a party to *ask* the question. Professor Capra responded that "ask" is meant to reflect that one of the counsel may want to ask the question, that is, make it their own question. A judge would do nothing more than read it. Another judge member stated that though he did not permit juror questions himself, the practice was sufficiently prevalent that it made sense to have a rule on point. He pointed out a discrepancy between the rule text and note (the note said that the judge should not disclose which juror asked the question, but the rule itself did not so provide). He also questioned the read / ask distinction in Rule 611(e)(3). Responding to a suggestion by Judge Schiltz, this member agreed that this concern could be addressed by revising the provision to state, "the court must ask the question or permit one of the parties to do so." A bit later, discussion returned to the read / ask distinction, and it was suggested that "read" was a better choice than "ask" because the judge might wish to emphasize to jurors that questions should not be asked extemporaneously. Another judge member then used the term "pose," and Professor Capra agreed that "pose" was a better choice than "read" or "ask."

Professor Bartell noted that subsection (3) only mentions questions that are "asked," while other subsections distinguish "asked, rephrased, or not asked." While it seems subsection (3) is meant to apply both to questions that are asked and those that are first rephrased, it is ambiguous, and subsection (3) could be read as not applying to questions that are rephrased.

A practitioner member asked whether this rule was modeled after a particular judge's standing order, and whether such resources could be cited in the committee note to illustrate that the practice already exists. Professor Capra stated that he reviewed the caselaw and included all the requirements found in the caselaw that were appropriate to include in a rule. But he agreed that it would be useful to cite other resources, such as the Third Circuit's model civil jury instruction, in the committee note.

Another practitioner member reiterated his concern that by putting this out for public comment, the Standing Committee is in essence putting its imprimatur on this practice. This is a controversial practice, and there are a number of judges who do not allow it. This member suggested revising Rule 611(e)(1) to state that the court has discretion to refuse to allow jurors to ask questions. Professor Capra stated that this suggestion gave him pause. There may be requirements in some jurisdictions that courts must permit the practice, or there may be such requirements in the future. The Advisory Committee did not want to take a stand either way.

Judge Bates asked whether Judge Schiltz and Professor Capra would consider taking the Rule 611(e) proposal back to the Advisory Committee to consider the comments of the Standing Committee. Professor Capra stressed the value of sending proposals out for comment in one large package rather than seriatim. Judge Bates noted, however, that the Rule 611(d) and 611(e) amendments are both new subdivisions that deal with entirely different matters.

A judge member stated that although she herself is "allergic" to the practice of jurors asking questions, the practice exists and the rules should account for it. But this member expressed agreement with Judge Bates's suggestion that the Advisory Committee consider these issues further before putting the rule out for public comment.

An academic member stated that his instinct was not to delay publication. By contrast to the Bankruptcy Rules, which are frequently amended, the tradition with the Evidence Rules has always been to try to avoid constant changes and—instead—to make amendments only periodically, in a package. The comments from the Standing Committee were important, and it was possible the Advisory Committee would decide not to go forward with the proposal after public comment; but this member favored sending the proposal forward for public comment.

Another judge member stated she agreed with Judge Bates. She could not recall there ever being an appellate issue regarding juror questions, and she favored waiting for the issue to percolate before adopting a rule on the issue. Additionally, judges who do allow juror questioning are very careful already. The judge member also questioned whether the rule should distinguish between the practice in civil and criminal cases. Had the Advisory Committee received any feedback from the criminal defense bar? What about from the government? This member agreed with the prediction that if the rule were to go forward without a caveat up front, it would be a signal to judges that they should be permitting the practice. Professor Capra stated that there has been a case in every circuit so far. He added that the public defender on the Advisory Committee voted in favor of the rule.

A judge member stated that if and when the rule did go out for public comment, the Advisory Committee should ask for comment on whether the practice should be allowed, not allowed, or left to the judge's discretion. Judge Bates added that even if the Advisory Committee did not specifically ask for it, the public comments would likely state whether that commentator thought the practice should be permitted.

Another judge member suggested that the rulemakers should be open to regional variations. The practice arose in Arizona state court and was adopted in the California state courts, and then as the state judges have moved on to the federal bench, they have taken the practice with them. The practice, this member suggested, is not as rare as it might seem to those on the East coast. Another judge member pointed out that the Ninth Circuit's model jury instruction addressing juror questions is presented in a way that makes clear that the judge has the option to allow or not allow juror questions. This has the benefit of clarifying that it is discretionary while still providing guidance.

As a result of the comments and suggestions received from the Standing Committee, the Advisory Committee withdrew the request for publication for public comment.

Rule 613(b). Judge Schiltz introduced this action item as an item that would conform Rule 613(b) to the prevailing practice. At common law, prior to introduction of extrinsic evidence of a prior inconsistent statement for impeachment purposes, the witness must be given an opportunity to explain or deny the statement. By contrast, current Rule 613(b) allows this opportunity to be given at any time, whether prior or subsequent to introduction of extrinsic evidence of the

statement. However, judges tend to follow the old common law practice, and the Advisory Committee agrees with that practice as a policy matter. Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place. The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence, such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused.

Professor Capra noted one style change to the rule, which moves the phrase "unless the court orders otherwise" to the beginning of the rule.

A practitioner member stated that he thought this was an excellent proposal.

Professor Kimble suggested changing "may not" to "must not." The style consultants tend to prefer "must not" in most situations. Professor Capra thought this suggestion would substantively change the rule. A party may not introduce the evidence unless the court orders otherwise, but the judge could allow it. It is not a command to the judge to not admit the evidence. Judge Schiltz stated he did not feel strongly one way or another, but based on Professor Capra's objection would keep the language as "may not."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 613(b).**

Rule 801(d)(2). Judge Schiltz introduced this action item, which concerns an amendment to the hearsay exemption for statements by a party-opponent. There is a split of authority on how the rule applies to a successor in interest of a declarant. Suppose, for example, that the declarant dies after making the statement; is the statement admissible against the declarant's estate? The Advisory Committee was unanimous in thinking the answer should be yes.

A judge member highlighted the statement in the committee note that the exemption only applies to a successor in interest if the statement was made prior to the transfer of interest in the claim. The member observed that this was obvious as a matter of principle, but it was not obvious from the text of the rule itself. He suggested that this is a sufficiently important limitation that it ought to be in the rule itself. Professor Capra undertook to consider this suggestion further during the public comment period; he suggested that writing the limit explicitly into the rule text might be challenging and also that the idea might already be implicit in the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 801(d)(2).**

Rule 804(b)(3). Judge Schiltz introduced the proposed amendment to Rule 804(b)(3)(B) set out on page 1029 of the agenda book. Rule 804(b)(3) provides a hearsay exception for declarations against interest. Rule 804(b)(3)(B) deals with the situation in a criminal case when a statement exposes the declarant to criminal liability. This tends to come up when a criminal

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defendant wants to introduce someone else's out-of-court statement admitting to committing the crime. Rule 804(b)(3)(B) requires that defendant to provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. The circuits are split concerning the meaning of "corroborating circumstances." Some circuits have said the court may only consider the guarantees of trustworthiness inherent in the statement itself. Other circuits allow the judge to additionally consider other evidence of trustworthiness, even if extrinsic to the statement. The proposed amendment would direct judges to consider all the evidence, both that inherent in the statement itself and any evidence independent of the statement.

A judge member noted that the rule only talks about corroborating evidence, not conflicting evidence, while the note speaks both to corroborating and conflicting evidence. Judge Schiltz stated that he made this point at the Advisory Committee meeting, but the response was that mentioning conflicting evidence in the text of Rule 804(b)(3) would necessitate a similar amendment to the corresponding language in Rule 807(a)(1). Professor Capra stated that courts applying Rule 807 do consider conflicting evidence, even though the rule text only says "corroborating." It is better to keep the two rules consistent than to have people wondering why Rule 804(b)(3) mentions conflicting evidence while Rule 807 does not. The judge member observed that one way to resolve the problem would be to make a similar amendment to Rule 807. Judge Bates noted that this could be considered during the public comment period.

A practitioner member asked why, in line 25, it says "the totality of the circumstances," but in the next line it does not say *the* "evidence." Should the word "the" be added on line 26? Professor Capra undertook to review this with the style consultants during the public comment period.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 804(b)(3).**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met in San Diego on March 30, 2022. The Advisory Committee presented an action item and briefly discussed one information item. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 199.

Action Item

Publication for Public Comment

Amendments to Appendix of Length Limits. Judge Bybee introduced this action item. The Standing Committee had already approved for publication for public comment proposed amendments to Rules 35 and 40 regarding petitions for panel rehearing and hearing and rehearing en banc, as well as conforming amendments to Rule 32 and the Appendix of Length Limits (Appendix). Subsequent to that approval, the Advisory Committee noticed an additional change that needed to be made in the Appendix. Namely, the third bullet point in the introductory portion

of the Appendix refers to Rule 35, but the proposed amendments to Rules 35 and 40 would transfer the contents of Rule 35 to Rule 40. As the amendment to the Appendix has not yet been published for public comment, the Advisory Committee would like to delete this reference to Rule 35 in the Appendix and to include that change along with the other changes approved in January for publication for public comment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to the Appendix of Length Limits.**

Information Items

Amicus Curiae Disclosures. Professor Hartnett introduced the information item concerning potential amendments to Rule 29's amicus curiae disclosure requirements. The Advisory Committee was seeking feedback from the Standing Committee regarding four questions. Due to time constraints, Professor Hartnett chose to ask just two of the questions at the meeting. The first question asked concerned the relationship between a party and an amicus. The Advisory Committee was trying to get a sense of whether disclosure of non-earmarked contributions by a party to an amicus should be disclosed, and, if so, at what percentage. The competing views ranged from those who say these should not be disclosed at all because a contributor does not control what an amicus says, to those who say significant contributors (*i.e.*, at least 25 or 30 percent of the amicus's revenue) have such a significant influence over an amicus that the court and the public should know about it. Second, regarding the relationship between an amicus and a non-party, the Advisory Committee sought feedback on whether an amended rule should retain the exception to disclosure for contributions by members of the amicus that are earmarked for a particular amicus brief. A point in support of retaining the exception was that an amicus speaks for its members, and therefore these contributions need not be disclosed. Points against retaining the exception were that there is a big difference between being a general contributor to an amicus and giving money for the purpose of preparing a specific brief, and it is easy to evade disclosure requirements by first becoming a member of the amicus and then giving money to fund a particular brief.

Judge Bates stated these are important questions and ones that the Standing Committee should focus on. He encouraged members to share any comments with Professor Hartnett and Judge Bybee after the meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow, Professor Gibson, and Professor Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on March 31, 2022. The Advisory Committee presented eleven action items: seven for final approval, and four for publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 250.

Action Items

Final Approval

Restyled Rules for the 3000-6000 Series. Judge Dow introduced this action item, which presented for final approval the restyled Rules in the 3000 to 6000 series. The Standing Committee already gave final approval for the 1000 and 2000 series. The Advisory Committee received extensive public comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. Professor Bartell noted that the Advisory Committee was not asking to send these rules to the Judicial Conference quite yet; rather, like the 1000 and 2000 series, they should be held until the remainder of the restyling project is completed.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed restyled Rules for the 3000-6000 series.**

Rule 3011. Judge Dow introduced this action item, which would add a subsection to Rule 3011 to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code. This is part of a nationwide effort to reduce the amount of unclaimed funds. He noted that the Advisory Committee received one public comment, which led it to substitute the phrase "information about funds in a specific case" for the phrase "information in the data base for a specific case."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 3011.**

Rule 8003. Judge Dow introduced this action item to conform the rule to recent amendments to Appellate Rule 3. No public comments were received on this proposed rule amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 8003.**

Official Form 101. Judge Dow introduced this action item. Questions 2 and 4 of the individual debtor petition form, which concern other names used by the debtor over the past 8 years, would be amended to clarify that the only business names that should be reported are those the debtor actually used in conducting business, not the names of separate legal entities in which the debtor merely had an interest. This change would avoid confusion and make this form consistent with other petition forms. The Advisory Committee received one public comment; it made no changes based on this comment.

Judge Bates clarified for the Standing Committee that in contrast to some other forms, Official Bankruptcy forms must be approved by the Judicial Conference through the Rules Enabling Act process.

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Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 101.**

Official Forms 309E1 and 309E2. Judge Dow introduced this action item regarding forms that are used to give notice to creditors after a bankruptcy filing. The Advisory Committee improved the formatting and edited the language of these forms in order to clarify the applicability of relevant deadlines. The Advisory Committee did not receive any comments, and its only post-publication change was to insert a couple of commas.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Forms 309E1 and 309E2.**

Official Form 417A. Judge Dow introduced this action item. This form amendment is to conform the form to the amendments to Rule 8003. There were no public comments on this proposed form amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 417A.**

Publication for Public Comment

Restyled Rules for the 7000-9000 Series. Judge Dow introduced this action item, which sought approval to publish for public comment the next portion of the proposed restyled rules. The Advisory Committee applied the same approach to these rules as it did when restyling the first six series.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed restyled Rules for the 7000 to 9000 series.**

Rule 1007(b)(7). Judge Dow introduced this action item. Under the current rule, debtors are required to complete an approved debtor education course and file a "statement" on an official form evidencing completion of that course before they can get a discharge in bankruptcy. As revised, the rule would instead require filing the certificate of completion from the course provider, as that is the best evidence of compliance. The amendment would also remove the requirement that those who are exempt must file a form noting their exemption. This requirement is redundant, as in order to get an exemption, the debtor would have to file a motion, and the docket will therefore already contain an order approving the exemption.

The Advisory Committee also sought approval to publish conforming amendments changing "statement" to "certificate" in another subsection of Rule 1007 and in Rules 4004, 5009, and 9006.

A judge member noted, and the Advisory Committee agreed to remedy, a typo on page 666, line 14 of the agenda book ("if" should be "is").

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Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006.**

New Rule 8023.1. Judge Dow introduced this action item, which concerned a proposed new rule dealing with substitution of parties. While Civil Rule 25 (Substitution of Parties) applies to adversary proceedings, the Part VIII rules (which govern appeals in bankruptcy cases) do not currently mention substitution. Proposed new Rule 8023.1 is based on, and is virtually identical in language to, Appellate Rule 43.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed new Rule 8023.1.**

Official Form 410A. Judge Dow introduced this action item to amend the attachment to the proof-of-claim form that a creditor with a mortgage claim must file. The amendment revises Part 3 of the attachment (regarding the calculation of the amount of arrearage at the time the bankruptcy proceeding is filed) to break out principal and interest separately.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Official Form 410A.**

Information Items

Judge Dow briefly noted that the Bankruptcy Threshold Adjustment and Technical Correction Act had not yet been enacted by Congress, but if and when it were to be enacted, the Advisory Committee would seek final approval of technical amendments to a couple of forms and would ask the Administrative Office to repost an interim version of Rule 1020 for adoption by bankruptcy courts as a local rule. He also mentioned, but did not discuss at length, three other information items in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow, Professor Cooper, and Professor Marcus provided the report of the Advisory Committee on Civil Rules, which last met in San Diego on March 29, 2022. The Advisory Committee presented two action items and five information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 722.

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Action Items

Final Approval

Rule 15(a)(1). Judge Dow introduced this action item, a proposed amendment to Rule 15(a)(1) for which the Advisory Committee was requesting final approval. The proposed amendment would replace the word "within" with the phrase "no later than." This change clarifies that where a pleading is one to which a responsive pleading is required, the time to amend the pleading as of right continues to run until 21 days after the earlier of the events delineated in Rule 15(a)(1)(B). The Advisory Committee received a few comments, but it made no changes based on these comments. In the committee note, it deleted one sentence that had been published in brackets and that appeared unnecessary.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 15(a)(1).**

Rule 72(b)(1). Judge Dow introduced this action item, which presented for final approval a proposed amendment to Rule 72(b)(1) (concerning a recommended disposition by a magistrate judge). The proposed amendment would bring the rule into conformity with the prevailing practice of district clerks with respect to service of the recommended disposition. Most parties have CM/ECF access, so the current rule's requirement of mailing the magistrate judge's recommendations is unnecessary. The amendment permits service of the recommended disposition by any means provided in Rule 5(b). The Advisory Committee received very few public comments. In the committee note, it deleted as unnecessary one sentence that had been published in brackets.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 72(b)(1).**

Information Items

Rule 12(a)(4). Judge Dow introduced this information item, which concerned a proposed amendment to Rule 12(a)(4) that was initially suggested by the DOJ and had been published for comment in August 2020. The Advisory Committee received only a handful of public comments, but two major comments were negative. Rule 12(a)(4) sets a presumptive 14-day time limit for filing a responsive pleading after denial of a motion to dismiss. This means that the DOJ only has 14 days after denial of a motion to dismiss on immunity grounds in which to decide whether to appeal the immunity issue; but courts frequently grant it an extension. The proposed amendment would have flipped the presumption, giving the DOJ 60 days as opposed to 14 unless the court shortened the time. The Advisory Committee considered a number of options, including a compromise time between 14 and 60 days, as well as providing the longer 60-day period only for cases involving an immunity defense.

The DOJ was unable to collect quantitative data as to how often it sought and received extensions. As a result, and based on the comments received and the views of both the Standing

and Advisory Committees members, the Advisory Committee voted not to proceed further with the proposed amendment to Rule 12(a)(4).

Judge Bates clarified that because the proposed amendment had not emerged from the Advisory Committee, this was not an action item, and therefore no vote of the Standing Committee was required.

Rule 9(b). Judge Dow introduced this information item, which concerned a proposal to amend the second sentence of Rule 9(b) in light of the Supreme Court's interpretation of that provision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Advisory Committee had appointed a subcommittee to study the proposal. However, the subcommittee found that there were not many cases coming up that indicated a problem. Moreover, a number of Advisory Committee members thought *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* were working pretty well in their cases. Therefore, the Advisory Committee chose not to proceed further.

Rule 41. Judge Dow noted this project, which was prompted by a suggestion from Judge Furman to study Rule 41(a)(1)(A). The initial question is whether that provision authorizes voluntary dismissal only of an entire action, or whether it also authorizes voluntary dismissal as to fewer than all parties or claims. The Advisory Committee appointed a subcommittee, which will study this issue and probably also Rule 41 more generally.

Discovery Subcommittee. Judge Dow provided an update on the Discovery Subcommittee, which is focused primarily on privilege log issues. The subcommittee met with bar groups and attended a two-day conference. There seems to be some common ground between the plaintiff and defense bar for procedures for privilege logs. There may be some forthcoming proposals to amend Rules 16 and 26 to deal with these procedural issues, particularly to encourage parties to hash out privilege-log issues early on.

The Discovery Subcommittee has paused its research into sealing issues pending an Administrative Office study of filing under seal.

MDL Subcommittee. Judge Dow introduced this information item. About fifty percent of federal civil cases are part of an MDL. The subcommittee's thinking continues to evolve as it receives input from the bench, the bar, and academics. About a year ago, the subcommittee was looking at the possibility of proposing a new Rule 23.3 (addressing judicial appointment and oversight of leadership counsel). The subcommittee then shifted and thought about revising Rules 16 and 26 to set prompts concerning issues that MDL judges ought to think about. Now, the subcommittee has begun to consider a sketch of a proposed Rule 16.1, which would contain a list of topics on which parties in an MDL could be directed to confer. Flexibility is critical, and any rule will just offer the judge tools to use in appropriate instances.

At a March 2022 conference at Emory Law School, the subcommittee heard from experienced transferee judges that lawyers can do a great service to the transferee judge by explaining their views of the case early on. The judge could then decide which of the prompts in the proposed rule fits the case. The rule would list issues on which the judge could require the lawyers to give their input.

Draft

The subcommittee has been focusing closely on the importance of an initial census. The initial census is key because it can tell the judge and parties who has the cases and what kinds of cases there are, and can help the judge make decisions on leadership counsel.

The subcommittee will work over the summer on the sketch of Rule 16.1 so as to tee up the question of whether or not to advance it. Judge Dow expressed a hope that the subcommittee would complete its work in the coming year.

Jury Trials. Judge Bates highlighted the portion of the Advisory Committee's report (pages 751–72) concerning the procedures for demanding a jury trial. Though the Advisory Committee has deferred consideration of this issue for the moment, Judge Bates suggested that it may be important to deal with it at some point. Judge Dow and Professor Cooper explained that Congress enacted legislation directing the FJC to study what factors contribute to a higher incidence of jury trials in jurisdictions that have more of them. Dr. Lee has launched that study, and predicts that he will have a short report on the topic ready for the Advisory Committee's fall agenda book.

OTHER COMMITTEE BUSINESS

Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002. Professor Struve presented this item, which concerned a report required under the E-Government Act of 2002. She thanked all the Advisory Committee chairs and reporters, Judge Bates, and the Rules Office staff for their work on this report. The privacy rules, which impose certain redaction requirements, took effect in 2007. The idea of the report is to evaluate the adequacy of these rules to protect privacy and security. The report does so in three ways: it discusses amendments (relevant to the privacy rules) that have been adopted since 2011 (the date of the last report); it notes privacy-adjacent items that are pending on the rules committees' dockets; and it discusses other privacy-related concerns discussed since 2011 that did not give rise to rule amendments because the rules committees determined that rule amendments were not the way to address those concerns. A new report to Congress will be prepared every two years going forward.

Professor Struve noted that the Standing Committee was asked to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, and to recommend that the Judicial Conference forward the report to Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously voted to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002 and to recommend that the Judicial Conference forward the report to Congress.**

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 1051 summarized legislation currently pending before Congress, as well as the Juneteenth National Independence Day Act, which passed and was signed into law by President Biden in 2021.

Draft

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 1061. The Judicial Conference requires the Standing Committee to submit a report on its strategic initiatives. He asked the Standing Committee for approval to submit the report.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the Judiciary Strategic Planning report for submission to the Judicial Conference.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their attention and insights. The Standing Committee will next meet on January 4, 2023. The location of the meeting had not yet been confirmed. Judge Bates expressed the hope that the meeting would take place somewhere warm.

Draft

TAB 1C

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 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 allows 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 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)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules 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 went into effect February 19, 2020.	
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.	

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- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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.	
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) requires 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) creates 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:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

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 Emergency 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) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
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. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
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 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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 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 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
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.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

Agenda E-19 (Summary)
Rules
September 2022

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 2, 4, 26, and 45, 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. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, 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. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, 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

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, 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. 22-24

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

6. Approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

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 7, 2022. 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 L. 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; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

representing 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. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, 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 Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

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

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

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 amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

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

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised 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.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) 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).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as 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" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

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

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that 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." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify 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. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current 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 potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current 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. The proposed amendment to Rule 804(b)(3) 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.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. 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. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

* * * * *

TAB 2

TAB 2A

This item will be an oral report.

MEMORANDUM

DATE: August 24, 2022

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

FROM: Catherine T. Struve

RE: Project on electronic filing by pro se litigants

Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018[1] provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group has convened via Zoom for three discussions. The December 2021 discussion centered on potential research questions for a projected study by the FJC. By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted the study and had circulated to the working group a draft of their report. The working group's March 2022 discussion focused on the study's findings. The final version of the report became available in May 2022,[2] and the working group met in August 2022 for further discussion of the study's findings.

This memo sketches possible topics that the advisory committees might discuss in light of the FJC's findings.[3] Part I.A of the memo provides a brief overview of the current rules on

1 For a review of current practices in the state courts, see National Center for State Courts, Self-Represented Efiling: Surveying the Accessible Implementations 3 (2022) (reporting that self-represented state-court litigants "often enjoy the same ability to efile as attorneys in the trial courts that offer electronic filing"), available at https://www.ncsc.org/__data/assets/pdf_file/0022/76432/SRL-efiling.pdf. An appendix to the study provides links to relevant e-filing programs by state. See id. Appendix A.

2 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

3 The suggestions gathered in this memo reflect insights contributed by many working-group members. Those members have a variety of views on the issues discussed here, and the suggestions in the memo may not be endorsed by all working-group members. My goal here is to collect possible issues for discussion rather than to report a consensus view of the working group.

electronic filing and on service, while Part I.B summarizes pending proposals to amend the rules with respect to electronic filing by self-represented litigants. Part II outlines possible questions for discussion by the advisory committees as to both filing and service.

I. The current rules, and proposals to amend them

In Part I.A., I briefly summarize the current rules on self-represented electronic filing and on service. Part I.B synopsizes pending proposals to amend the electronic-filing rules.

A. The current rules

Under the rules as amended in 2018, pro se litigants can file electronically only if permitted to do so by court order or local rule. The Civil, Bankruptcy, and Appellate Rules contemplate that courts can require electronic filing by a pro se litigant, so long as they do so by order, or via a local rule that includes reasonable exceptions. The Criminal Rule does not permit a court to require pro se litigants to file electronically; the Committee Note observes that incarcerated defendants will typically lack the opportunity to file (and receive notices) electronically. As to service, requirements for separate service of a filing hinge on whether the filing was made via the court's case management / electronic case filing (CM/ECF) system or otherwise.

1. Filing

As amended in 2018, Civil Rule 5(d)(3) currently reads:

> (3) Electronic Filing and Signing.
>
> > (A) By a Represented Person--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
> >
> > (B) **By an Unrepresented Person--When Allowed or Required. A person not represented by an attorney:**
> >
> > > **(i) may file electronically only if allowed by court order or by local rule; and**
> > >
> > > **(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.**
> >
> > (C) Signing. A filing made through a person's electronic-

> filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.
>
> (D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(Emphasis added.) Substantively similar electronic-filing provisions appear in Appellate Rules 25(a)(2)(B) and Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B).

The 2018 Committee Note to Civil Rule 5(d) states in part:

> Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A similar passage appears (without the last sentence in the quote above) in the Committee Note to Bankruptcy Rule 5005(a)(2); the Committee Note to Appellate Rule 25(a)(2)(B) briefly observes that that provision parallels the approach taken in Civil Rule 5.

Criminal Rule 49(b)(3) provides:

> (3) Means Used by Represented and Unrepresented Parties.
>
> (A) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

> **(B) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.**

(Emphasis added.) The 2018 Committee Note to Criminal Rule 49(b)(3)(B) explains:

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

2. Service

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[4] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[5] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[6] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[7] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by

4 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

5 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

6 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

7 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

filing it with the court's electronic-filing system."[8]

In a case where all parties are represented by counsel,[9] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which, as noted in Part I.A.1, occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.

As for service by a self-represented litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[10]

It should be noted that, in its research, the FJC found at least one clerk's office that took a different view of Civil Rule 5(b)(2)(E). Under this office's interpretation, Civil Rule 5(b)(2)(E) exempts paper filers from serving registered users of CM/ECF. The argument is that when a filer submits a filing to the court by a means other than CM/ECF and the court staff then dockets the filing in CM/ECF, the filer has "sen[t the filing] to a registered user by filing it with the court's electronic-filing system" because the filing is eventually uploaded (by the clerk's office) into the court's electronic-filing system. A counter-argument,[11] though, might be that such an argument proves too much: All filings, no matter how submitted, are eventually uploaded into the CM/ECF system, and thus if that interpretation were correct, the drafters of Rule 5(b)(2)(E) could have

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8 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

9 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

10 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

11 Other possible counter-arguments exist. For example, some rules expressly distinguish between "service by the clerk" and service by "a party." See Appellate Rule 25(b); Bankruptcy Rule 8011(b).

saved eight or nine words by deleting "with the court's electronic-filing system" and instead saying simply, "sending the filing to a registered user by filing it."

B. Current proposals

Pending before the advisory committees are a number of proposals to amend one or more of the electronic filing rules so as to adopt a national rule permitting pro se litigants to file electronically. I will highlight in this section the two most detailed proposals.[12] Sai proposes adoption of nationwide presumptive permission for pro se litigants to file electronically.[13] John Hawkinson, by contrast, proposes that if the requirement of permission by court order or local rule is retained, then the national rules[14] could be amended to address the standard for granting permission.

Sai initially submitted Sai's proposal as a response to the package that became the 2018 electronic filing amendments. Sai has re-submitted the proposal, which includes the following elements:[15]

> 1. Remove the presumptive prohibition on pro se use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
>
> 2. Treat pro se status as a rebuttably presumed good cause for nonelectronic filing.
>
> > a. For pro se prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
>
> 3. Require courts to allow pro se CM/ECF access on par with attorney filers, prohibiting any restriction merely for being pro se or a non-attorney, and prohibiting registration fees.
>
> 4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.

John Hawkinson proposes that Civil Rule 5 be amended to address local court bans on pro se electronic filing, and perhaps to address the standard for granting leave to file

12 Other suggestions also support a national rule allowing pro se electronic filing and offer policy reasons to adopt such a rule. See, e.g., infra note 40 (citing one such suggestion).
13 I focus here on Sai's suggestion No. 21-CV-J, submitted to the Civil Rules Committee.
14 Mr. Hawkinson's suggestion focuses on Civil Rule 5. See Suggestion No. 20-CV-EE.
15 This is an excerpt from Sai's 2017 proposal.

electronically:

> I recently became aware that some districts by standing order unconditionally bar non-attorney pro se litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). See Perdum v. Wells Fargo Home Mortg., No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). See also Oliver v. Cnty. of Chatham, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).
>
> The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. Oliver at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

II. Possible discussion topics

This section sketches some topics that the advisory committees might consider at their fall meetings. In II.A, I outline some issues about electronic filing, and in II.B, I sketch questions about service.

A. Electronic filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access.

Shifting the rules' default position. As noted in Part I.A.1, the current rules permit, but do not require, the courts to provide self-represented litigants with access to CM/ECF. A court can provide such access either by local rule or by order in a case. Should the rules be amended to provide the opposite default rule – namely, that self-represented litigants may[16] use CM/ECF unless the court otherwise provides (by local rule or order in a case)? In assessing this question, it seems important to consider the current practices in the various types of court. Qualitatively, the FJC study reports that "[m]any courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected."[17]

16 None of the pending proposals suggests that self-represented litigants should be *required* to use CM/ECF.

17 FJC Study, supra note 2, at 7.

Quantitatively, the study found that, among the courts of appeals, five circuits[18] presumptively permit CM/ECF access for non-incarcerated self-represented litigants,[19] seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances).[20] The FJC Study used two techniques to ascertain what district courts are doing on this question: Researchers (in a separate 2019-2022 study) reviewed the local rules for all 94 districts,[21] and researchers in the FJC Study conducted interviews with personnel in 39 district clerks' offices.[22] The researchers report that, based on the local rules, at least[23] 9.6% of districts "permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints);[24] 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF."[25] Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts.[26]

A proposed rule amendment that flatly required courts to provide self-represented litigants with access to CM/ECF would confront opposition from stakeholders, given that most courts do not offer blanket permission for CM/ECF use by self-represented litigants and some courts bar such use altogether. A proposal to shift the presumption (that is, to presumptively permit rather than to presumptively disallow CM/ECF access for self-represented litigants)

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18 The five-circuit figure excludes the Ninth Circuit, see FJC Study at 7 nn. 3 & 4. But the FJC Study reports, based on its interview(s) with court staff, that "[i]n fact, the [Ninth Circuit] encourages pro se use of CM/ECF." FJC Study at 13; see also Ninth Circuit Rule 25-5(a).

19 In the interests of simplicity, this discussion of e-filing access focuses on non-incarcerated self-represented litigants. Access policies for incarcerated self-represented litigants present distinct issues.

20 See FJC Study, supra note 2, at 6-7.

21 See id. at 4.

22 See id.

23 Given the timing of the FJC's local-rules study, it may not fully capture courts' adoption of more permissive practices specifically during COVID. For instance, "[e]ffective May 1, 2020, and until further notice," the Northern District of California granted blanket permission for self-represented litigants to register for CM/ECF in existing cases. See https://cand.uscourts.gov/cases-e-filing/cm-ecf/setting-up-my-account/e-filing-self-registration-instructions-for-pro-se-litigants/ . This district is not listed as one that has a local rule granting blanket permission. See FJC Study at 7 n.7.

24 The districts with local provisions providing blanket permission include three that have a large volume of cases involving pro se litigants (the Northern District of Texas, the Northern District of California, see supra note 23, and the Northern District of Illinois) as well as districts with a more moderate volume of such cases (the Western District of Washington, the Western District of Missouri, the District of Kansas, and the Southern District of Illinois) and districts with a smaller volume of such cases (the Western District of Wisconsin, the District of Nebraska, and the District of Vermont). See https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map (showing volume of pro se civil cases filed 2000-2019, by district).

25 FJC Study at 7.

26 Id. at 8.

would allow courts to continue their current practices. Under such a shifted presumption, a court wishing to limit or disallow CM/ECF access for self-represented litigants would have to do so by local rule or court order; this would impose on courts the costs of taking such action, but it might also nudge some courts to reconsider their current reluctance to permit such access.

However, participants in the working group discussions have asked whether it would make sense to adopt a default rule that is out of step with the practices of most courts. If not, that might raise the possibility that the case for switching the default rule is stronger with respect to the courts of appeals, where the practice has already moved farthest in the direction of presumptive access to CM/ECF.[27] On the other hand, the fact that the courts of appeals are already moving to increase access without being required to do so by the national rules might be taken, instead, as a reason that a national rule change is not necessary.

Proscribing outright bans. The FJC study found a number of district courts[28] – and, at least nominally, one court of appeals[29] – that do not permit any self-represented litigants to access CM/ECF. As noted in Part I.A, the current rules permit outright bans, in the sense that the rules permit, but do not require, the courts to grant access by local rule or by order in a case. Mr. Hawkinson proposes that the rules be revised to "discourag[e] such blanket bans, and perhaps even [to provide] that leave should be freely given."[30]

Treating case-initiating filings differently. A number of courts are more restrictive with respect to case-initiating filings. The FJC Study notes courts that permit self-represented litigants access to CM/ECF but only for filings after case initiation,[31] as well as a few districts that are similarly restrictive even as to attorneys' filings.[32] Thus, although one proponent of increased CM/ECF access argues that case-initiating access is important,[33] it seems likely that increasing

27 Participants have suggested that the appellate courts' relative willingness to provide CM/ECF access to self-represented litigants may be connected to the relative simplicity of the dockets on appeal (compared with the dockets in the district courts and bankruptcy courts).

28 The FJC Study observes that "[t]he rules for fourteen district courts state that pro se litigants may not use CM/ECF." Id. at 7. In addition to the 14 districts noted in that passage, the study found three other districts that appear to take the same position. See id. at 16 (noting that despite local provisions nominally permitting access by permission, "[i]n fact, pro se litigants are never granted CM/ECF filing privileges" in the District of Idaho); id. at 27 (reporting that in the Southern District of Georgia, "[p]ro se litigants may not file using CM/ECF"); id. at 43 (reporting that in the District of Utah, "[p]ro se parties may not use CM/ECF.").

29 "The electronic filing guide for [the Sixth Circuit] states that the court does not permit pro se litigants to use CM/ECF, … but some pro se litigants have been granted electronic filing privileges as exceptions to the rule." FJC Study at 7. See id. at 12 ("Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.").

30 See Hawkinson suggestion, supra note 14.

31 See, e.g., FJC Study at 7 ("Pro se plaintiffs seldom can use CM/ECF to file their complaints.").

32 See id. at 23-24 (discussing Western District of Arkansas); id. at 43 (discussing District of Utah).

33 See Sai's proposal, supra note 13, at 24 (arguing that inability to initiate a case via electronic filing

CM/ECF access for case-initiating filings could meet with particular resistance. A prime concern, here, is the difficulty that can ensue if a person uses CM/ECF to mistakenly create a new record with a new case number.[34] However, as a matter of court practice, an intermediate possibility may exist: a number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it.[35]

Treating incarcerated self-represented litigants differently. It is not uncommon for local provisions on self-represented filing to distinguish between incarcerated and non-incarcerated self-represented litigants. As the FJC Study found:

> Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.
>
> Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.[36]

In considering possible rule changes, it will be important to consider how to take account of the specific issues arising in carceral settings.[37]

Encouraging alternative means of electronic access. One topic of discussion is whether courts could provide self-represented litigants with benefits akin to those of CM/ECF through electronic-submission avenues that do not carry CM/ECF's projected disadvantages.[38] The FJC

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could impede a litigant's ability to timely file a case or to obtain time sensitive interim relief).

34 See FJC Study at 6.

35 See id.

36 Id. at 8.

37 Among the potential complicating factors for incarcerated litigants' access to courts is the fact that they may be moved among different facilities during the pendency of a case. And even if a particular institution provides an opportunity to *file* documents electronically, it may not similarly facilitate receiving and retrieving notices and documents electronically.

38 During prior discussions of CM/ECF access for self-represented litigants, participants cited – as possible downsides of such access – litigants' lack of competence to use CM/ECF; the burden on clerk's offices of training litigants to use CM/ECF and of addressing filing errors; inappropriate filings; inappropriate docketing practices (wrong event or wrong case) and sharing of credentials. See, e.g., Minutes of April 2017 Meeting of Bankruptcy Rules Committee; Minutes of April 2016 Meeting of Civil Rules Committee; Minutes of April 2015 Meeting of Civil Rules Committee; Minutes of March 2015 Criminal Rules Committee Meeting. Compare FJC Study at 7 (stating that courts that have allowed self-

Study observes that "[s]ome courts … accept submissions by email" and "[a] few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF," but that "[m]any to most courts do not accept such electronic submissions."[39]

An avenue for electronic submission of filings to the court would offer self-represented litigants a number of the advantages offered by CM/ECF access. Litigants would avoid the costs and logistical challenges[40] of printing and mailing the papers filed with the court, and their filings would reach the court more quickly than if they were filed by mail. Advantages would also accrue to court personnel who would spend less time scanning paper filings. And court personnel and litigants who have visual impairments could benefit because files submitted electronically may be more likely to be accessible to those with visual impairments than files created by scanning paper filings.[41]

A perhaps unsettled question is whether an alternative electronic-submission system would automatically offer self-represented litigants the benefit of a later filing deadline. Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office.[42] If submission via email to a court-provided email address or via upload to a court's electronic drop box were regarded as "electronic filing," then the users of such systems could benefit from that extended filing time. However, it is not entirely certain that all courts would take this view; accordingly, it seems useful for a court adopting such a submission system to clarify by local rule the time-of-day deadline for such electronic submissions.[43]

It should be noted that provision of an alternative method for electronic *submission to the court* will not by itself offer self-represented litigants all of the advantages of CM/ECF participation. Two of those advantages merit separate discussion: electronic noticing, and avoiding the need for separate service on registered CM/ECF users. The CM/ECF system automatically provides registered users with electronic notice (and a free download) of any filings in their cases. A number of courts separately provide self-represented litigants who are

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represented litigants to use CM/ECF "reported fewer problems than expected").

39 FJC Study at 9.

40 Logistical challenges include those faced by filers outside the country, those with a disability, and those who have health concerns about visiting public spaces during the pandemic. See Sai's proposal, supra note 13, at 27; comment of Dr. Usha Jain, Nos. 20-AP-C & 20-CV-J.

41 See infra note 47.

42 See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

43 The time-computation rules permit courts to specify a different time of day via local rule or order in a case. See the rules cited supra note 42.

not users of CM/ECF with the opportunity to register to receive electronic notice of filings in their case.[44] Such an electronic-notice mechanism seems to be an important component of a program to provide self-represented litigants with access equivalent to that furnished by CM/ECF – both because it provides an avenue for notice that may be more timely and effective than service by mail[45] and because the notice recipient receives an opportunity to download an electronic copy of the relevant filing.[46] Among other advantages, such an electronic copy may increase accessibility for readers with visual disabilities, because this electronic copy will likely be more amenable to use by text-to-speech programs than a copy made by scanning a paper received in the mail.[47] On the other hand, it makes sense that the courts providing an electronic-noticing program typically make it optional, not mandatory – because some self-represented litigants could not navigate the electronic-notice-and-download tasks and, for those litigants, hard copies sent by mail are the better option.

As noted in Part I.A.2, because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. To qualify for this exemption the litigant must "send[the paper] to a registered user by filing it with the court's electronic-filing system." For the reasons noted in Part I.A.2, a court might conclude that submission via an alternative means of electronic access (email or upload to a court portal) does not fit within this description. In that view, electronic submission to the court outside of CM/ECF might not exempt a self-represented litigant from the duty to separately serve all other parties (even those that are registered users of CM/ECF). This issue could be addressed by adopting a local rule exempting non-CM/ECF users from separately serving registered CM/ECF users,[48] or by revising the national rules concerning service. I turn to the latter possibility in Part II.B.

Non-rule-based avenues for change. A recurring question during the working group's discussions has been whether the rules themselves are an impediment to increasing access for

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44 See FJC Study at 11. See also, e.g., U.S. District Court, S.D.N.Y., Pro Se (Nonprisoner) Consent & Registration Form to Receive Documents Electronically, available at https://www.nysd.uscourts.gov/sites/default/files/pdf/proseconsentecfnotice-final.pdf .

45 Sai has pointed out that the ability to receive electronic notice of filings is particularly important for litigants who are traveling or who have a disability. See Sai's proposal, supra note 13, at 24-25.

46 See FJC Study at 11 ("CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again.").

47 As Sai points out, a text-to-speech program cannot read a scanned PDF unless the scanned PDF is first processed using optical character recognition ("OCR") technology; and the resulting OCR-processed file may contain errors that would not be present in the same document if it were in native PDF format. See Sai's proposal, supra note 13, at 28.

48 Local rules, of course, must be "consistent with" the national rules. Civil Rule 83(a)(1); see also Appellate Rule 47(a)(1); Bankruptcy Rule 9029(a)(1); Criminal Rule 57(a)(1). For the reasons discussed in Part I.A.2, perhaps the national service rules might be viewed as ambiguous on the question of what counts as "sending … to a registered user by filing … with the court's electronic-filing system." If so, then a local rule could be viewed as clarifying that ambiguity.

self-represented litigants. With the possible exception of the service issue (discussed in Part II.B), the access issues noted in this memo could be addressed by a court entirely through local provisions, consistent with the current national Rules. A court could offer self-represented litigants access to CM/ECF. Or it could offer self-represented litigants a non-CM/ECF option to email or upload documents plus an option to register to receive electronic notices of others' filings in the case. While the current rules do not nudge the courts in this direction, neither do they impede a court from pursuing this direction if it wishes to do so.

Thus, some participants have asked whether the proposals to increase electronic-filing access are best addressed by measures other than a rule amendment. A helpful approach might be to provide resources and training that could address underlying reasons for reluctance to expand electronic access for self-represented litigants. Resources might include, for example, training modules that could be provided to self-represented litigants on the use of CM/ECF, and anti-malware technology that could be provided to courts to screen electronic files submitted via email or upload. Such matters lie outside the province of the rules committees, but it could be useful for the rules committees to consider making a recommendation that other federal-judiciary actors study these matters – for example, the Judicial Conference Committee on Court Administration and Case Management and perhaps the Judicial Conference Committee on Information Technology, in coordination with any existing working group that is addressing issues facing self-represented litigants.

The need for broad consultation. The public suggestions proposing greater access for self-represented litigants have raised important points about the experience of those who represent themselves in federal court. Further insights on the experience of pro se litigants might be gained by consulting lawyers with experience assisting pro se litigants in federal court.[49] It is likewise important to gain perspective from clerks' office personnel. The interviews conducted by the FJC provide a head start on that task; as proposals are developed, it could also be useful to solicit views from organizations such as the National Conference of Bankruptcy Clerks, the Federal Court Clerks Association, the Administrative Office's Bankruptcy and District Clerk Advisory Groups, and the circuit clerks.

B. Service on registered CM/ECF users

Part I.A.2 observed that because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable.

Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Each filing a self-represented litigant makes by a means other

49 A potential resource, in this regard, is the Federal Courts working group of the Self-Represented Litigation Network, see https://www.srln.org/taxonomy/term/677.

than CM/ECF will eventually be uploaded by the clerk's office into CM/ECF, and at that point all registered CM/ECF users in the case will receive a notice of electronic filing and an opportunity to download the document. As a practical matter, though there may be a lag between the submission of the document and the time when the court clerk uploads it into CM/ECF, it seems plausible to surmise that the document will ordinarily become available to the judge no sooner than it becomes available to registered users via the notice of electronic filing.

The hardship imposed by that additional task (serving registered CM/ECF users) will depend on the circumstances of the case and the litigant. For some litigants, effecting separate service might not be onerous; this would be true if the self-represented litigant is thoroughly conversant with email and has been able to obtain all other litigants' consent to email service. But for self-represented litigants who lack reliable access[50] to or proficiency with email – or who have not been able to obtain their opponent's consent to email service – the separate-service requirement means making additional hard copies of the paper in question and delivering them by non-electronic means. And regardless of the alternate service method (email or paper), the rules require a certificate of service, which is an additional technical requirement that might trip up a self-represented litigant.

Presumably for these reasons, some courts have adopted local provisions eliminating the requirement of separate service on registered users of CM/ECF.[51] A question for the advisory committees is whether it would be useful to amend the national rules to adopt that approach. Such an amendment would provide a national imprimatur for the existing local rules, and would also change the practice in districts that currently require separate service even on registered CM/ECF users. Because some districts have already adopted this practice, there is a reservoir of experience on which the committees could draw in determining whether the practice has any downsides.[52]

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50 For instance, many incarcerated litigants likely lack reliable access to email.

51 See, e.g., D. Ariz. E.C.F. Admin. Policies & Procedures Manual II.D.3 ("A non-registered filing party who files document(s) with the Clerk's Office for scanning and entry to ECF must serve paper copies on all non-registered parties to the case. There will be some delay in the scanning, electronic filing and subsequent electronic noticing to registered users. If time is an issue, non-registered filers should consider paper service of the document(s) to all parties."); S.D.N.Y. Electronic Case Filing Rule 9.2 ("Attorneys and pro se parties who are not Filing or Receiving Users must be served with a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Local Rules. Such paper service must be documented by electronically filing proof of service. Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service.").

52 Personnel in those courts could tell us, for example, how non-CM/ECF users discern which other litigants are and are not registered CM/ECF users. Litigants who file via CM/ECF receive a system-generated notice of electronic filing that says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). Such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

If the advisory committees are inclined to consider such amendments, questions about implementation arise. For example, should the exemption extend only to service on registered CM/ECF users, or should it also encompass service on non-CM/ECF users who have registered with the court to receive notices of electronic filing in the case? And, of course, there are drafting questions. As to the latter, I sketch below – purely for purposes of illustration – one possible way to accomplish this type of amendment; but there may well be better ways to implement the idea. The sketch below illustrates a possible amendment to Civil Rule 5:

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

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

(2) Service <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

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

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

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

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

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person consented to in writing--in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

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

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**. A paper is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it, in which event service is complete upon filing, but is not effective if the filer learns that it did not reach the person to be served.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3). When a paper that is required to be served is served by other means:

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

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

* * *

III. Conclusion

The FJC Study has given the advisory committees an invaluable factual basis on which to consider whether amendments to the national rules might usefully address questions of electronic filing, and questions of service, by self-represented litigants. As noted in Part II, an additional question is whether the rulemaking committees might recommend that other groups within the federal judiciary consider fostering increased access through means other than rule amendments. I look forward to learning from the advisory committees' discussion of those possibilities.

TAB 2B

This item will be an oral report.

Electronic Filing Deadlines in State Courts

Marie Leary and Jana Laks

October 2022

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Contents

Introduction

This report presents the results of an analysis of electronic filing practices in state courts to identify courts that require attorneys to complete electronic filings by a certain time (other than midnight local time) on the due date. In 2018, the Delaware Supreme Court ordered Delaware courts to amend their rules and/or electronic-filing policies to require that all electronic filings in nonexpedited matters, except for initial pleadings and notices of appeal, be completed by 5:00 p.m. Eastern Time in order to be considered timely filed that day.[1] Four federal courts have a filing deadline other than 12:00 midnight for electronic documents filed on the date they are due: before 5:00 p.m. (EST) in the district courts for the Eastern District of Arkansas and the District of Delaware (except for initial pleadings), before 6:00 p.m. (EST) in the District of Massachusetts, and before 4:30 p.m. (EST) in the District of Massachusetts Bankruptcy Court.[2]

To determine whether electronic filing deadlines other than 12:00 midnight on the filing due date are a more frequent occurrence in state courts, we examined state court systems in thirty states, arbitrarily chosen from the states that comprise each of the eleven federal numbered circuits to avoid overrepresentation of a geographic region. In circuits with an even number of states, half of the states were selected by choosing every other state from a list of all states in the circuit in arbitrary order. In circuits with an odd number of states, one more than half of the states were selected by choosing every other state from an arbitrary list of all states in the circuit. The number of states selected from each of the eleven circuits is proportionate to the total number of states located within each circuit. For example, five of the state court systems studied are geographically located within the Ninth Circuit, and two state court systems represent the Third Circuit.

Our findings are summarized below, and the appendix provides a state-by-state description of the relevant court rules.[3]

Description of Electronic Filing Systems in State Courts

Although some variation exists in the electronic filing systems and practices of individual federal courts, the implementation of electronic filing in state courts can differ greatly from one state to another. Therefore, filing deadlines identified in state courts should be considered within the context of the e-filing system and filing practices operational in each court. Except for specific, narrow exceptions for certain types of cases (e.g., grand jury matters, sealed cases) or kinds of documents (e.g., complaints, notices of removal, charging documents in a criminal case, under seal filings),

1. *See* Chief Justice Delaware Supreme Court, Work Life Balance Final Order (issued July 18, 2018, effective Sept. 14, 2018) (Delaware Supreme Court ordered all Delaware courts to adopt a new 5:00 p.m. electronic filing deadline and recommended additional policies and practices to improve work-life balance for Delaware legal professionals and their staff).

2. *See* Eastern District of Arkansas, CM/ECF Administrative Policies and Procedures Manual for Civil Filings § III.A.3 (rev. June 8, 2022) (applies to documents electronically filed on the last day of any given deadline); District of Delaware, Standing Order Regarding Revision to Electronic Case Filing Policies and Procedures (adopted Aug. 16, 2022; effective Sept. 1, 2022) (deadline for filing and service of documents in the U.S. District Court for the District of Delaware moved to 5:00 p.m. ET from the prior deadline of 6:00 p.m. ET for all documents other than initial pleadings); District of Massachusetts, CM/ECF Case Management/Electronic Case Files Administrative Procedures § K (July 2011) (applies to a document electronically filed on the date on which it is due); D. Mass. Bankr. R., App. 8, R. 3(c)(2) (applies to documents where the court orders that filing must be completed by a specific date but does not specify the time).

3. *Also available at* https://www.fjc.gov/sites/default/files/materials/01/ElectronicFilingStateCourtsAppendix.pdf.

all federal courts (courts of appeals, district courts, and bankruptcy courts) require attorneys to file all documents in all civil and criminal cases electronically using the federal judiciary's Case Management/Electronic Case Files (CM/ECF) system.[4] And although each federal court has the authority to establish for itself local rules governing e-filing,[5] components of federal e-filing such as having only one electronic filing and case-management service used by all courts and filers, and federal rules that provide electronic filing requirements common to all CM/ECF users regardless of the court, establish a degree of uniformity in federal e-filing not present when describing electronic filing in state courts. State courts in all thirty states were found to have an electronic court document filing system. However, these systems vary widely in the degree to which they are implemented in only a few courts or statewide, the approach adopted to create and structure their filing systems, the individuals authorized to register and e-file documents through system, the rules and procedures governing electronic filing, and the case types and documents for which e-filing is mandated or voluntary.

Limited and Statewide Implementation. Despite the differences described below, court systems in all thirty selected states were found to authorize electronic filing in all or some of their courts by means of an "electronic filing system." Such systems share the common characteristics of being a web-based system established for the purpose of filing documents with or by the court, integrating documents into the court's case-management system, and electronically serving notice to the parties who have registered with the electronic filing system. For all thirty states, the term "electronic filing" or "e-filing" does not encompass the submission or transmission of documents to or from the court through other electronic means such as e-mail, facsimile, or computer discs.

Except for New Hampshire, Montana, and Wyoming, which have no intermediate appellate courts, the state court systems studied had at least two appellate-level courts and one or more trial-level courts. In twelve states, electronic filing is implemented in all appellate- and trial-level courts.[6] Twelve additional states authorize e-filing in all appellate-level courts and have extended e-filing to most but not all trial-level courts.[7] In three states, e-filing is authorized in courts at one appellate level but not the other, and to some trial-level courts but not others.[8] One state has implemented e-filing in one appellate-level court and in all trial-level courts.[9] And in two states e-filing is only authorized in trial-level courts.[10]

Types of Court Electronic Filing Systems. The state court systems studied appear to have used several different approaches to establish electronic filing. Courts in thirteen states have electronic filing systems developed internally within the court system itself.[11] Outside vendors may have

4. *See* Fed. R. App. P. 25; Fed. R. Civ. P. 5; Fed R. Crim. P. 49; Fed. R. Bankr. P. 5005.

5. *See* Fed. R. App. P. 25(a); Fed. R. Civ. P. 5(e); Fed R. Crim. P. 49(d); Fed. R. Bankr. P. 5005(a) (each authorizing courts to establish local rules requiring or allowing e-filing).

6. *See* Appendix: California, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, Ohio, Rhode Island.

7. *See* Appendix: Alabama, Arizona, Arkansas, Delaware, Hawaii, New Mexico, North Carolina, Mississippi, Montana, Texas, Virginia, Wyoming.

8. *See* Appendix: New York, North Dakota, Wisconsin..

9. *See* Appendix: New Jersey.

10. *See* Appendix: Alaska, Kentucky.

11. *See* Appendix: Colorado, Florida, Hawaii, Kentucky, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, New York, Ohio, Virginia, Wisconsin.

assisted with designing the system, but authorized users file directly with the court through a portal maintained and supported by the court. Fourteen state court systems have contracted with private-sector providers (often referred to as electronic filing service providers or EFSPs) to design, build, maintain, and support their electronic court systems.[12] An electronic filing service provider is generally a third party who, for a fee, provides software that allows users to prepare and submit e-filings, pay the filing fees related to their submissions, and receive notifications from the court. Three states contract directly with an electronic service provider referred to as an e-filing manager that receives and processes e-filing submissions directly from registered users and from court-approved or certified secondary or alternative electronic filing service providers.[13] Using multiple competing EFSPs allows the courts to offer varying service levels to users who are able to choose between EFSPs based on their needs and price. The remaining four states use both approaches in their courts, implementing an internally developed filing system for some of its courts (e.g., appellate courts only) while a using a private sector provider for the remaining courts (e.g., all trial-level courts).[14]

Adopting either the first or second approach described above, court systems in sixteen states have implemented a statewide electronic filing system using a single portal.[15] This portal acts as a central hub, allowing courts and filers throughout the state to link to one website where documents are filed and then forwarded to the appropriate courts and clerks across the state. Nine of the electronic filing systems with one universal filing portal for all active courts are court-created, while the remaining seven require registered users to file through a single approved e-filing service provider.[16] Eleven of the fourteen state court systems with more than one electronic filing system have two e-filing portals, one portal for appellate court filings and another for trial court filings.[17] The remaining three state court systems have three e-filing portals, with each representing a distinct electronic filing system.[18]

Mandatory and Permissive/Voluntary Electronic Filing. As stated previously, except for certain types of proceedings or documents, attorneys must e-file any document in federal district courts and courts of appeals that they conventionally would have filed with the clerk's office in paper format, including most pleadings, motions, and notices. Although state courts are moving in the direction of eliminating paper filings, e-filing is not mandatory in all state courts that are authorized to accept electronic filings. In addition, even state courts for which e-filing is mandatory may not accept electronic filing of all documents in all civil and criminal cases or appeals. In thirteen of the thirty state courts studied,[19] electronic filing is mandatory for attorneys in all state

12. *See* Appendix: Alaska, Arizona, Arkansas, California, Delaware, Illinois, Maryland, Minnesota, New Hampshire, New Mexico, Rhode Island, Texas, Wyoming.

13. *See* Appendix: Illinois, Maryland, and Texas.

14. *See* Appendix: Alabama, Connecticut, North Carolina, North Dakota.

15. *See* Appendix: Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Montana, New Mexico, New York, Ohio, Rhode Island, Texas.

16. *Id.*

17. *See* Appendix: Alabama, Arizona, California, Connecticut, Minnesota, New Jersey, North Carolina, North Dakota, Virginia, Wisconsin, Wyoming.

18. *See* Appendix: Delaware, Nebraska, New Hampshire.

19. *See* Appendix: Alaska, Arkansas, Florida, Hawaii, Maryland, Minnesota, Mississippi, Nebraska, New Jersey, North Carolina, North Dakota, Rhode Island, Wisconsin.

courts authorized to accept electronic filings pursuant to the rules governing electronic filing. Electronic filing is either fully or partially mandatory in the active courts of five states,[20] and mandatory in part in all of the courts authorized to accept electronic filings in one state.[21] Ten states have made e-filing mandatory in some of the courts authorized to accept documents electronically and optional or voluntary in others.[22] And in one state, electronic filing is optional in all appellate and trial courts authorized to participate in the state court's electronic filing system.[23]

For purposes of this study, electronic filing authorized in a trial or appellate court is considered "*mandatory*" if registered attorneys are required to submit documents in civil and criminal cases electronically as provided by the governing rules. These rules may provide for exceptions prohibiting e-filing of certain categories of civil and/or criminal cases.[24] In addition to exempting categories of cases that can be e-filed, state courts with mandatory e-filing rules may also limit the types of documents that can be filed in civil and/or criminal cases.[25] Electronic filing authorized in a trial or appellate court is designated "*mandatory in part*" if registered attorneys are required to submit documents electronically only for specific types of cases as provided by the governing rules. Ten states in our study have one or more courts where attorneys are required to e-file documents in civil appeals or civil cases only.[26] And one state court mandates electronic filing in all criminal cases while e-filing documents in civil cases is optional.[27] Electronic filing authorized in a trial or appellate court is "*optional*" (also labeled voluntary or permissive in state court rules) if registered attorneys are permitted to voluntarily file cases and documents electronically as provided by the governing rules or file their documents conventionally in paper format as provided by court rules and procedures that would apply in the absence of electronic filing. Eleven states have one or more courts where registered attorneys are permitted to file documents electronically in civil and/or criminal cases, but are not required to do so.[28]

Electronic Filing Issues in State Courts

The nonuniformity among state courts in the structure and implementation of their electronic filing systems appears to extend to the rules that govern the core formatting, service, and filing requirements for e-filed documents, including rules addressing whether the filing of an electronic document must be completed before a specific time of day (other than before midnight) on the due date for the court to consider the document to be "timely filed." Rules addressing e-filing deadlines in

20. *See* Appendix: California, Connecticut, Delaware, New Hampshire, Texas.

21. *See* Appendix: Illinois.

22. *See* Appendix: Arizona, Colorado, Kentucky, Ohio, Massachusetts, Montana (if trial courts designate case types for which electronic filing is mandatory), New Mexico, New York, Virginia, Wyoming.

23. *See* Appendix: Alabama.

24. *See, e.g.*, State of New Hampshire Superior Court, Administrative Order 2022-01: Case Type Exemptions from Electronic Filing in Superior Court (Jan. 20, 2022).

25. *See, e.g.*, Administrative Procedures for Mississippi Electronic Courts (Oct. 2018, effective Oct. 25, 2018) (mandatory electronic filing in Mississippi trial courts applies to subsequent filings in all civil and criminal cases; civil complaints, criminal complaints, bills of information, indictments, summonses and subpoenas must be filed conventionally on paper with the court).

26. *See* Appendix: California, Colorado, Connecticut, Delaware, Kentucky, Massachusetts, Montana (if implemented by individual trial courts), New Hampshire, New Mexico, New York.

27. *See* Appendix: Texas Justice of the Peace Courts.

28. *See* Appendix: Alabama, Arizona, Colorado, Kentucky, Massachusetts, Montana, New Mexico, New York, Ohio, Virginia, Wyoming.

the state courts studied were usually located near or in the same section as rules addressing separate but related filing issues, such as when electronic documents are considered filed by the court, how the date and time of filing is determined, and when the court's electronic filing system is available for e-filing. Although the legal basis for electronic filing and the source of rules that govern e-filing procedures are different in each court system studied, rules addressing these issues to some degree were identified for each state court electronic filing system.

The majority of state court systems address these filing-related issues in amendments to the sections of statewide procedural rules (e.g., rules of appellate, civil, or criminal procedure) that directly relate to filing for each of the state's participating courts.[29] Some states with one e-filing system for appellate courts and another for trial courts establish procedural rules applicable to all active courts at each level.[30] In at least seven states, these rules were included in a separate, stand-alone compilation of rules establishing electronic filing procedures that govern e-filing in every court throughout the state required or choosing to implement electronic filing.[31] These electronic filing rules were adopted by the state supreme court and included within the court's rules or published as general orders.[32] Several state supreme courts have established minimum requirements for electronic filing that all e-filing courts within the state must incorporate, including provisions addressing time and date of filing and filing deadlines.[33] Local rules and administrative orders of the lower courts may cover additional aspects of e-filing not addressed by the minimum standards as long as e-filing occurs consistent with the policies, guidelines, and/or standards authorized by the supreme court.[34] Several court systems that permit some or all of the courts throughout the state to implement electronic filing by local rule require these courts to follow the date and time of filing as set forth in statewide procedural rules; inconsistent local rules setting forth a different time deadline for filing electronic documents are superseded.[35] When these primary sources did not address, or did not clearly address, the state court's requirements for filing, timely filing, or filing deadlines, secondary resources were used to fill the informational gaps, including e-filing frequently asked questions (FAQs), e-filing user's manuals or guides, and a court's e-filing webpage.

In order to satisfy a deadline fixed by statute, rule, or order of the court by submitting a document electronically to a state court, the filer must know when the court's authorized electronic filing system is available to receive documents, what the court's requirements are for a submission to be deemed "filed," and whether the court requires that a document be filed by a certain time of day or before midnight (in the court's time zone) on or before the date on which the document is due to be considered "timely filed" by the court. Thus, the extent to which the state courts' electronic filing rules and/or supplemental resources of the state court electronic filing systems address the following issues is considered separately:

(1) the days and hours during which electronically transmitted documents will be received by the court (or when the court's electronic filing system is available to accept documents);

29. *See, e.g.*, Appendix: Colorado, Delaware, New Mexico, North Carolina, Texas.

30. *See, e.g.*, Appendix: California, Mississippi, Virginia.

31. *See* Appendix, Arkansas, Hawaii, Illinois, Maryland, Massachusetts, Nebraska, Rhode Island.

32. *Id.*

33. *See* Appendix: Florida, Illinois, Texas.

34. *Id.*

35. *See* Appendix: California, Massachusetts.

(2) when (date and time) documents received electronically will be considered by the court to be "filed" as part of the official court record of a case; and
(3) whether an electronically submitted document is required to be filed by a certain time of day (other than midnight in the court's time zone) on or before the date on which the document is due to be considered "timely filed" by the court in order to satisfy a deadline.

When the Court's Electronic Filing System Is Available. Except for courts in four states, the state court electronic filing systems studied are available to receive electronically submitted documents for the purpose of filing with the court as part of an existing case and/or to commence a new case twenty-four hours a day, seven days a week, with the exception of when the system is unavailable due to scheduled or other maintenance or repair.[36] Electronic filing systems in the courts of four states are unavailable for several hours each day, some providing system maintenance as the reason.[37] During this time, registered users are not able to log into the system. Only one state with daily restrictions on the accessibility of its electronic filing system, however, appears to require documents to be electronically submitted earlier than midnight. In Virginia Circuit Courts, the Virginia Judiciary E-Filing System (VJEFS) is regularly available on weekdays, not including holidays, from 7:00 a.m. to 7:00 p.m. EST.[38] Although 7:00 p.m. EST on weekdays is not presented as a deadline for filing, but as a "shut off" time after which VJEFS goes offline, the result is the same in that a document must be submitted to the court before a certain time of day (earlier than midnight) for the court to consider the document received that day.

Because a document that has been electronically submitted to a court will not be considered to be officially filed by the court without some degree of clerk review to determine if it meets the requirements for using the court's electronic filing system, most courts are careful when describing the availability of their electronic filing system using phrases such as "a document can be submitted electronically" or the "court shall receive electronic documents." Courts using the term "filed" to describe the availability of their filing system (e.g., "documents can be filed electronically 24 hours a day, 7 days a week") may inadvertently convey that a court considers an electronic document, submitted at any time on any day of the week, to be "filed" without further court review.[39] Although documents can be submitted electronically twenty-four hours a day, some courts encourage e-filers to submit documents in advance of filing deadlines, cautioning that the electronic filing system may not always be available due to scheduled maintenance or technical difficulties experienced by the e-filer or the system.[40] In addition, courts encourage filers to submit all documents during normal court business hours in the event telephone or online assistance or support is needed.

When the Court Deems an Electronic Document "Filed." In order to meet filing deadlines, it is necessary to know when a court deems a document received through its authorized electronic

36. An electronic filing system is considered available twenty-four hours a day, seven days a week with no daily restrictions preventing users from logging into the system if this has been stated in any rules, procedures, etc., or if any time before midnight is the stated deadline for submitting a document that will be considered filed that day and no restrictions on the e-filing system's availability were located in any rules, procedures, etc.

37. *See* Appendix: Connecticut, Hawaii, New Jersey (Tax Court), Virginia (VACES—appellate courts, VJEFS—trial court).

38. *See* Appendix: Virginia (VJEFS—trial court).

39. *See* Appendix: Alaska, Mississippi, North Carolina.

40. *See, e.g.*, Appendix: California, Kentucky, Mississippi.

filing system "filed" and part of the official court record in a case. Although all state courts that allow electronic filing consider an electronic document to be filed when the electronic filing process is complete, the definition of when this occurs was found to differ between courts in different states, and in a few states, between courts within the same state. All active courts, or courts that are currently authorized to participate in a state court system's electronic filing system, in almost half of the states in the study (fourteen) consider electronic filing complete when a document is submitted and received by the court's authorized electronic filing system, unless the court rejects the document upon review.[41] If accepted after review for compliance with all applicable rules, the document is deemed filed as of the date and time it was originally received by the electronic filing system. In seven states, all active or participating courts consider electronic filing complete when a document submitted to the authorized electronic filing system is accepted by the clerk's office after review for compliance with all applicable rules.[42] If accepted, the document is deemed filed as of the time and date of its original submission. This is true even when the document is not reviewed and accepted by the clerk's office on the same day it was received. All active or participating courts in six states consider electronic filing complete when a document is submitted to the authorized electronic filing system *and* electronically received by the clerk's office, unless the court rejects the document upon review.[43] This differs from courts that deem a document to be filed when received by the court's authorized electronic filing system, regardless of when it was received by the clerk's office. If accepted, the document is deemed filed as of the date and time it was received in the clerk's office.

Active or participating courts in three states do not all apply the same rule for when e-filing is complete and electronic documents are considered filed.[44] For example, electronic documents submitted to the New Hampshire Supreme Court are deemed filed the date and time of original submission upon acceptance, while documents electronically transmitted to New Hampshire superior and circuit courts are considered filed the date and time received upon receipt by the authorized electronic filing system. In addition to the requirements described above, courts in five states do not consider e-filing to be complete until all required fees are paid at the time of filing, or an appropriate waiver of fees is submitted with the document to be filed.[45]

Regardless of when filing is deemed complete initially, electronic documents in all state courts are required to pass clerk review for compliance with all applicable rules, procedures, and standards before the document is file-stamped or docketed and considered part of the official record of a case. Some reasons given for why a court may reject a document for filing include that the filing was not signed by the party, it was not in a digitized format approved by the clerk, it was in violation of the rules governing redactions from court records, or it was filed in the wrong case or with an incorrect case number or caption. Although some courts that allow the filing party to correct the filing and resubmit the document will consider the corrected document filed on the original filing date,[46] others assign the resubmitted document a new submission date and time on the date

41. *See* Appendix: Alabama, Arkansas, Colorado, Delaware, Florida, Kentucky, Maryland, Nebraska, New Mexico, New York, North Carolina, Texas, Virginia, Wyoming.

42. *See* Appendix: Alaska, Illinois, Massachusetts, Montana, New Jersey, Rhode Island, Wisconsin.

43. *See* Appendix: Arizona, California, Connecticut, Hawaii, Mississippi, North Dakota.

44. *See* Appendix: Minnesota, New Hampshire, Ohio.

45. *See* Appendix: Connecticut, New Hampshire (superior and circuit courts), New York, North Dakota (district courts), Wisconsin (circuit courts, except notice of appeal cannot be rejected for failure to pay fee).

46. *See, e.g.*, Appendix: Illinois, North Dakota, Rhode Island, Wyoming (chancery court).

it was resubmitted for filing.[47] Once the document is electronically file-stamped and entered on the docket, it is considered a permanent part of the case record.

Similar to the date and time stated on the Notice of Electronic Filing transmitted when a document is submitted to a federal court via CM/ECF, some state courts consider the date and time stated on a notification sent to the filer automatically by the electronic filing system when a document is submitted as the date and time of original submission.[48] However, several state courts that consider an electronically submitted document filed upon receipt by the clerk's office make clear in their electronic filing rules that the date and time stated on the confirmation of receipt or notice of electronic filing sent to the filer upon submission is the date and time the document was received by the clerk's office and not the date and time the document was submitted by the filer.[49] Although this is not likely to affect the date of filing if the document is accepted after court review, the time of filing may be important if a statute, rule, or court order requires that a document be filed by a certain time of day.

When the Court Deems an Electronic Document "Timely Filed" to Satisfy Filing Deadlines. Electronic versions of documents are filed within the same deadlines as paper documents. Filing a document electronically does not alter or extend any filing deadline. Attorneys, pro se filers, or anyone the court has authorized to register to file documents using the court's authorized electronic filing system are responsible for timely filing of electronic documents to the same extent as paper documents, with the same consequences for missed deadlines. To meet a filing deadline, a document must be "timely filed," meaning that filing must be complete by a certain time of day where the court is located on or before the date on which the document is due. Except for the three district courts and one bankruptcy court mentioned previously, in federal courts attorneys must complete electronic filing before midnight local time where the court receiving the document(s) is located for the court to consider the documents timely filed on that day.[50] Except for the rules described below requiring e-filed documents to be stamped by a particular time (earlier than midnight local time) for the documents to be considered timely filed on that day, similar to federal courts most of the state courts studied consider a document that is received electronically to have been filed on the same day it is received if the document is submitted on or before midnight (in the court's time zone) and the document is not rejected by the clerk's office after review for compliance with applicable rules. However, unlike federal courts, several state courts do not consider documents to be received if such documents are submitted before the midnight deadline on a Saturday, Sunday, legal holiday, or any other day that the clerk's office is closed for business. [51] These documents

47. *See* Appendix: Minnesota (appellate courts), Ohio (Ashland County Court of Common Pleas).

48. *See, e.g.*, Appendix: Alabama, Arkansas, Florida, Kentucky (a document will not be considered filed until the eFiling system generates a Notice of Electronic Filing with a hyperlink to the electronically filed document), Massachusetts, Nebraska, New Hampshire (supreme court), Ohio Tenth District Court of Appeals, Virginia, Wyoming.

49. *See, e.g.*, Appendix: Arizona, California, Connecticut, Hawaii, Mississippi (for the filing of an electronic document to be completed, all active courts require that the filer must have received the Notice of Electronic Filing from the court).

50. *See* Fed. R. App. P. 26(a)(4)(B); Fed. R. Civ. P. 6(a)(4)(A); Fed R. Crim. P. 45(a)(4)(A); Fed. R. Bankr. P. 9006(a)(4)(A).

51. *See* Appendix: California, Illinois, Massachusetts, Montana, New Hampshire (supreme court), New Mexico (documents are considered received by the court if submitted before midnight on a day preceding the next business day of the court), New York, Ohio (First & Eighth District Courts of Appeals, Athens County Common Pleas Court), Texas, Virginia, Wyoming.

will be deemed received on the following business day or the next day the clerk's office is open for business. Unless extended pursuant to a court's applicable time-computation rules, in these courts if the last day of a filing deadline is a Saturday, Sunday, or legal holiday, a document must be submitted prior to a weekend or legal holiday for it to be considered timely filed.

In federal courts, if the last day of a filing deadline is a Saturday, Sunday, or legal holiday, the filing deadline is extended to the end of the next business day, which is defined as midnight in the court's time zone unless a different time is set by a statute, local rule, or court order.[52] Time-computation rules in all state courts studied include a similar provision specifying that the last day of a deadline should be included when computing any period of time unless the last day is a Saturday, a Sunday, or a legal holiday, in which event the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Like the federal rule, several state courts specify that the last day ends for electronic filing at midnight unless a different time is set by a statute, local rule, or court order.[53] However, most rules governing time computation in state courts must be applied in conjunction with any time-of-day deadlines for filing provided in rules governing electronic filing to determine what time the last day of a time period ends. Also similar to time-computation rules applicable in federal courts, state time-computation rules do not apply to a court order requiring a party to file papers on a specific date. If a filing deadline is a date certain (for example, a court order requiring the parties to file all summary judgment motions no later than September 20) and that date falls on a weekend or holiday, the deadline does not move to the next business day.

State Courts with Filing Deadlines Earlier than Midnight in the Courts' Time Zone. In addition to Delaware, courts in Connecticut, Ohio, North Carolina, Alaska, New Mexico, and New York have adopted rules that require electronic documents to be submitted or received by a particular time of day for the documents to be considered timely filed on that day. Electronic filing is mandatory for attorneys in all civil and criminal cases in the Connecticut Supreme Court and appellate court, including the filing of all appeals, applications, motions, and documents. Except for certain civil case types and documents, electronic filing of most civil, family, housing, and small-claims case types is mandatory for attorneys in Connecticut superior courts, and in Connecticut probate courts with respect to all case types. Procedural rules for Connecticut's appellate courts and superior courts contain similar provisions establishing that a document that is electronically received by the clerk's office for filing after 5 p.m. on a day on which that office was open, or is electronically received by that office for filing at any time on a day on which that office is closed, shall be deemed filed on the next business day that office is open.[54] Deadlines for filing are determined in relation to each probate court's scheduled hours, and a document received by the court through its authorized electronic filing system after the court's posted closing time is deemed filed on the next day that the court is open.[55]

Electronic filing is optional in the Ohio Supreme Court, and Ohio courts of appeal and trial-level courts can individually choose whether to authorize by local rules the filing of documents by electronic means. If the court adopts such local rules, they must include a provision specifying the

52. *See* Fed. R. App. P. 26(a)(1)(C), (a)(4)(B); Fed. R. Civ. P. 6(a)(1)(C), (a)(4)(A); Fed R. Crim. P. 45(a)(1)(C), (a)(4)(A); Fed. R. Bankr. P. 9006(a)(1)(C), (a)(4)(A).

53. *See* Appendix: Florida, Minnesota, Montana, New Mexico, North Dakota.

54. *See* Appendix: Connecticut (supreme court, appellate court, superior court).

55. *See* Appendix: Connecticut (probate court).

days and hours during which electronically transmitted documents will be received by the court, and a provision specifying when documents received electronically will be considered to have been filed. The Ohio Court of Claims implemented optional electronic filing for all case types and established by local rule that in order for a document submitted electronically to the court to be considered timely filed on the same day that it is submitted: (1) the document must be submitted on a business day that is not a Saturday, a Sunday, or legal holiday; (2) the document must be submitted prior to 4:59 p.m. Eastern Standard Time, unless the hearing officer has ordered the document filed by an earlier time; and (3) the document must be deemed filed and stamped with the date and time it was submitted upon acceptance after clerk review for compliance with the applicable court rules, policies, and procedures.[56] Documents submitted on a Saturday, or Sunday, or court holiday will be deemed submitted on the following business day, and documents filed later than 4:59 p.m. Eastern Standard Time shall be deemed to have been filed the following business day. The Lima Municipal Court, one of Ohio's 88 municipal courts, one located in each county, implemented optional electronic filing for pleadings, motions, and other documents in criminal and traffic cases.[57] In order to be file-stamped on the date of transmission pursuant to the Lima Municipal Court's electronic-filing policy, the document must be received and time-stamped by the clerk by 4:00 p.m. Eastern Time on a business day in the time zone where the court is located. Documents received after 4:00 p.m. or at times when the clerk's office is closed shall be file-stamped the next business day. For a definitive determination of whether there are any Ohio common pleas courts or additional municipal courts that have adopted a filing deadline earlier than midnight, it may be necessary to contact the clerk's office for each court. Although the Ohio Tenth District Court of Appeals, one of the three courts of appeals currently active or participating in the state court's electronic filing system, adopted an 11:59 deadline for attorneys required to file all documents electronically, an earlier deadline was implemented for documents submitted to the e-filing system by the court of appeals or any lower court or tribunal for purposes of proceedings before the Tenth District Court of Appeals.[58] If such documents are submitted to the e-filing system after 4:59 p.m. on a business day or on a Saturday, Sunday, or legal holiday, these documents are deemed to have been filed on the next business day irrespective of the time stamp applied to the document.

The Alaska Court system is in the process of deploying electronic filing to superior and district courts throughout the state.[59] Attorneys must file all case documents in eFiling courts in applicable case types, for cases filed after the implementation of the authorized electronic filing system in that court location. Provisional rules for electronic filing establish that a document submitted to the authorized electronic filing system before 11:59 p.m. Alaska Time is deemed filed that day, except that complaints for forcible entry and detainer must be filed during regular court business hours (8:00 a.m.–4:30 p.m. Monday through Thursday; 8 a.m.–12:00 noon Friday) to be considered filed that day. Complaints for forcible entry and detainer filed outside of regular court business hours will be considered filed on the next business day following electronic filing.

In July 2021, the North Carolina Supreme Court began the process of phasing out the optional Pilot Electronic Filing Portal and implementing a statewide electronic-filing and case-management system developed by Tyler Technologies (Odyssey) for North Carolina superior and district

56. *See* Appendix: Ohio (court of claims).

57. *See* Appendix: Ohio (Lima Municipal Court).

58. *See* Appendix: Ohio (Tenth District Court of Appeals).

59. *See* Appendix: Alaska (superior and district courts).

courts.[60] Beginning in 2022, every three to four months superior and district courts in a new group of counties have switched over to Odyssey, thus Odyssey should be implemented statewide by June 2024. Amendments to the North Carolina General Rules of Practice for the superior and district courts mandate electronic filing for pleadings and other documents filed in all case types by attorneys in counties with the new Odyssey electronic filing system. In addition, new rules establish that a document is filed when it is received by the court's electronic-filing system, and if a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date. The new rule defining the time of day by which electronic documents due on a certain date must be filed in order to be considered timely filed on that date follows recent amendments to the North Carolina Business Court Rules. Pursuant to these amendments, electronic filing is mandatory for attorneys in all actions designated as a mandatory complex business case, and a document due on a date certain must be filed by 5:00 p.m. Eastern Time on that date, unless the court orders otherwise.[61]

Three New Mexico trial courts require a document submitted electronically to be received before the close of the business day of the court in which it is being filed in order for the document to be considered filed on the date submitted.[62] If electronic transmission is received after the close of business, the document will be considered filed on the next business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative. This time of filing deadline applies to documents voluntarily submitted electronically for filing in New Mexico magistrate courts and in the New Mexico Bernalillo metropolitan court in criminal cases only.[63] In civil cases, electronic filing is mandatory for attorneys representing parties in the New Mexico magistrate courts and the New Mexico Bernalillo metropolitan court, and an e-filed document received before midnight on the day preceding the next business day of the court will be considered filed on the immediately preceding business day of the court.[64] Pursuant to the time-computation rules for criminal cases filed in New Mexico magistrate courts and the New Mexico Bernalillo Metropolitan Court, the time for filing is extended to midnight for a document electronically submitted on the last day of a filing deadline unless a different time is set by a court order.[65] Electronic filing is optional for attorneys representing parties in civil and criminal cases in New Mexico municipal courts.[66] If documents are submitted electronically, they must be received before the close of the business day of the municipal court in which it is being filed in order to be considered filed on the date submitted. And pursuant to the time-computation rule applicable to filing deadlines in New Mexico municipal courts, the time for filing is extended to midnight for a document electronically submitted on the last day of a filing deadline unless a different time is set by a court order.[67]

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60. *See* Appendix: North Carolina (superior and district courts).

61. *See* Appendix: North Carolina (business court).

62. *See* Appendix: New Mexico (magistrate courts, Bernalillo metropolitan court, municipal courts).

63. *See infra* notes 134, 135.

64. *See* Appendix: New Mexico (magistrate courts, Bernalillo metropolitan court).

65. New Mexico Rules of Criminal Procedure for the Magistrate Courts, R. 6-104 (time-computation rule for criminal cases filed in N.M. magistrate courts); New Mexico Rules of Criminal Procedure for the Metropolitan Courts, R. 7-104 (time-computation rule for criminal cases filed in N.M. Bernalillo metropolitan court).

66. *See* Appendix: New Mexico (municipal courts).

67. New Mexico Rules of Procedure for the Municipal Courts, R. 8-104 (time-computation rule for cases filed in N.M. municipal courts).

On August 10, 2022, a pilot program was authorized permitting attorneys admitted to practice in New York and unrepresented litigants to voluntarily file and serve documents in certain proceedings in the New York City Family Court.[68] A document is deemed to be filed when its electronic transmission is recorded at the New York State Electronic Filing System (NYSCEF) site. Although documents may be transmitted at any time of the day or night to the NYSCEF site, documents that are received after 5:00 p.m. or on a Saturday, Sunday, or legal holiday will be considered filed at 9:00 a.m. on the next business day.[69] Pursuant to the applicable rule governing time computation,[70] if a filing deadline falls on a Saturday, Sunday or public holiday and if the deadline ends at a specified hour, the deadline is extended to the next succeeding business day at or before the same hour (5:00 p.m.).

Authorized Users of State Court Electronic Filing Systems

Only registered filing users can e-file documents through state court electronic filing systems. All state court electronic filing systems studied permit attorneys who are formally admitted to and remain in good standing with the state's bar to register as filing users. Delaware e-filing courts also require attorneys who are active members of the Delaware Bar to maintain an office in Delaware for the practice of law.[71] Some e-filing courts permit attorneys admitted pro hac vice to e-file documents.[72] Nebraska appellate and trial courts with electronic filing systems require all electronic filings to be submitted exclusively by Nebraska counsel with whom an attorney admitted pro hac vice in a particular case is associated.[73] Twenty-four states permit pro se (self-represented) parties to e-file if they choose to do so in all or in one or more of their e-filing courts.[74] E-filing courts in eight states require pro se parties to submit documents electronically.[75] Self-represented incarcerated parties (pro se prisoners) are often exempt from mandatory filing requirements for pro se litigants.[76] In three states, e-filing is optional for pro se litigants in all e-filing courts, but if a pro se litigant registers and submits documents electronically in a case, then e-filing is mandatory

68. Administrative Order of the Chief Administrative Judge of the Courts (AO/188/22) (Aug. 10, 2022) (details and rules governing a Pilot Program permitting optional or voluntary/consensual E-Filing in N.Y. County (Manhattan) family court only for the filing of new and/or in pending petitions for support, custody/visitation, guardianship, parentage-assisted reproduction, parentage-surrogacy, and paternity proceedings).

69. *See* Appendix: New York (N.Y.C. family court).

70. N.Y. Gen. Constr. Law §§ 19, 20, 25-A (governs time computation in N.Y. trial and appellate courts).

71. *See* Appendix: Delaware.

72. *See* Appendix: Alabama, Arkansas, Arizona, California, Colorado, Florida, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New York, Mississippi, Ohio, Illinois, Wisconsin. Additional e-filing courts that permit attorneys admitted pro hac vice to submit documents electronically may be identified by contacting the clerk's office for each court location.

73. *See* Appendix: Nebraska.

74. *See* Appendix: Alabama (circuit, district, juvenile courts), Alaska, Arizona, Arkansas, California, Colorado (family court cases only), Connecticut (superior, probate courts), Delaware (supreme, Common Pleas, Justice of Peace Courts), Florida, Hawaii, Kentucky (district courts), Maryland, Massachusetts, Minnesota, Nebraska, New Jersey (tax court), New York (optional except specific civil proceedings mandatory in Surrogate's Courts), North Carolina (in counties with Odyssey File & Serve), North Dakota, Ohio (appellate and trial courts where implemented), Rhode Island, Texas, Virginia (Court of Appeals), Wisconsin (court of appeals, circuit courts).

75. *See* Appendix: Connecticut (supreme, appellate court), Illinois, New Hampshire (supreme court, superior court (civil only), Circuit Courts (civil only)), New Jersey (superior, municipal courts), New York (Surrogate's Courts (specific civil proceedings)), North Carolina (business court), Virginia (supreme court), Wyoming (chancery court).

76. *See, e.g.*, Appendix: Connecticut, New Hampshire, Illinois, Virginia (supreme court).

for all future filings.[77] All e-filing courts in three states explicitly prohibit pro se parties from registering for access to their electronic filing systems.[78]

Many e-filing courts extend an attorney registered user's e-filing privileges to authorized agents like paralegals and assistants. However, the registered attorney with authorized access to the electronic filing system is still responsible for the contents of the filing. E-filing courts may permit nonparties with an interest in a particular case to register for access to the filing system, including court reporters, creditors, members of the media, mediators, mental health professionals, process servers, witnesses seeking a protective order, intervenors, amici curiae, and court investigators. However, access to the entire court file is limited for these parties.

Maps

The three maps on the following pages illustrate electronic filing deadlines in state supreme, appellate, and trial courts.[79]

Related Documents

A lengthy appendix collecting rule text may be attached; it is also available separately online:
https://www.fjc.gov/sites/default/files/materials/01/ElectronicFilingStateCourtsAppendix.pdf

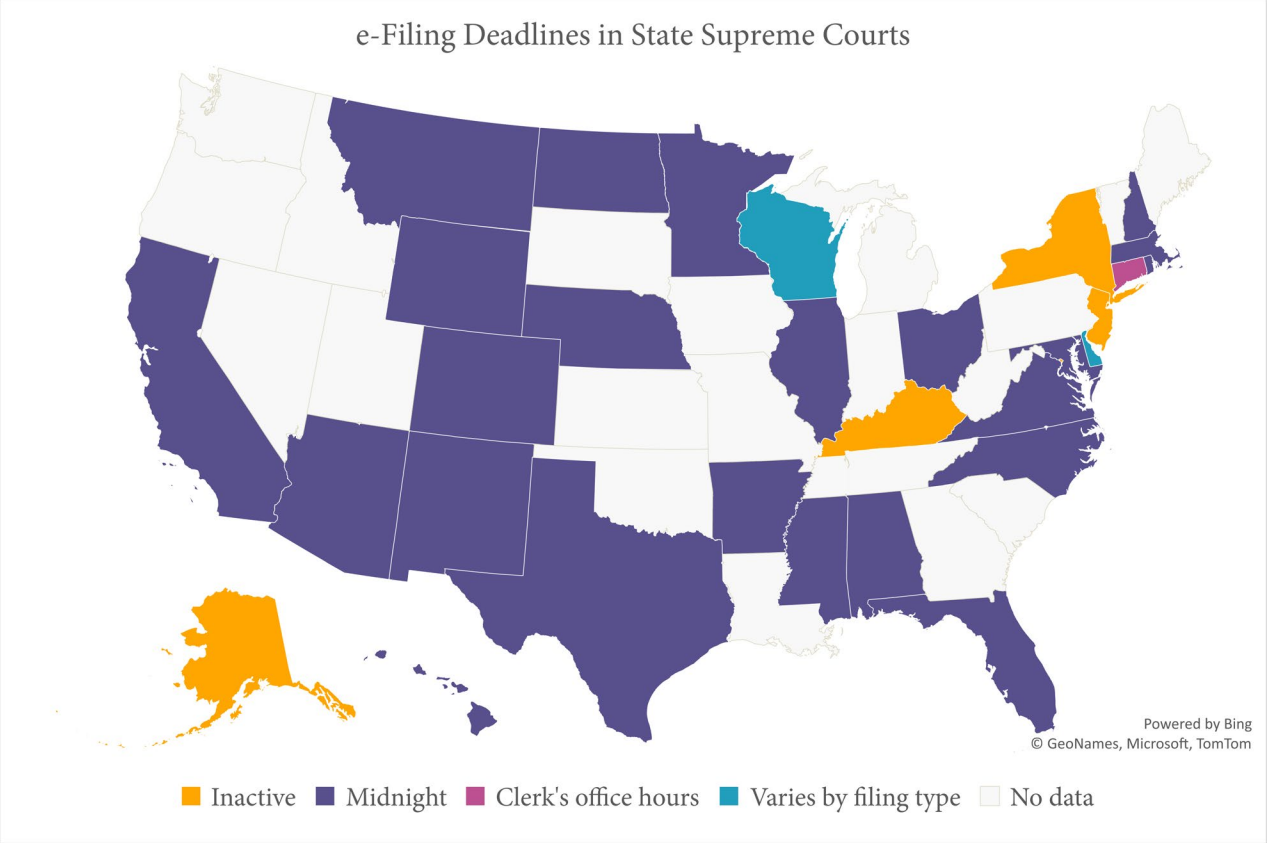
A report on "Electronic Filing Times in Federal Courts" also is available separately online:
https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf

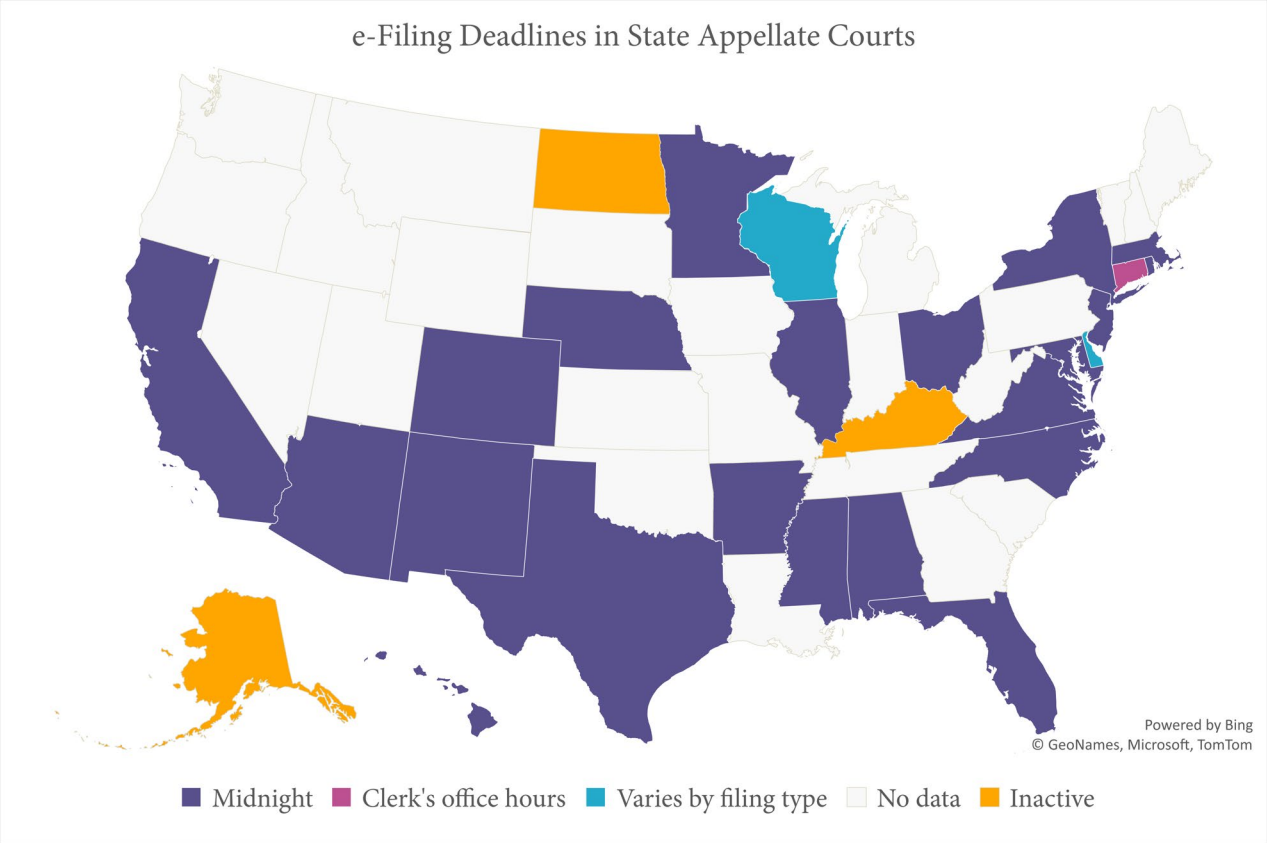
77. *See* Appendix: Maryland, Minnesota (e-filing mandatory for all subsequent filings in the case), Nebraska.

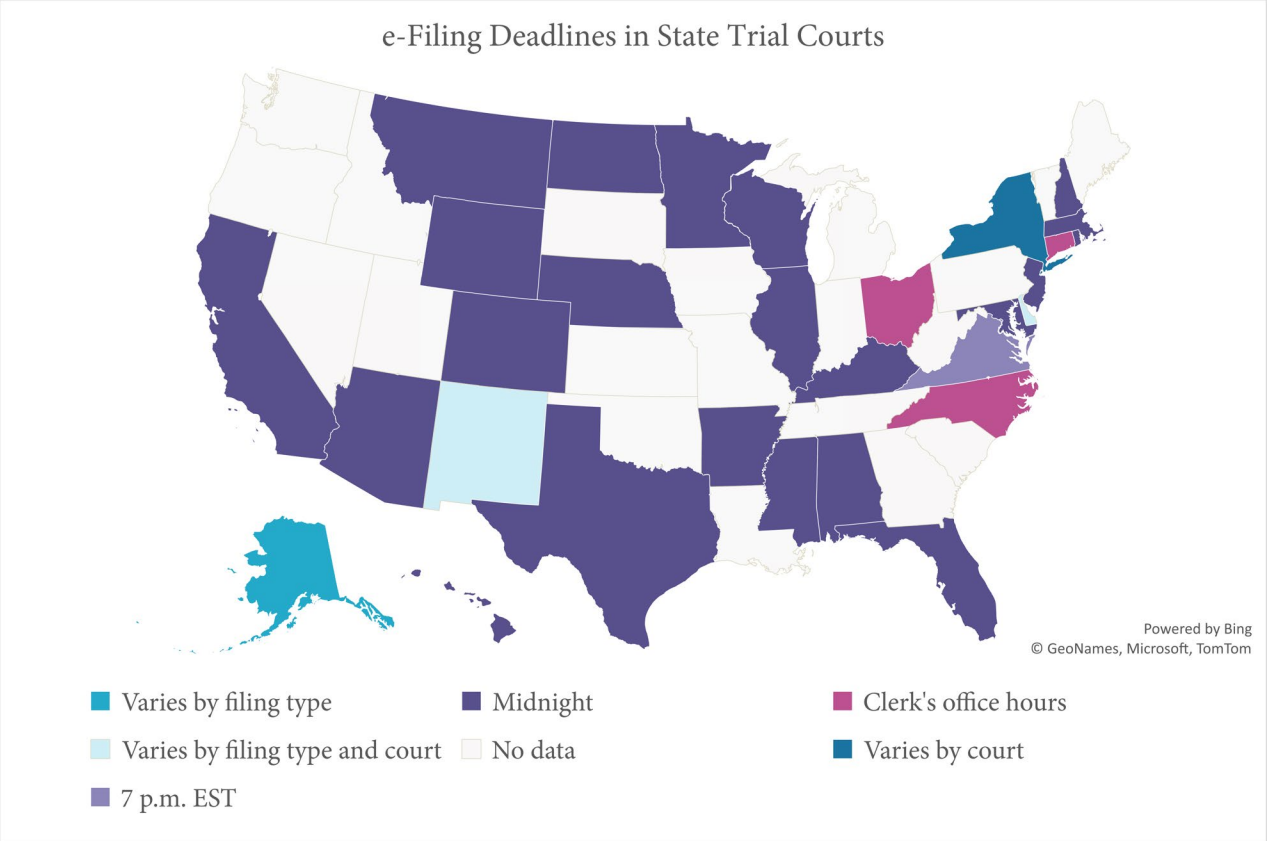
78. *See* Appendix: Mississippi, Montana, New Mexico.

79. Explanation of categories used in maps to illustrate electronic filing deadlines in state supreme, appellate, and trial courts: Midnight (documents filed before midnight are considered filed on that day); Clerk's office hours (documents filed *after* the office hours of the Clerk of Court are considered filed the next business day); Varies by filing type (filing deadlines vary based on case type, e.g., different deadlines for filings in criminal and civil cases); Varies by court (in state trial courts only, filing deadlines vary based on court type, e.g., different deadline for family courts); Inactive (state courts not authorized to implement e-filing or that have chosen not to implement e-filing at this time); No data (information for this state was not analyzed in this report).

Electronic Filing Deadlines in State Courts




e-Filing Deadlines in State Appellate Courts
Powered by Bing
© GeoNames, Microsoft, TomTom
Midnight
Clerk's office hours
Varies by filing type
No data
Inactive


e-Filing Deadlines in State Trial Courts
Powered by Bing
© GeoNames, Microsoft, TomTom
Varies by filing type
Midnight
Clerk's office hours
Varies by filing type and court
No data
Varies by court
7 p.m. EST

TAB 3

TAB 3A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA BUEHLER CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

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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 6, 2022

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 13, 2022, in Washington, D.C. The draft minutes from the meeting are attached to this report.

The Advisory Committee has no action items for the January meeting of the Standing Committee, but it does have several information items.

It is particularly eager to hear thoughts and comments regarding amicus disclosures. (Part II of this report.)

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

- proposed amendments, currently published for public comment, regarding rehearing;
- clarifying the process for challenging the allocation of costs on appeal;
- 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 the Bankruptcy Rules Committee, clarifying the process for direct appeals in bankruptcy cases;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and
- a new suggestion to require disclosure of third-party litigation funding.

The Advisory Committee also considered two items and removed them from the Committee's agenda (Part IV of this report):

- a suggestion, 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 suggestion to identify the amicus or counsel who triggered the striking of an amicus brief.

II. Amicus Disclosures (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Prompted by the introduction of the AMICUS Act in 2019, the Advisory Committee has been considering possible amendments to Federal Rule of Appellate Procedure 29 regarding amicus disclosures. It has not yet settled on any proposed amendments. Instead, it has produced working drafts to help guide deliberations.

The current version of Rule 29(a)(4)(E) provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "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.

The latest working draft, along with particular discussion questions, is set out below as new, separate paragraphs of Rule 29.

Rule 29. Brief of an Amicus Curiae

* * *

(c) **Disclosures of Relationship Between the Amicus and a Party**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

(1) whether a party or its counsel authored the brief in whole or in part;

(2) whether a party or its counsel contributed or pledged to contribute money intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief;

(3) whether a party or its counsel has (or two or more parties or their counsel collectively have) a majority ownership interest in or majority control of a legal entity submitting the brief as an amicus curiae; and

(4) whether a party or its counsel has (or two or more parties or their counsel collectively have) contributed 25% or more of the gross annual revenue of an amicus curiae during the twelve-month period preceding the filing of the amicus brief. 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 business may be disregarded.

Discussion notes:

Should the percentage be higher or lower than 25%? Some have argued for a 50% threshold.

Should the lookback period be the current or immediately prior calendar year rather than the twelve-months preceding filing? Current or immediately prior calendar year might be easier to administer, but perhaps not for amici using a different fiscal year. Is one or the other easier to evade?

(d) **Identification; Disclosure by Party.** Any disclosure required by paragraph (c) must identify the name of the party or counsel. If a party is aware that an amicus has failed to make a disclosure about the relationship between the amicus and that party required by paragraph (c), the party must do so.

(e) **Disclosures of Relationship Between the Amicus and a Nonparty**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must identify any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief.

Discussion notes:

This working draft requires disclosure of earmarked contributions by nonparty members of an amicus. The current rule exempts contributions by the members of an amicus organization from disclosure. An exception for members allows easy evasion: a contributor can simply become a member. In its First Amendment cases, the Supreme Court has treated members and contributors interchangeably. On the other hand, revealing contributions by members may make disclosure turn on the details of an organization's internal fundraising practices.

This working draft also sets a dollar threshold for disclosure of earmarked contributions by nonparties. Should there be a higher dollar threshold for disclosure of earmarked contributions by members compared to nonmembers?

This working draft does not have a provision parallel to (c)(3) or (4) for nonparties. Should it? Whether a contribution is made by a party or by a nonparty, there is an interest in the court knowing who is speaking to help properly weigh the message in the amicus brief. But limiting disclosure of contributions to those that are earmarked for that brief is an important aspect of narrow tailoring.

> And there are additional interests where contributions by parties are involved that do not apply to nonparties: 1) preventing parties from evading limits on the length of briefs, and 2) not misleading a court into thinking that an amicus is more independent of a party than it truly is.

Parties.

The major differences between the current rule and this draft are that the draft would require disclosure of (1) whether a party or its counsel have a majority ownership or control of an amicus, and (2) whether a party or its counsel contributed 25% or more of the revenue of the amicus during the twelve-month period preceding the filing of the amicus brief.

The Advisory Committee has not settled on a contribution percentage that would trigger disclosure. At the October 2022 meeting, one particular concern was that litigants would tend to view whatever threshold was set as a cut-off point beyond which it was not worth filing an amicus brief. That, apparently, is how the current rule operates in practice: Briefs don't get filed if they would require the disclosures called for in the current rule. The concern is that whatever percentage is chosen will send the message that briefs at that threshold will be viewed skeptically and therefore such briefs will rarely be filed.

To the extent this prediction is accurate, the benefits of disclosure must be weighed against the loss of those briefs.

One way that the Advisory Committee is considering dealing with this problem is to require disclosure of contributions in different bands. For example, an amicus would have to disclose that a party made contributions in the range of 20% to 30%, or 30% to 40%, or 40% to 50%, or more than 50%. Such banding could avoid sending that message that briefs above a certain threshold should not be filed. And it could allow different judges to discount briefs based on their own individualized judgment rather than forcing the Advisory Committee to determine a single appropriate threshold for all judges and all briefs.

Another concern is the impact on different kinds of amici. Organizations with a broad funding base would not be hurt, but those with a narrower focus might be.

Nonparties.

The major differences between the current rule and this draft are that the draft would (1) require disclosure of earmarked contributions by members of the amicus, and (2) set a $1000 threshold for earmarked contributions whether by a member or nonmember.

There are competing concerns when considering whether to require disclosure of earmarked contributions by members. On the one hand, an exception for members allows for easy evasion by any contributor who is willing to become a member. On the other hand, failure to have to an exception for members may benefit organizations with more established amicus programs because they raise money from general contributions, while organization with less established amicus programs, and who pass the hat for an amicus brief, would be affected.

One way that the Advisory Committee is considering dealing with this problem is to limit the membership exception to those who have been members for a sufficiently long period of time.

The Advisory Committee has also not decided whether to require disclosure of non-earmarked contributions to an amicus by nonparties, parallel to working draft 29(c)(3) and (4). Without such a provision, many of the concerns raised by the sponsors of the AMICUS Act would remain unaddressed. But required disclosures here would be significant for many organizations, particularly non-business and true advocacy organizations. There is also reason to doubt its efficacy, because a very wealthy funder in the background could create several different shell organizations for each amicus brief.

The Advisory Committee is well aware of First Amendment concerns in this area. Such concerns have informed its separate treatment of parties and nonparties because the government interests in disclosure—as well as the burdens of disclosure—are different. The Advisory Committee is also trying to be precise about the nature of the interests in disclosure, thinking carefully about the difference between (1) the interests in disclosure so that judges are not misled in ways that affect their decisions and (2) the interests in disclosure so that the public is aware of who is behind a brief. And it is paying attention to the burdens caused by disclosure, while seeking to narrowly tailor additional disclosure requirements.

III. Other Matters Under Consideration

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

In a project that began in 2018, the Advisory Committee has been considering amendments to the procedure for rehearing. In April of 2021, the Advisory Committee approved a draft for submission to the Standing Committee. That draft would have carried forward various oddities in the existing rules that the Advisory Committee was reluctant to change. But at its June 2021 meeting, the Standing Committee remanded the matter, inviting the Advisory Committee to take a bit freer of a hand. In January and June of 2022, the Standing Committee approved a revised approach for publication.

Those proposed amendments have been published and the comment period remains open. The early comments received have not led the Advisory Committee to reconsider any aspect of the proposed amendments. It expects to receive more comments and will carefully consider them.

The Advisory Committee expects to present these amendments for final approval in June of 2023.

B. Costs on Appeal—Rule 39 (21-AP-D)

The Advisory Committee is exploring whether any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Appellate Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Supreme Court observed 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. It also noted, without further comment, an argument that the current Rule impermissibly allows for the recovery of costs not listed in 28 U.S.C. § 1920.

The Advisory Committee believes that while costs on appeal are usually modest, one kind of cost—the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond)—can be considerable. These bonds are approved by the district court to secure a stay of enforcement of a judgment. For that reason, while the court of appeals allocates which party must pay these costs, the bill of costs that includes the premium paid for a supersedeas bond is filed in the district court.

The Advisory Committee believes that it is close to recommending an amendment for publication and public comment. The latest draft seeks to make clear that, after the court of appeals has initially decided which party or parties must bear the costs (and, if divided, in what percentage), a party may seek reconsideration of that decision by filing a motion in the court of appeals within 14 days after entry of judgment. Additional drafting may seek to reduce possible confusion about how these cost provisions interact with issuance of the mandate.

Here is the latest draft:

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Where Applicable; Reconsideration. The assessment of costs under paragraph (a) applies to costs taxable in the court of appeals under paragraph (e) and to costs taxable in district court under paragraph (f). A party may seek reconsideration of the assessment of costs under paragraph (a) by filing a motion in the court of appeals within 14 days after the entry of judgment.

(c)~~(b)~~ Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(d)~~(c)~~ Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(e)~~(d)~~ Costs on Appeal Taxable in the Court of Appeals; ~~Bill of Costs:~~ Objections; Insertion in Mandate.

(1) A party who wants costs taxed in the court of appeals must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs taxable in the court of appeals.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally

determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(f) ~~(e)~~ Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

The Advisory Committee believes that this amendment would work best if made in conjunction with an amendment to Civil Rule 62—which already requires the district court to approve the bond or other security before the stay takes effect—requiring that the premium paid for the bond be disclosed before the bond is approved. That way, the prevailing party in the district court would know well in advance the cost it might be facing if the court of appeals reverses. But the Appellate Rules Committee also believes that it is worth pursuing this amendment to Appellate Rule 39 even if the Civil Rules Committee declines to act.

The Advisory Committee expects to present amendments for approval for publication and public comment in June of 2023.

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

The Advisory Committee has been considering suggestions to establish more consistent criteria for granting IFP status and to revise the FRAP Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within the purview of the Advisory Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

Based on informal information gathering about IFP practice in the courts of appeals, the Advisory Committee thinks that IFP status is rarely denied because the applicant has too much wealth or income and that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status.

Attached to this report is a draft of a revised Form 4, drawing upon existing and proposed forms created for similar purposes. This draft was revised after consultation with senior staff attorneys in the circuits.

In reviewing this working draft, the Standing Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The draft Form 4 contains the question, "What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?" It does not, however, require applicants to separately state each asset. It also does not require inclusion of spousal assets because the Advisory Committee tends to think that the intrusiveness of questions about a spouse outweighed their benefit—particularly because spousal information seemed unlikely to make a difference to the indigency determination.

The Advisory Committee is not yet seeking publication and public comment, That's because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, and the Advisory Committee thinks it appropriate to confer informally with the Clerk of the Supreme Court before recommending publication.

D. Electronic Filing by Pro Se Litigants (Joint Project)

Multiple Advisory Committees have been considering amending their respective rules to more broadly allow electronic filing by pro se litigants. Extensive research by the FJC suggests that the courts of appeals are more receptive to electronic filing by unrepresented litigants than are trial courts.

This greater receptivity may be the result of the much smaller number of filings in a case in the courts of appeals. It may also be due to the practice in the courts of appeals regarding the filing of case-initiating documents: even when filed by attorneys, these documents do not open a case in CM/ECF, but instead lead to a case that is opened by the court staff.

The Advisory Committee is open to the possibility of flipping the presumption and allowing pro se litigants to file electronically unless precluded by the court. It is certainly open to lifting the requirement that pro se litigants serve paper copies of documents on electronic filers, even though the pro se litigant's filing will be scanned and uploaded into ECF, thereby prompting electronic service on electronic filers.

It is also open to the possibility of taking the lead in this area, making such changes before other Advisory Committee do so. But it appreciates that there is also value in continuing to have the various sets of rules evolve in tandem.

E. Direct Appeals in Bankruptcy

The Advisory Committee on the Federal Rules of Bankruptcy Procedure is proposing to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly to the court of appeals. A question arose about how this process fits with Federal Rule of Appellate Procedure 5, which governs appeals by permission. Appellate Rule 5 seems to envision that the party seeking leave to appeal is the appellant.

In order to make the process of direct appeals in bankruptcy fit better with the Federal Rules of Appellate Procedure, the Appellate Rules Committee is considering an amendment to Federal Rule of Appellate Procedure 6, which governs appeals in bankruptcy.

Some background may be helpful. Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, an appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. § 158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

Significantly, the question under § 158(d)(2) is not whether an appeal will be heard at all. If the appropriate lower court does not certify a direct appeal, or the court of appeals does not authorize a direct appeal, the appeal will simply be heard by the district court or bankruptcy appellate panel. For that reason, it makes sense for Bankruptcy Rule 8006(g) to be revised to clarify that any party to the appeal may

file a request that the court of appeals authorize a direct appeal. The Bankruptcy Rules Committee views this as clarification of existing law, not a change in the law.

Here is the proposed amendment to Bankruptcy Rule 8006(g):

> **(g) Request** After Certification **for** ~~Leave to Take a Direct Appeal to~~ **a Court of Appeals** To Authorize a Direct Appeal~~After Certification~~**.** Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition ~~a request for leave to take a direct appeal to a court of appeals must be~~ filed with the circuit clerk in accordance with Fed. R. App. P. 6(c).

This change helps to reveal that Appellate Rule 5 is an awkward fit for direct appeals in bankruptcy cases. In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. In that context, the party seeking permission to appeal is the appellant. Those are the kinds of cases on which Appellate Rule 5 is focused.

The problem, from an appellate perspective, is that Appellate Rule 5 is aimed at appeals that can be taken only by permission—that is, whether the appeal can be taken at that time at all—while Bankruptcy Rule 8006 and § 158(d)(2) are about which court will hear an appeal.

To create a better fit, the draft below would amend Appellate Rule 6(c) to provide additional procedures specifically designed for direct appeals under § 158(d)(2).

The draft below would also add new provisions applicable to direct appeals. These new provisions would:

> (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal;
>
> (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004;[1]

[1] Some bankruptcy orders are appeal as of right. 28 U.S.C. § 158 (a)(1) and (2). Others are appealable only with leave of court. 28 U.S.C. § 158 (a)(3). Bankruptcy Rule 8004 governs the process for seeking leave to appeal under § 158(a)(3). If the appeal for which some party seeks direct review in the court of appeals is not appealable as of right, but is appealable only with leave of court under § 158(a)(3), any decision on a

(c) specify how time is calculated; and

(d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

Here is the draft of Appellate Rule 6:

Rule 6. Appeal in a Bankruptcy Case

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

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

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

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

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

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

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

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

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motion seeking such leave to appeal must be included when seeking permission for a direct appeal to the court of appeals.

(A) **Motion for Rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) **The record on appeal.**

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) **Making the Record Available.**

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) **Filing the record**

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Appeal ~~Review~~ by Permission Under 28 U.S.C. § 158(d)(2).

(1) **Applicability of Other Rules.** These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5(a)(3), 5(d), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

~~(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C)~~.

(2) **Additional Rules.** In addition, the following rules apply:

(A) Petition to Authorize a Direct Appeal. After the notice of appeal has been filed in the bankruptcy court and a certification under 28 U.S.C. § 158(d) has been filed in the appropriate court under Bankruptcy Rule 8006(b), any party to the appeal may petition the court of appeals to authorize a direct appeal.

(B) **Content**. The petition must include the material required by Rule 5(b), a copy of the notice of appeal, and a copy of the certificate under § 158(d). If the appeal to the district court or bankruptcy appellate panel is not as of right under 28 U.S.C. § 158(a)(1) or (2) but requires leave of court under § 158(a)(3), the petition must also include a copy of any decision on a motion under Bankruptcy Rule 8004.

(C) **Calculating Time**. The date when an authorization is entered serves as the date of the notice of appeal for calculating time under these rules.

(D) **Bond for Costs on Appeal**. The court in which the certificate under 28 U.S.C. § 158(d) was filed may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

(E) ~~(A) The~~ **Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal.

~~(B)~~ (F) **Completing and Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

~~(C)~~ (G) **Stay~~s~~ Pending Appeal**. Bankruptcy Rule 8007 applies to a stay~~s~~ pending appeal.

~~(D)~~ (H) **Duties of the Circuit Clerk**. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

~~(E)~~ (I) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, each ~~the~~ attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

This amendment is made in conjunction with an amendment to Bankruptcy Rule 8006(g).

In the ordinary case, decisions by bankruptcy courts are appealable to either the district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to the court of appeals. But in certain circumstances, the appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. § 158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. Appellate Rule 5 governs such petitions for permission to appeal. But in the context of 28 U.S.C. § 158(d)(2), the question is not whether there will be an appeal, but only whether that appeal will be heard by the court of appeals—as opposed to the district court or bankruptcy appellate panel. Accordingly, Bankruptcy Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal.

These features of direct appeals under § 158(d)(2) make Appellate Rule 5 an awkward fit. To create a better fit, Appellate Rule 6(c) is revised to specify further procedures specifically designed for direct appeals under § 158(d)(2). New provisions (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal; (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004; (c) specify how time is calculated; and (d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

The Advisory Committee intends to seek approval for publication and public in June of 2023, after a subcommittee closely examines this draft.

F. Midnight Deadline for Time of Filing (19-AP-E)

Considerable research has now been completed to help inform the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight. The joint subcommittee needs to be reconstituted to evaluate that research.

G. Disclosure of Third-Party Litigation Funding (22-AP-C)

The Advisory Committee is considering a new suggestion that Appellate Rule 26.1 be amended to require the disclosure of a non-party that has a financial stake in the outcome of an appellate case. There are third-party litigation funders who make non-recourse investments in litigation and the suggested amendment would require their disclosure.

The Civil Rules Committee has been considering this issue for some time, and the Appellate Rules Committee decided to hold this matter until its spring meeting, pending consultation with the Civil Rules Committee.

V. Items Removed from the Advisory Committee Agenda

A. Appeals in Consolidated Cases

In 2018, the Supreme Court decided that consolidated actions retain their separate identity for purposes of appeal and invited rulemaking if that holding caused practical problems. *Hall v. Hall,* 138 S. Ct. 1118 (2018), A Joint Civil-Appellate Subcommittee has been considering possible amendments to Civil Rules 42 and 54 in response. Extensive empirical research by the FJC convinced the Joint Subcommittee that there was not a sufficient problem to warrant a rule amendment.

The Appellate Rules Committee accepted this conclusion and removed the suggestion from its agenda.

B. Striking Amicus Brief; Identifying Triggering Person (22-AP-B)

The Advisory Committee considered a new suggestion related to amicus briefs and disqualification. Rule 29 allows a court to refuse to file an amicus brief or to strike an amicus brief if the brief would cause a judge to be disqualified. The suggestion is that, when this happens, the court should identify each amicus or counsel that would cause the disqualification.

Because the basis for disqualification varies over time, the Advisory Committee had doubts about the usefulness of such a provision. Moreover, the Advisory Committee feared that such disclosures could be reverse engineered to determine which judges would have been disqualified and why, thereby running the risk of manipulation designed to create disqualification.

For these reasons, the Advisory Committee removed the suggestion from its agenda.

TAB 3B

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 13, 2022

Washington, D.C.

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, October 13, 2022, at 9:00 a.m. EDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Justice Leondra R. Kruger, Judge Carl J. Nichols, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Department of Justice. Professor Bert Huang and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Judge Bernice Donald, Member Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; H. Thomas Byron III, Chief Counsel, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Allison A. Bruff, Counsel, RCS; Scott Myers, Counsel, RCS; Christopher Pryby, Rules Law Clerk, RCS; Shelly Cox, Management Analyst, RCS; Nicole Teo, Intern, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Tim Reagan and Marie Leary, both of the Federal Judicial Center, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone, particularly new members and staff. He invited those participating in the meeting to introduce themselves.

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II. Approval of the Minutes

The Reporter corrected a date from 2020 to 2010 in the draft minutes of the March 30, 2022, Advisory Committee meeting. (Agenda book page 121). With that corrected, the minutes were approved.

III. Discussion of Matter Published for Public Comment

Judge Bybee presented information about the proposed amendments to Rules 35 and 40 that have been published for public comment. (Agenda book page 124). So far, we have received few comments, and none of the comments received to date warranted a meeting of the subcommittee. We expect more comments before the deadline on February 16, 2023.

To be prepared to consider any comments, we need to replace members of the subcommittee that are no longer available. Judge Wesley and Mark Freeman will join Danielle Spinelli on this subcommittee.

IV. Discussion of Matters Before Subcommittees

A. Amicus Disclosures (21-AP-C)

Danielle Spinelli, the chair of the subcommittee, was unable to attend the meeting. The Reporter presented the report of the amicus subcommittee. (Agenda book page 152). After emphasizing that, as before, the subcommittee is not yet proposing amendments but instead providing a working draft to help guide the Committee's discussion, he walked through draft Rule 29(c).

That provision deals with disclosure of the relationship between an amicus and a party. The major differences between the current rule and this draft are that the draft would require whether a party or its counsel have a majority ownership or control of an amicus, and whether a party or its counsel contributed 25% or more of the revenue of the amicus during the twelve-month period preceding the filing of the amicus brief.

The Reporter invited discussion of the appropriate percentage, noting that some have argued for a 50% threshold.

A judge member wondered about the workability of the draft rule. Would it be easy to evade? Difficult to administer? Another judge member noted that this provision deals only with parties and asked whether there is a problem there that needs to be addressed. Judge Bybee responded that that the materials submitted raised one such example. The judge member added that he concurs with the subcommittee that requiring disclosure regarding parties is a lot less problematic from a First Amendment perspective than requiring disclosure regarding nonparties.

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A liaison member asked for the theory behind the percentage. The Reporter stated that a judge member at a prior meeting had suggested something in the range of 25% to 33%. Judge Bybee added that there was no great place to copy from, noting that the Amicus Act uses a 3% threshold.

A different liaison member stated that, in the real world, briefs don't get filed if they would require the disclosures called for in the current rule. Whatever percentage is chosen will send the message that briefs at that threshold will be viewed skeptically and therefore such briefs will rarely if ever be filed. Mr. Freeman added that this rings true.

Judge Bates asked if there has been an assessment of how this draft would impact briefs that are filed. The Reporter stated that it is very difficult to make such an assessment, precisely because these disclosures are not currently required.

In response to a question by a lawyer member whether briefs with the disclosures would never get filed, the liaison member said not never, but that some funders will not want to disclose and that there will be concern about the credibility of a brief with these disclosures. Judge Bybee noted that this raised a policy question of how much is lost if briefs are not filed.

The liaison member explained that organizations with a broad funding base won't be hurt, but organizations with a narrower focus might be caught. If there is so much skepticism, will the brief be discounted? Other briefs are filed pro bono and won't be affected.

Mr. Freeman noted that in the intellectual property area, there may be broad based funding but still a fear of Astro-turfing. On the one hand, judges may find a brief valuable, but on the other, disclosure could deter some Astro-turfing.

Judge Bates noted that there is a trade-off between getting the information from the disclosure and not getting the brief. A judge member observed that an amicus always has to state its interest, why it has skin in the game. Why not require the disclosure of a dominant role, leaving it to them to decide if they are deterred? Judge Bates, noting that the focus at this point is on parties, stated that the question is how much do we lose in that context.

Another judge member suggested that there might be a way to signal that the percentage chosen is not a threshold beyond which a brief is discounted: require disclosure in various percentage bands.

In response to a question from the Reporter whether it was the existence of a disclosure rule or the underlying funding that would lead to discounting a brief, Mr. Freeman said that he would want to know about funding and the funding would cast doubt on a brief. A liaison member said that that would be especially true if an amicus

purported to speak for an industry but a party was a key funder of the amicus. An academic member suggested articulating the purpose of a rule, at least in the committee note, and that disclosure can be viewed as an extension of the statement of interest.

Judge Bybee invited discussion of the idea of disclosure bands. A liaison member suggested that there should be a band (such as under 25%) where no disclosure is required, and that bands can suggest that disclosure doesn't mean that your goose is cooked. An academic member asked if disclosure could affect the nature of the briefs, perhaps the balance between "me, too" briefs and briefs that provide different information. The liaison member responded that it is hard to tell. Some others think more is better; perhaps disclosure could reduce the arms race. An amicus that made a disclosure could use its statement of interest to counterbalance the disclosure.

Mr. Byron stated that the concern we are trying to address may be broader than money. There are lots of discussions and shared interests. A lawyer member agreed that discussions take place; there are common interests, but also different interests if an amicus is independent. The concern is if there is some kind of control by a party, so the brief is not ultimately one from the amicus. A judge member agreed. There is no need to get into the weeds of conversations between an amicus and a party. Control is important, so we are aware if the amicus is an echo of the party.

Judge Bybee asked about the percentage. A judge member said that there is no science here, but that someone with 25% will be heard.

The Reporter asked for views of the sliding scale approach. In response to a question about how that would work, the judge who floated the idea suggested that each judge could decide independently when the percentage is significant. The inquiring judge saw the virtue of an approach that leaves this determination to individual choice.

A different judge member asked about the relationship between (c)(3)—which deals with ownership or control—and (c)(4)—which deals with funding. The Reporter stated that there could be funders, even at the 50% or higher level, that would not be covered by the ownership or control provision. A liaison member added that ownership or control is not equivalent to percentage of contribution. He also stated that it would be useful to say in the committee note that the idea of the disclosure is not that such a brief would be useless, but that the information might be relevant to a judge. Mr. Freeman suggested that there should be some way to say that the contribution level is zero. The liaison member noted that an amicus can say that in its statement of interest.

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The Reporter invited discussion of the look-back period. A calendar year might be easier to administer, but easier to evade. In response to a question about data relevant to this question, the Reporter noted that we would learn through the comment period. Professor Coquillette agreed that we will learn a lot when we publish, and urged that alternatives be included in any publication to avoid the need to republish.

A liaison member suggested adding "or promise to contribute" to paragraph (4). Mr. Freeman suggested building in some "reasonable effort" or "reasonable knowledge" provision because it could be costly to figure out exactly if someone is just on one side or the other of a line.

An academic member asked about requiring disclosure of the date of formation of an amicus and why it was formed. The Reporter stated that the subcommittee had concluded that this would be more burdensome than helpful; one subcommittee member stated that she recalls liking the idea.

The Reporter discussed paragraph (d), which would require a party who is aware that an amicus has failed to make a required disclosure to make that disclosure.

After a short break around 10:30, the Committee resumed its discussion of amicus disclosures. The Reporter described Rule 29(e) of the working draft, which addresses disclosure of the relationship between an amicus and a nonparty. The major changes would be to (1) require disclosure of earmarked contributions by members of the amicus, and (2) to set a $1000 threshold for earmarked contributions whether by a member or nonmember.

A liaison member stated that this provision would have different practical effects on different kinds of organizations. Organizations with more established amicus programs would not be affected because they raise money from general contributions. Organization with less established amicus programs, and who pass the hat for an amicus brief, would be captured. Some may be reluctant to contribute. The existing rule that distinguishes between members and nonmembers seems to work.

In response to a question from Judge Bybee, the liaison member noted that some organizations wouldn't file under this provision because the brief would be perceived as less credible, and some members wouldn't put money in the hat because they did not want their contributions disclosed. Some organizations may change their fundraising structure, but organizations with more established and regular fundraising structures would be more favorably treated by this provision compared to those who don't come to court much.

An attorney member observed that money is fungible and therefore would favor something like (c)(3) and (4) for nonparties as well, perhaps at a higher

percentage. Transparency helps the public have faith in the judiciary. Without a disclosure requirement, when such information is revealed by the media, it looks like the judiciary either doesn't care or was fooled. The member exception in the current rule should be deleted.

The liaison member stated that lawyers are pretty careful; perhaps the phrase "directly or indirectly" would get at the problem. The rule law clerk noted that the text of the New York Court of Appeals amicus disclosure rule does not have an exception for members.

Judge Bates stated that the nonparty issue is important and was the genesis of the suggestion by Senator Whitehouse and Representative Johnson. Most of their examples involved nonparties and would not be captured without robust nonparty disclosure.

The Reporter directed attention to the issue of the exception for members of the amicus. A liaison member said that there is a big difference between members and nonmembers in the existing rule. Is the amicus brief really the view of the organization—as opposed to the view of someone else? Is the organization speaking or is it being used as a front? Was the contributor really a member before the brief was even considered? Perhaps what should matter is the percentage of the cost of the brief.

The Reporter directed attention to the issue of whether there should be a parallel to (c)(3) and (4) for nonparties. At the last meeting, there did not seem to be much support for that idea and the working draft does not include such a provision, but the Committee has not rejected the idea.

A liaison member noted that lots of foundations and wealthy individuals give lots of money to progressive causes. A parallel to (c)(3) would not capture a lot, and it is not clear how it would apply to a nonparty. A parallel to (c)(4) would require significant disclosures not tied to the filing of an amicus brief and would be pretty significant for a lot of organizations. If the concern is with those who join an organization right around the filing of an amicus brief, the member exception could be limited to longstanding members. If an organization doesn't have an amicus budget, it would either reconfigure its budget or not file an amicus brief.

Professor Struve picked up on the idea of a member look-back. One question is how broad-based the organization is; a different question is who the person making the contribution is. Some information can be obtained from tax forms.

Judge Bates posed the question: how relevant is the information that would be disclosed by adding a provision like (c)(4) to (e)?

A judge member responded that it is hard to say. He always takes an industry brief with a grain of salt. The interest is obvious because the viewpoint is obvious. The concern is where control is with a party. A liaison member agreed. Judge Bybee said that he doesn't get a lot of amicus briefs and recognizes the biases. If a case is big enough to attract amici, the principal briefs are usually good.

Judge Bates noted that the Committee had not yet considered the recusal issues that a nonparty relationship to an amicus might raise. The Reporter noted that a suggestion involving amicus briefs and recusals is a later item on the agenda.

He asked if there were any more comments on the question of a parallel to (c)(4) for nonparties. A liaison member noted that such a provision would impact non-business filers and true advocacy organizations. Mr. Freeman expressed doubts about its efficacy: a very wealthy funder in the background could create several different shell organizations for each amicus brief. The liaison member added that it would be possible to structure an 801(c)(4) organization so as not have to disclose, explaining that a single individual could fund several organizations and the Form 990 is not public. A lawyer member observed that layers may protect against disclosure. A judge said that a challenge for the subcommittee is that people find a way.

A different judge member emphasized that there are two different concerns: The first is that appellate judges might be misled about who is really behind a brief; does that really happen in a significant number of cases? The second is whether, as a matter of administering justice, the court and the public should know who is really behind a brief. It is important to be precise about the different concerns.

Judge Bybee responded that, in contrast to the Supreme Court, he doesn't see that many amicus briefs. He is interested in their content.

The judge member wondered, if the disclosure is not of much benefit to judge, whether it is worth running the risks of disclosure.

A different judge member responded that disclosure has relevance to the public and its perspective, even if it doesn't affect the judicial decision. The prior judge agreed, but reiterated that it is important to focus on which justification is being relied on. While the public has an interest in knowing who really is participating, there are countervailing concerns.

The Reporter added that it is important not only to be clear about the reasons supporting any disclosure requirement, but also to focus on narrowly tailoring any disclosure requirement to those reasons.

B. Costs on Appeal—Rule 39 (21-AP-D)

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Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 203). He began by noting that the Supreme Court in the *Hotels.com* case had indicated that rule governing costs on appeal could be cleaned up to better handle the interplay between the court of appeals (which decides who bears the costs on appeal) and the district court (which taxes some of those costs). Sometimes, as in *Hotels.com*, there is a very significant supersedeas bond; the cost of that bond is taxed in the district court, but the district court cannot reallocate who pays the cost. Instead, a party who seeks a different allocation must ask the court of appeals to do so.

At the last meeting, the Advisory Committee discussed how to make it clear that parties should ask the court of appeals and the appropriate timing for such a request. Because the other party and the district court may not always know of the cost of the bond, the subcommittee had previously recommended that an amendment to Appellate Rule 39 be made in conjunction with an amendment to Civil Rule 62 requiring disclosure of the bond premium at the time the bond is approved. But at the last meeting, the Advisory Committee thought that while an amendment to Civil Rule 62 would be valuable, amending Appellate Rule 39 would be worthwhile even without an amendment to Civil Rule 62.

The subcommittee was charged with focusing on two issues: first, where in Rule 39 should an amendment be placed and, second, the timing of a request to the court of appeals to reallocate the costs.

The subcommittee concluded that the best place for an amendment would be as a new, separate subdivision 39(b), immediately following the allocation principles of 39(a).

The subcommittee concluded that while there was no perfect deadline for asking the court of appeals to reallocate the costs, it landed on 14 days after entry of judgment, the same as for filing the bill of costs in the court of appeals. A drawback of a short deadline that is before or simultaneous with the filing of the bill of costs in the court of appeals is that there isn't a target. A drawback of a later deadline is that it runs into the deadline for issuance of the mandate, which shouldn't be delayed for costs.

The subcommittee also thought that it worthwhile to clean up some language in what would become 39(e) to make clear that the bill of costs filed in the court of appeals deals only with the costs taxable in the court of appeals, not the costs taxable in the district court.

In response to a question by Judge Bybee, Judge Nichols explained that setting a deadline after the bill of costs is filed in the court of appeals wouldn't help because the bill of costs filed in the court of appeals does not include the costs taxable in the district court. Absent an amendment to the Civil Rules, a party may not know the

cost of the supersedeas bond until the bill of costs is filed in the district court. It would be possible to allow a party to request the court of appeals to reallocate the costs after everything is done, but that would invite a second round of litigation about costs.

The Reporter echoed the point that the cost of the supersedeas bond is sought in the bill of costs filed in the district court, and that it is worthwhile keeping the concept of the allocation or assessment of costs between the parties separate from the calculation of what those costs are.

A liaison member suggested that the bill of costs filed in the court of appeals could include a good faith estimate of the costs to be sought in the district court and allow some time thereafter. Judge Nichols agreed that could be done, but also noted the prior recommendation that the Civil Rule be amended to require disclosure of the premium paid for the bond at a much earlier date.

Judge Bates asked when the costs are assessed. The Reporter stated that the proposed amendment sought to clarify that the initial assessment of costs is done under Rule 39(a) and that the new 39(b) would allow for reconsideration of that assessment. Judge Nichols added that the assessment is done in the court of appeals opinion or judgment, either by virtue of the default rules of 39(a) or court ordering a departure from those default rules under 39(a). Proposed 39(b) would allow a party to seek an assessment that differs from what was already done under 39(a).

Judge Bybee observed that if a split decision doesn't make clear which party is to bear the costs, the clerk will ask the judges. The response might be that each bears its own costs, without having any idea about the cost of a bond. Judge Nichols stated that proposed 39(b) would allow a party to ask the court of appeals to change that determination. The subcommittee considered dealing with all of these cost issues in the court of appeals after everything was done in the district court, but thought that this created additional litigation in the court of appeals.

In response to questions from a judge member, Judge Nichols stated that there weren't many examples. A court of appeals can delegate the allocation issue to the district court.

Mr. Byron noted that if a good faith estimate is provided, then the deadline can be 21 days, the same as the date for issuance of the mandate.

The Reporter added that a virtue of asking the court of appeals to reallocate soon after its decision on the merits is that the matter will be fresh in the judges' minds. In addition, the problem of making sure that the parties know the cost of the supersedeas bond could be addressed by an amendment to Civil Rule 62.

Judge Bybee wondered whether all deadlines should be off for bonds. Ms. Dwyer stated that she didn't have a problem with proposed Rule 39(b). It isn't earthshattering; she has never seen a problem in this area in her 35 years.

Mr. Freeman reminded the Committee of the Solicitor General's question whether the costs of a supersedeas bond may be recoverable at all. He also asked how proposed Rule 39(b) interacts with the issuance of the mandate.

Professor Struve noted that the mandate issue is front and center in the *Hotels.com* case, with the curious situation of the division of labor required by that case and the resulting risk of falling between the two stools. One could move up the date of seeking reconsideration in the court of appeals. One could move back the date of the mandate. Or one could have a special rule and exception regarding the mandate.

A judge member asked why not leave it to the district court to reallocate costs, as a number of courts do. Judge Nichols responded that the Supreme Court said that the existing rule makes sense because the court of appeals best understands the nature of the victory.

Ms. Dwyer noted that there is a mandate problem; the court can't just recall the mandate.

Judge Nichols asked if there is agreement that the best solution would:

1) Provide parties with perfect information early;
2) Provide the court of appeals with authority—which it could delegate to the district court—to determine who bears the costs and in what percentage; and
3) Minimize any impact on the issuance of the mandate to the extent possible so that things get wrapped up in the court of appeals early.

Mr. Byron expressed uncertainty about number 2 and suggested that it is not always a good idea to jam up the court of appeals with what could be hard but rare issue. Perhaps the mandate could be held.

Judge Nichols stated that we don't want to create a jurisdiction stripping problem. Mr. Freeman noted that in some cases a delay of the mandate may be a real problem. A liaison member added that a party resisting payment may seek to delay the mandate.

Professor Struve added that it need not be all or nothing. While mandates are undertheorized, there could be a limited remand, so that the case goes down except for this limited purpose.

Judge Bybee asked whether there is a big enough issue to deal with. Judge Nichols responded that a survey of the clerks and other research had shown this to be a very small problem with few reported cases. Proposed 37(b) is not designed to change much, but rather to make express what is now already an option, and to provide the clarity suggested by *Hotels.com*. If the Supreme Court had not suggested that matters be clarified, it wouldn't be clear that an amendment is warranted. Judge Bybee added that a rule amendment allows useful information to be added in a committee note.

A liaison member observed that there may be more of a problem now. Professor Struve added that a court of appeals can let a district court resolve the allocation question. The Reporter emphasized that the subcommittee was looking to make a minimalist change, rather than a complete revamping of how costs on appeal are handled.

Judge Nichols asked whether the Committee wanted to do anything? A minor change along the lines under consideration? Be more aggressive in moving closer to an optimum solution? He noted that the current draft of 37(b) is not perfect, that we are not fixing a huge problem, and that the subcommittee would give it another try. Judge Bybee agreed that it made sense for the subcommittee to do so.

The Committee then took a break for lunch.

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

Lisa Wright presented the report of the IFP subcommittee. (Agenda book page 209). She explained that the subcommittee has been looking into ways to make Form 4 simpler, useful, and less intrusive.

A survey revealed that indigency is clear in the vast majority of cases; the existing forms come back with lots of zeros. When IFP status is denied, it is typically because of the lack of a nonfrivolous legal issue.

After the last meeting, a draft revised form was circulated to senior staff attorneys for comment. The response was generally supportive. Some had concerns about the order of the questions, whether liquid assets should be separated from illiquid assets, whether more detail about expenses should be required, and whether information about spouses should be required.

In response, the subcommittee reduced the three introductory questions to one yes-or-no question. It concluded that a distinction between liquid and illiquid assets would be relevant to very few cases, and that if an applicant had significant assets but could not access them, the applicant could explain that situation. It also concluded that more detail regarding expenses was not necessary, because the funds for those expenses would have to come from either assets or income, both of which

must be reported. The subcommittee considered asking whether spousal income and assets were available to the applicant, but concluded that the intrusiveness of questions about a spouse outweighed their benefit. Given the survey responses—which were based on a form that requires disclosure of spousal resources—it seemed unlikely that they make a difference to the indigency determination.

Ms. Wright added that the IFP statute has a drafting error. It is not entirely clear whether the statutory provision calling for a "statement of all assets such prisoner possesses" applies to non-prisoners. Courts generally say it does. The draft form calls for the applicant to state the applicant's "total assets"; does that comply with the statutory provision calling for "all assets"?

Judge Bybee thanked the subcommittee and those who contributed to its work, noting that the draft form is an improvement on the current form. He asked whether the point of the first question was that if an applicant answered "yes," that there may be no need to answer the remaining questions. Ms. Wright explained that the subcommittee was initially thinking along those line, but concluded that the rest of the draft form was so simple that it made sense to simply answer all of the questions.

Judge Bybee wondered whether it would make sense to move the first question to the end; the Clerk's office could jump to the last question when processing applications. Ms. Wright responded that the first question also signaled the general nature of IFP eligibility.

The rules law clerk noted that there was some district court and unpublished court of appeals caselaw that interpreted "all assets" to include spousal assets, as well as a published court of appeals decision holding that it was an abuse of discretion to deny IFP status for failure to include spousal information without inquiring about its availability to the petitioner. Ms. Wright noted that the form could ask if spousal assets are available.

Judge Bybee asked if the subcommittee was asking the Advisory Committee to approve the draft form. Ms. Wright said not at this point. The next step would be to consult with the Supreme Court Clerk; the rules of the Supreme Court incorporate this form.

Professor Struve noted that question 2 asks for "monthly take-home pay from work," but that this amount varies for some workers. Perhaps "average" should be added. Ms. Wright suggested "typical" rather than "average." Professor Struve was content with leaving question 2 as is.

The Reporter asked if the Committee is comfortable with the form calling for "total assets" rather than "all assets." In response to a question from Judge Bybee, Ms. Wright stated that the difference could be that "all assets" might require listing assets. Ms. Dwyer stated that this draft form is great. It includes what the court takes

into account. Itemizing assets would be going backwards. She suggested that perhaps the questions should be reordered: 1, 3, 2.

In response to a question from Mr. Byron about caselaw regarding question 6, the Reporter noted the *Floyd* case. [*Floyd v. U.S. Postal Service*, 105 F.3d 274 (6th Cir. 1997).] There, the Department of Justice had argued that the requirement of stating "all assets such prisoner possesses" meant that only prisoners had to file an affidavit of assets. The Court of Appeals rejected that view, relying in part on existing Form 4. As to another issue regarding IFP practice, *Floyd* read the Prison Litigation Act to repeal part of then-existing FRAP 24. A later decision interprets a subsequent amendment to FRAP 24 to supersede *Floyd* regarding that issue. [*Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999).] In addition, there is a history in this area of the form driving practice, even without amendments to statute or rule.

Judge Bybee returned to the issue of the order of the questions, noting that some staff attorneys from some circuits had concerns about the placement of the first question. If the draft form no longer instructs applicants to skip the rest of the questions if this is answered yes, it can be moved to the end and the Ninth Circuit can simply look to the last question first. Moreover, some circuits have their own forms, so this won't be the last word.

Ms. Dwyer said that she had no objection to moving the first question to the end.

Judge Bybee synthesized various suggestions and proposed that question 6 read, "What is the total value of all your assets?"

With these changes, the draft form can be discussed informally with the Clerk of the Supreme Court.

V. Discussion of Joint Projects

A. Pro Se Electronic Filing

The Reporter introduced the joint project regarding electronic filing by pro se litigants, pointing both to his short memo about two issues that this Committee might want to focus on and Professor Struve's longer memo about the project as a whole. (Agenda book page 217).

First, based on an FJC Report, it appears that the courts of appeals are more receptive to electronic filing by unrepresented litigants than are trial courts. (Agenda book page 237). Maybe this is because of the much smaller number of filings in the courts of appeals. Maybe this is because the filing of case-initiating documents in the courts of appeals, even when filed by attorneys, do not open a case in CM/ECF, but instead a case is opened by the court staff. The Committee might think it appropriate

Draft

to flip the default and allow electronic filing in the courts of appeals unless a court order or local rule prevents such filing, perhaps with a good cause requirement. Alternatively, the Committee might think that the courts of appeals are broadly allowing electronic filing by unrepresented litigants under flexibility afforded by the current rule, so that there is no need to change anything.

Second, those who do not file electronically—unlike those who do file electronically—generally have to serve a physical copy of papers on other parties and provide proof of that service, even though the clerk's office will scan submissions and place them on ECF, thereby triggering electronic service on electronic filers. The Committee might consider lifting this burden from paper filers.

Professor Struve reported on how other Advisory Committees have reacted to this project. Bankruptcy is on board with the project, viewing it as an access to courts issue. But their support is tempered by concerns about inappropriate filings, the need to screen filings, and various technical and logistical concerns. Civil has concerns about how much this project is a matter for rule making, as opposed to other Judicial Conference committees. Service is a classic rules issue, but there are concerns about whether documents filed under seal always make it to other parties.

It is also possible to disaggregate submission of documents (whether via CM/ECF or email) from notice of submission of those documents. Technical issues like adequate software to scan for viruses could be handled by CACM.

Judge Bates stated that we are looking for the input of this Committee. There had been suggestions made to various committees; they had been stalled, in part because some committees wanted to wait for others. At his direction, the Reporters worked as a group to move the project along.

A judge member observed that, based on the FJC report, it seemed that the Sixth Circuit was out of step. Mr. Reagan responded that, since the original research was conducted months ago, the Clerk of the Sixth Circuit had stated that they are now looking into joining the majority. The judge noted that there was no real downside to crafting a rule that reflects the majority or consensus approach.

Professor Struve said that the key question here is whether this Committee want to move first and make the rule in the courts of appeals more permissive or wait until other courts are ready as well. Ms. Dwyer stated that the Ninth Circuit presumes that electronic filing is permitted unless the court says no, and that the court has arrangements with 4 or 5 prisons, too. We don't have the staff or other resources for a separate system for pro se litigants. When items are filed under seal, staff will check to see if appropriate, referring the issue to a panel if necessary.

Draft

Professor Struve added that anyone can file under seal, but needs to show that the seal should continue. Ms. Dwyer pointed out that plenty of lawyers have problems with oversize filings.

Mr. Reagan stated that in some districts where there is a relationship with a state prison, state prisoners have the best access to electronic filing among pro se litigants: they can go to the library, email the court, and the court converts the email to place on the docket. Ms. Dwyer asked why move backwards from the progress made during the pandemic; it is easier to put electronic submissions on the docket than to scan paper filings.

A judge member mentioned that an email box was a success. A different judge member stated that, from the district court perspective, moving away from paper is good, including for filing and serving court orders. Dealing with docketing of non-electronic documents takes a lot of time. Ms. Dwyer added that mailing costs a huge amount of money in postage.

Mr. Byron noted the value in taking baby steps here. A judge member suggested at least not requiring non-electronic filing to mail documents to electronic filers. Mr. Freeman urged that we not let the perfect by the enemy of the good. Should the Appellate Rules move forward alone or only if all sets of rules move forward together? Professor Struve added that they have evolved thus far in tandem and that there is value in keeping them together.

B. Direct Appeals in Bankruptcy Cases

The Reporter introduced a possible amendment to FRAP 6 in conjunction with a proposed amendment to Bankruptcy Rule 8006(g). (Agenda book page 255.) This issue was not on the Committee's agenda at the last meeting but arose during the last meeting. No action was taken at the time, but Judge Bybee encouraged the Reporter to work with the reporters for the Bankruptcy Rules Committee and its Privacy, Public Access, and Appeals Subcommittee.

Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, § 158(d)(2) permits an appeal to be taken directly to the court of appeals. The Bankruptcy Committee is proposing to amend Bankruptcy Rule 8006(g) to make clear that any party to a bankruptcy appeal can request that the appeal be heard directly by the court of appeals. That Committee views the amendment as a clarification of existing law, not a change in the law.

The problem from the perspective of the Appellate Rules is that FRAP 5, which deals with permission to appeal, doesn't fit this situation very well. That's because FRAP 5 is designed for the situation where the question before the court of appeals

is whether to allow an appeal at all. But in the context of direct bankruptcy appeals under § 158(d)(2), there is an appeal; the question is whether the court of appeals (as opposed to the district court or bankruptcy appellate court) is going to hear that appeal.

Accordingly, the draft amendments to FRAP 6, which deals generally with appeals in bankruptcy cases, would add specific provisions to deal with the procedure for seeking authorization of such a direct appeal. The reporters for the Bankruptcy Rules Committee are satisfied with this draft, and are the members of that Committee's Privacy, Public Access, and Appeals Subcommittee. But due to the way this issue can up, no subcommittee of this Committee has considered this draft.

Professor Struve added that when FRAP 6(c) was created, the possibility that an appellee might seek authorization for a direct appeal was not considered and the rule was not drafted with that possibility in mind.

Mr. Byron noted that where there is a right to appeal under § 158(a)(1) or (2), the only question is where the appeal will be heard. But there are also appeals that can only be heard by leave of court under § 158(a)(3). Is it clear enough how the draft amendment to FRAP 6 works in those situations?

The Reporter responded that this draft does not address leave to appeal under § 158(a)(3), although it does require, in cases where leave to appeal is required under § 158(a)(3), that the petition to authorize a direct appeal include a copy of any decision on a motion under Bankruptcy Rule 8004, which governs motions seeking leave to appeal under § 158(a)(3).

Professor Struve added that it would feel clearer if one were also looking at Bankruptcy Rules 8004 and 8006. Perhaps discussion of those rules should be added to the committee note.

The Reporter reiterated that no subcommittee of this Committee had yet reviewed this draft. While this Committee delayed the Bankruptcy Committee from publishing their proposed rule in August of 2022, the next time proposed rules would be published for public comment would be August of 2023, so putting this off until the spring meeting need not further delay publication.

Judge Bybee appointed Justice Kruger and Danielle Spinelli as a subcommittee to give the draft a close read.

C. Appeals in Consolidated Cases

Draft

The Reporter presented a report about appeals in consolidated actions. (Agenda book page 265.) A Joint Civil-Appellate Subcommittee has been considering for some time whether any rule amendments would be appropriate in response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In that case, the Court held that consolidated cases retain their separate identity for purposes of appeal. That means that once any one of the consolidated cases is completely decided, an immediate appeal can be taken.

Extensive research by the FJC led the Joint Subcommittee to conclude that there is not a sufficient problem to warrant a rule amendment. The issue arises rarely. And lawyers tend to err on the side of filing premature notices of appeal.

Mr. Byron asked if there were any representatives from this Committee on the Joint Subcommittee. The Reporter responded that by the time the Joint Subcommittee reached its final decision, it appeared that changes to the membership of this Committee had left the Joint Subcommittee without a representative from this Committee. But he added that one member of the Joint Subcommittee was a Circuit Judge who had been on the panel reversed by the Supreme Court in *Hall*.

The Committee unanimously voted to remove this item from the agenda, with Judge Bybee noting that the issue could be raised again in the future.

VI. Discussion of Recent Suggestions

A. Striking Amicus Brief; Identifying Triggering Person (22-AP-B)

The Reporter presented a suggestion that was not on the agenda for the last meeting but briefly discussed at that meeting because it was filed after the agenda book had been compiled and related to another matter that was on the agenda. The suggestion is that, when a court strikes an amicus brief (or prohibits its filing) under FRAP 29(a)(2) because the brief would otherwise result in a judges' disqualification, that the amicus or counsel triggering the problem be identified.

The Reporter noted that the Committee might choose to refer the matter to a subcommittee, or it might conclude that the matter is too close to the standards for recusal—the suggestion that was removed from the agenda at the last meeting—and likewise remove this suggestion from the agenda.

Mr. Freeman wondered about the mechanics; would the brief be refiled with the triggering amicus or counsel removed? Judge Bybee expressed the concern that at some point it would be possible to figure out which judge was the issue and why. A judge member questioned its utility. The reasons for recusal are multifaceted. A judge might recuse from cases involving a law firm where his son worked, but only while he worked there, not after he left the firm.

A liaison member wondered, if the brief could not be refiled, what benefit there could be—other than the possibility of reverse engineering what judge would have been recused. A judge member asked if we know about the ability to refile, to which the liaison member replied that it would depend on when the brief was stricken, and at least would require a motion seeking permission to file late. The Reporter added that the suggestion is that the information could be used to avoid future briefs being stricken.

Mr. Freeman expressed concern about reverse engineering and the information being used to keep particular judges off a case. The bite is in en banc proceedings. He fears that it would be used opportunistically. The United States wouldn't do so, but there are cases where people act strategically.

A liaison member said that it would produce no really useful information for the future because the reason for a recusal issue can change, and it only matters for en banc proceedings or a very small circuit like the First.

Mr. Freeman added that the history would be public, enabling reverse engineering.

The Committee agreed, without opposition, to remove the item from its agenda.

B. Third-Party Litigation Funding (22-AP-C)

The Reporter presented a suggestion that Rule 26.1 be amended to require disclosure of a non-party that has a financial stake in the outcome of an appellate case. (Agenda book page 279). There are third-party litigation funders who make non-recourse investments in litigation and the suggested amendment would require their disclosure. The Reporter noted that the Civil Rules Committee has been considering this issue for some time, as shown by the twenty-five-page excerpt from its Fall 2021 report. This Committee might consider creating its own subcommittee or seeking to coordinate with Civil.

Further discussion revealed that while the MDL subcommittee had been considering this topic, there is currently no Civil subcommittee addressing this issue.

Judge Bybee decided to hold this item until the next meeting following consultation with the Civil Rules Committee.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Draft

Judge Bybee directed the Committee's attention to a table of recent amendment to the Appellate Rules. (Agenda book page 236). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns.

VIII. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

IX. Adjournment

Judge Bybee thanked everyone, noting that it had been a very productive meeting. He acknowledged that it consumed a lot of time, and that there are other demands on people's time. That time is well worth it if the Committee's efforts can prevent or help avoid misunderstandings and errors.

The next meeting will be held on March 29, 2023, in West Palm Beach, Florida.

The Committee adjourned at approximately 3:15 p.m.

Draft

TAB 4

TAB 4A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA BUEHLER CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 5, 2022

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 15, 2022. One Committee member participated remotely by means of Microsoft Teams; the rest of the Committee met in person. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek publication for comment of an amendment to Official Form 410. 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 an amendment to Rule 8006(g). The second information item discusses

the Advisory Committee's continuing consideration of responses to public comments on published amendments to Rule 3002.1. The final item reports on the Advisory Committee's discussion of electronic filing by pro se litigants.

II. Action Item

Item for Publication

The Advisory Committee recommends that an amendment to Official Form 410 (Proof of Claim) be published for public comment in August 2023. The form as proposed for amendment appears in the appendix to this report.

The proposed amendment would eliminate on the proof-of-claim form the language that restricts use of a uniform claim identifier ("UCI") to electronic payments in chapter 13. It would allow the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case if it chooses to do so.

Part 1, Box 3, of Official Form 410 currently provides space for a "Uniform claim identifier for electronic payments in chapter 13 (if you use one)." Dana C. McWay, chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, recommended that the quoted language be modified so that it is no longer limited to chapter 13. She explained that "[c]ase trustees make payments to creditors in chapter 7 asset cases, chapter 12 cases, chapter 13 cases, and when acting also as a disbursing agent, in Subchapter V chapter 11 cases. Allowing any creditor to provide this identifier can assist trustees in all case types to issue electronic payments in lieu of paper checks." Suggestion 22-BK-C at 1.

The Advisory Committee agreed with the suggestion, but on the recommendation of the Forms Subcommittee, it voted to expand the amendment even further. Rather than simply removing the words "in chapter 13," the Advisory Committee concluded that the entire phrase "for electronic payments in chapter 13" should be removed, finding no reason that the UCI could not be used for paper checks as well as electronic payments. Indeed, the Advisory Committee was informed that the UCI is currently being used for payments by check.

III. Information Items

Information Item 1. Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals). The proposed amendment, which was suggested by Bankruptcy Judge A. Benjamin Goldgar, would make explicit what the Advisory Committee believes was the existing meaning of the rule—that any party to an appeal may submit a request to the court of appeals to accept a direct appeal under 28 U.S.C. § 158(d)(2) within 30 days after it has been certified for direct appeal.

At the request of the reporter to the Standing Committee, the reporters for this Advisory Committee and the Appellate Rules Advisory Committee worked in tandem to create proposals

for their respective committees that would address the issue of petitions for direct appeal in a coordinated fashion. The amendment to Rule 8006(g) approved for publication by the Advisory Committee is a result of that effort. Because the Appellate Rules Advisory Committee at its fall meeting created a subcommittee to consider related amendments to FRAP 6(c) and to report back at its spring meeting, the Advisory Committee will wait to seek approval for publication of Rule 8006(g) until publication is also sought for amendments to the appellate rule.

Information Item 2. Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) and Related Forms. In a series of meetings over the summer, the Consumer Subcommittee completed its review of the comments submitted in response to the 2021 publication of proposed amendments to Rule 3002.1. At the fall meeting, the Advisory Committee approved the changes recommended by the Subcommittee. It also approved the Subcommittee's recommendation that the rule as revised be republished for comment in August 2023.

Substantial changes to the rule as published are being proposed, and the Advisory Committee concluded that that republication would be helpful. There is not such urgency to amend Rule 3002.1 that a year's delay will be harmful. Some new provisions—such as the authorization of noncompensatory sanctions and the elimination of any restriction on when a motion to determine the status of a mortgage claim can be filed—might attract significant comment. Furthermore, the rule addresses some fairly technical issues on which further input from mortgage experts and trustees might be useful to the Advisory Committee. Because the Advisory Committee still needs to consider the implementing forms in light of the comments and proposed changes to the rule, it will wait until the June 2023 meeting to present the revised rule and forms to the Standing Committee.

Information Item 3. Electronic filing by pro se litigants. Professor Struve presented a report on the work of the Pro-Se-Electronic-Filing Working Group and sought feedback from the Advisory Committee. Several members expressed support for expanding e-filing access by self-represented litigants and indicated that they did not find persuasive the reasons given for not doing so (*i.e.,* litigants' lack of competence to use CM/ECF; the burden on clerk's offices of training litigants to use CM/ECF and of addressing filing errors; inappropriate filings; inappropriate docketing practices (wrong event or wrong case), and sharing of credentials). The clerk of court representative observed that paper filings create more work for the clerk's office than electronic filings. Others pointed out that paper filing can be disadvantageous, depending on the area of the country, because there may be mail delays or the courthouse may be at a far distance.

Two participants expressed notes of caution. They raised concerns about inappropriate filings and the possible inclusion of personally identifying information. In response it was noted that these same problems can exist with paper filings.

Overall, the Advisory Committee was supportive of examining how to extend access to electronic filing to pro-se litigants in bankruptcy cases.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410

Proof of Claim

12/24

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____

Uniform claim identifier ~~for electronic payments in chapter 13~~ (if you use one):

__ __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
- ❑ No
- ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
- ❑ No
- ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**
- ❑ No
- ❑ Yes. The claim is secured by a lien on property.

Nature of property:
- ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
- ❑ Motor vehicle
- ❑ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%
- ❑ Fixed
- ❑ Variable

10. **Is this claim based on a lease?**
- ❑ No
- ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
- ❑ No
- ❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $3,350* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $15,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/25 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.
❑ I am the creditor's attorney or authorized agent.
❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Official Form 410 (Committee Note) (12/24)

Committee Note

The last line of Part 1, Box 3, is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases.

Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court 12/24

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Fill in the caption at the top of the form.**
- **If the claim has been acquired from someone else, then state the identity of the last party** who owned the claim or was the holder of the claim and who transferred it to you before the initial claim was filed.
- **Attach any supporting documents to this form.** Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)

  Also attach redacted copies of any documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called "Bankruptcy Rule") 3001(c) and (d).
- **Do not attach original documents because attachments may be destroyed after scanning.**
- **If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.**
- **A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual's tax identification number, or financial account number, and only the year of any person's date of birth.** See Bankruptcy Rule 9037.
- **For a minor child, fill in only the child's initials and the full name and address of the child's parent or guardian.** For example, write *A.B., a minor child* (*John Doe, parent, 123 Main St., City, State*). See Bankruptcy Rule 9037.

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court's PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate. 11 U.S.C. § 503.

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor's name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include documents showing that a security interest has been filed or recorded, such as a mortgage, lien, certificate of title, or financing statement.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed in the district where the case is pending.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to **privacy** on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that some creditors use to facilitate ~~electronic~~ payment.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part to the extent that the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

TAB 4B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 15, 2022
Washington, D.C. and on Microsoft Teams

The following members attended the meeting in person:

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

District Judge Marcia Krieger attended remotely.

The following persons also attended the meeting in person:

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
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
Circuit Judge William J. Kayatta, liaison from the Standing Committee
Bankruptcy Judge Laurel M. Isicoff, Liaison to the Committee on the Administration of the Bankruptcy System
Nancy Whaley, National Association of Chapter 13 Trustees
H. Thomas Byron III, Administrative Office
Brittany Bunting-Eminoglu, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Allison A. Bruff, Esq., Administrative Office
Shelly Cox, Administrative Office
Carly E. Giffin, Federal Judicial Center
Christopher Pryby, Rules Law Clerk
Dana Yankowitz Elliott, Administrative Office

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Daniel J. Isaacs-Smith, Administrative Office

The following persons attended the meeting remotely:

Shari Barak, LOGSLegal Group LLP
Pam Bassel, Chapter 13 trustee
Edward J. Boll, Dinsmore & Shohl LLP
Hilary Bonial, Bonial & Associates, P.C
Lisa Caplan, Rubin Lublin
Andrea L. Cobery, U.S. Bank
Jeff Collier, Attorney for Locke D. Barkley, Trustee
Professor Daniel R. Coquillette, consultant to the Standing Committee
James Davis, Chapter 13 trustee
Kathy Day, no affiliation
Ana V. De Villiers, Office of Laurie K. Weatherford, Chapter 13 trustee
Marcy J. Ford, Trott Law, P.C.
Jeff S. Fraser, Albertelli Law
Lisa Gadomski, Schiller, Knapp, Lefkowitz & Hertzel, LLP
Rebecca R. Garcia, Chapter 12 and 13 trustee
John Hawkinson, freelance journalist
Susan Jenson, Administrative Office
Teri E. Johnson, Law Office of Teri E. Johnson, PLLC
Sarah M. McDaniel, Mackie Wolf Zientz & Mann, P.C.
Lisa K. Mullen, Chapter 13 trustee
Lance E. Olsen, McCarthy Holthus, LLP
Madeline Polskin, Shell Point Management
Tim Reagan, Federal Judicial Center
Andrew Spivack, Brock & Scott PLLC
Linda St. Pierre, McCalla Raymer Leibert Pierce, LLC
M. Regina Thomas, bankruptcy court clerk in N.D. Ga.
Vicki Vidal, Black Knight
Julia Waco, Gregory Funding Bankruptcy Department
Alice Whitten, Wells Fargo Legal
Crystal Williams, no affiliation

Discussion Agenda

1. **Greetings and Introductions**

Judge Dennis Dow, chair of the Advisory Committee, first introduced Senior Inspector Tirrell Richardson of the Judicial Security Division who provided a brief security announcement. Judge Dow then welcomed the group and thanked everyone for joining this meeting, including those attending virtually, Judge Krieger and Professor Coquillette. He welcomed new Rules Committee Chief Counsel H. Thomas Byron III. He noted that this will be his last meeting as chair of the Advisory Committee, and that also leaving the Committee are Judge Thomas Ambro

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and Professor David Skeel. He thanked them for their service. He noted that Judge Rebecca Connelly will be succeeding him as chair. He stated that this has been one of the highlights of his professional career and thanked everyone for their work on this Committee.

Scott Myers made a special presentation to Judge Dow of a commemorative book with the following inscription:

In special recognition of the Honorable Dennis R. Dow for his exemplary contributions to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States

Member:	2014-2022
Forms Subcommittee Chair:	2014-2018
Chair, Advisory Committee:	2018-2022

In his eight years on the Advisory Committee Judge Dow was witness to and participated in a number of significant changes to the Bankruptcy Rules and Forms, including a complete revision and restyling of the Official Bankruptcy Forms shortly after he became a member, the promulgation of rule amendments requiring the adoption of a plan form for chapter 13 cases, and a multi-year effort to restyle the Bankruptcy Rules, currently on track to go into effect December 1, 2024.

Judge Dow contributed greatly to the Advisory Committee's many projects, but his leadership was particularly evident in the adoption of rule and form amendments necessary to address the passage of the Small Business Reorganization Act of 2019 (the SBRA), the most significant addition to the Bankruptcy Code in 14 years. The SBRA was signed into law with an effective date 180 days after enactment, requiring the Advisory Committee, the Standing Rules Committee and Judicial Conference to 'shorten' the normal three-year amendment process required under the Rules Enabling Act (the REA) to roughly four months. In those four months, the Advisory Committee not only proposed Official Form amendments and Interim Rules that courts could adopt as local rules to implement the SBRA while the REA amendment process ran its course, but it even built in a one-month public comment period to ensure that the best version possible of the needed amendments would be implemented. And just a few months after SBRA took effect, Judge Dow led efforts to respond to temporary changes to the SBRA provisions that Congress enacted during the COVID-19 pandemic

This commemorative volume contains the full set of SBRA Rule amendments sent by the Supreme Court to Congress in May 2022 -- on track to go into effect December 1, 2022. These Rules are a small sample of the work done under Judge Dow's leadership.

Judge Dow then reviewed the anticipated timing of the meeting and when he anticipated lunch. In-person participants were asked to state their name before speaking for the benefit of those not present, and remote participants were asked to keep their cameras on and mute themselves and use the raise hand function or physically raise their hands if they wished to speak.

2. **Approval of Minutes of Remote Meeting Held on March 31, 2022**

Two corrections of the minutes have been requested.

First, Dana Yankowitz Elliott requested a change in the final paragraph of (3)(D) (the report on the meeting of the Bankruptcy Committee). She requested that the language "The Bankruptcy Committee also supports the proposed amendment to Rule 7001(1)" be changed to "The Bankruptcy Committee continues to receive informational updates on the status of the proposed amendment to Rule 7001(1)" and that the language "and remains available should the Advisory Committee wish to refer any matters related to *Fulton* for the Bankruptcy Committee's feedback or input" be added at the end of the paragraph. The minutes as so amended were approved by motion and vote.

Second, in the report by Judge Catherine McEwen on the meeting of the Advisory Committee on Civil Rules in (3)(C), the second paragraph should be deleted. The proposed change is being made to Criminal Rule 16, not Civil Rule 16, and is not relevant to the bankruptcy rules. All remaining paragraphs in her report should be renumbered.

With those changes, the minutes were approved.

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

(A) ***June 7, 2022 Standing Committee Meeting***

Judge Dow gave the report.

(1) **Joint Committee Business**

(a) ***Emergency Rules***. The Standing Committee gave final approval to the proposed new and amended rules addressing future emergencies, including new Bankruptcy Rule 9038.

(b) ***Juneteenth National Independence Day***. The Standing Committee also gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform, adding Juneteenth National Independence Day to the lists of specified legal holidays.

(c) ***Pro Se Electronic Filing Project***. Professor Catherine Struve provided the Standing Committee a status report on the working group meetings on the suggestions related to electronic filing by self-represented litigants. She stated that the working group would be meeting again during the summer and would hope to present

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topics for discussion at the fall meetings of the advisory committees.

(2) **Bankruptcy Rules Committee Business**

The Standing Committee provided final approval on seven items and approved four others for publication for public comment.

Final Approval

(a) ***Restyling***. Judge Dow presented for final approval Parts III through VI of the restyled Rules. He noted that the Advisory Committee received extensive comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. The Standing Committee approved the proposed restyled Rules in Parts III through VI.

(b) ***Rule 3011***. The Standing Committee gave final approval to the proposed amendment to Rule 3011. The amendment adds a subsection to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code.

(c) ***Rule 8003***. The Standing Committee approved the proposed amendment to conform the rule to the recent amendments to Fed. R. App. P. 3.

(d) ***Official Form 101***. The Standing Committee gave final approval to amendments to the individual debtor petition form, concerning other names used by the debtor over the past 8 years.

(e) ***Official Forms 309E1 and 309E2***. The Standing Committee gave final approval to the amendments to the forms used to give notice to creditors after a bankruptcy filing. The amendments improve the formatting and applicable deadlines.

(f) ***Official Form 417A***. The Standing Committee approved amendments to the form to conform to the amendments to Rule 8003.

Publication for Public Comment

(a) ***Restyled Rules for Parts VII – IX***. The Standing Committee approved for publication for public comment the proposed restyled rules in Parts VII – IX.

(b) ***Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006***. The Standing Committee approved for publication for public comment an amendment to the rule that would require filing the certificate of completion of a course on personal financial management rather than a statement. Conforming amendments in rules 4004, 5009 and 9006 were also approved for publication.

(c) ***Rule 8023.1***. The Standing Committee approved for publication for public comment a new Rule 8023.1 concerning substitution of parties.

(d) ***Official Form 410A***. The Standing Committee approved for publication for public comment amendments to the attachment to the proof-of-claim form that a creditor with a mortgage claim must file.

Information Item

Judge Dow also reported on changes that would be required to forms upon anticipated enactment of the Bankruptcy Threshold Adjustment and Technical Correction Act.

(B) ***Oct. 13, 2022, Meeting of the Advisory Committee on Appellate Rules***

The next meeting of the Appellate Rules Advisory Committee will be on Oct. 13, 2022, in Washington, D.C. and the report will be made at the spring meeting.

(C) ***Oct. 12, 2022, Meeting of the Advisory Committee on Civil Rules***

The next meeting of the Civil Advisory Committee will be on Oct. 12, 2022, in Washington, D.C. and the report will be made at the spring meeting.

(D) ***June 7, 2022, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

The Bankruptcy Committee met in June in Denver. It will meet again on December 8-9, 2022, in Washington, D.C.

Legislative Proposal Regarding Emergency Authority and Proposed Rule 9038

The Bankruptcy Committee has been updated by Judge Connelly on the status of proposed Rule 9038, which the Standing Committee has recommended to the Judicial Conference for final approval. The Bankruptcy Committee appreciates the Rules Committee's work on this important effort.

Just as the Rules Committee was considering rules amendments under the CARES Act to deal with future emergencies, in spring 2020, the Bankruptcy Committee developed a legislative proposal to extend statutory deadlines during the pandemic, which the Judicial Conference adopted. Unfortunately, Congress did not take any action on the legislative proposal, and on recommendation from the Bankruptcy Committee, the Conference rescinded the legislative proposal in March 2021.

The Bankruptcy Committee may still consider a broader legislative proposal after the COVID-19 emergency subsides and courts resume normal operations. The broader proposal would likely provide a permanent grant of authority during an ongoing emergency and could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. Just like the narrower proposal that was tied to the COVID-19 emergency, the permanent grant of authority would not extend to the Bankruptcy Rules. The Bankruptcy Committee does not have any legislative proposal currently under consideration, but if and when it does consider a proposal related to emergency authority, it will coordinate closely with the Rules Committee to ensure that there is no conflict or overlap with Proposed Rule 9038 (if adopted) or otherwise.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

At its December 2021 and June 2022 meetings, the Bankruptcy Committee considered certain structural concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys. It also solicited feedback on these concerns from the AO's Bankruptcy Judges and Bankruptcy Clerks Advisory Groups.

Current law prohibits post-petition collection of unpaid attorney fees for representing a chapter 7 debtor. Chapter 7 debtors' attorneys have developed several methods to ensure that they are paid for their work, including bifurcation of their fees and services under separate prepetition and post-petition agreements. Bankruptcy courts, in turn, have spent considerable time in otherwise straightforward chapter 7 cases wrestling with the legality of, and appropriate parameters for, these payment structures. Rulings on whether and to what extent these arrangements are allowed are inconsistent around the country.

To address these issues, the Bankruptcy Committee considered a number of potential statutory and non-statutory fixes originally proposed in the Final Report of the American Bankruptcy Institute's Commission on Consumer Bankruptcy, and ultimately recommended that the Judicial Conference seek legislation to amend the Bankruptcy Code to (1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees.

If the Conference adopts the legislative position and Congress enacts amendments to the Code based on this position, conforming changes to the Bankruptcy Rules would be required.

City of Chicago v. Fulton

The Bankruptcy Committee continues to receive informational updates on the status of the proposed amendment to Rule 7001(a) that responds to issues raised by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton* and remains available should the Rules Committee wish to refer any matters related to *Fulton* for the Bankruptcy Committee's feedback or input.

With respect to the attorneys' fee proposal, Judge Dow asked whether a bankruptcy judge would have to approve fees in every case. Judge Isicoff said the details would have to be worked out, but she contemplated that the courts would adopt something like the practice in chapter 13 cases, a no-look rule if the fees were within certain guidelines. Judge Dow noted that Judge Isicoff is a leader in this area, having authored a leading opinion on the topic.

Subcommittee Reports and Other Action Items

4. **Report by the Consumer Subcommittee**

(A) ***Consider changes to proposed amendments to Bankruptcy Rule 3002.1 in light of public comments***

Professor Gibson provided the report.

After presenting the Subcommittee's preliminary reactions to the comments to the Advisory Committee at its last meeting, the Subcommittee has met several times and now recommends a revised amended Rule 3002.1 to the Advisory Committee, which the Subcommittee believes is responsive to the comments.

The key changes to the published draft are as follows:

In subdivision (b) the Subcommittee recommended changing the order of former (b)(2) and (b)(3) and making optional the provisions for annual notices of HELOC-payment changes. This is also responsive to comments suggesting that the rule was not authorized by the Rules Enabling Act. Other changes include a clarification of the amounts of the next two payments following an annual notice and the addition of an explicit exception for HELOCs in (b)(1). Professor Gibson noted that the except clause in (b)(1) should be modified to limit it to the time period for notice, not the service requirement. Judge Connelly suggested reversing the sentences so the time period exception comes after the service requirement in (b)(1) so the first sentence would provide "The notice must be served on: [list]". Professor Struve suggested a slight modification to the structure of the second sentence to provide "Except as provided in (b)(2), it must be filed and served at least 21 days before the new payment is due."

The Subcommittee recommended several changes to (b)(4) in response to comments. A service requirement is added, and the effective date of a payment change when there is no objection is clarified. The references to § 1322(b)(5) is deleted.

Changes to (b)(1), (c), (d) and (e) are primarily stylistic.

The Subcommittee recommended significant changes to (f), which was the subject of most of the critical comments upon publication. The Subcommittee recommends that (1) the midcase review be made optional rather than mandatory, (2) it be initiated by either the trustee or the debtor, (3) it could be sought at any time during the case rather than just between 18 and 24 months after the petition was filed, but the committee note suggests that it should be used only when necessary and appropriate for carrying out the plan, and (4) it would be initiated by motion,

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rather than notice. The claim holder would have an obligation to respond only if the claim holder disagreed with the facts set forth in the motion. A sentence was added to authorize the court to enter an order favorable to the moving party if the claim holder does not respond.

Judge Kahn suggests that the language in (f)(3) should contemplate that the court should be able to enter an order even if a claim holder filed a response agreeing with the facts set forth in the motion. The sense of the Advisory Committee was favorable to amending the language to say, "If the claim holder does not respond to the motion or files a response agreeing with the facts set forth in it, the court may enter an order favorable to the moving party based on those facts."

Judge Isicoff asked whether the motions must be served under Rule 7004. Judge Dow said that the amended rule does not so require, and Professor Gibson said that this question is not addressed by the current rule. Judge McEwen suggested that courts may want to impose a Rule 7004 service rule because of the way the mortgage servicing industry works. Judge Connelly said that this was not addressed and should be left to the courts. Judge McEwen suggested adding something to the committee note inviting courts to address the issue. Deb Miller said requiring Rule 7004 service for these motions would be a considerable expense to the trustee. No change was suggested by the Advisory Committee in response to this discussion.

The revised proposal consolidates all end-of-case determination provisions in a single subdivision (g). The Subcommittee recommended that the current procedure of (f)-(h) be retained, with some changes to make it more effective. The procedure would be initiated by a notice rather than a motion and would have to be filed within 45 days after the debtor completed all payments due to the trustee under the plan. The claim holder would be required to file a response to the notice. The time limits for both the notice and response would be longer than under the current rule, and Official Forms would be created for both filings.

If either the trustee or the debtor wanted a court determination of whether the debtor had cured any default and paid all required postpetition amounts, either could file a motion for a court determination. The Subcommittee recommends that the rule not specify what should be in the court's order, but a Director's Form could be created for this purpose.

Deb Miller stated that the midcase motion to determine status will address the concern that there was no vehicle to allow the debtor's attorney or trustee to determine whether payments were current before the end of the case.

In (h), the Subcommittee recommends two changes in response to comments. One is to insert the word "as" in the first sentence, as in the existing rule. The second is to provide authorization for noncompensatory sanctions in appropriate circumstances.

Changes were made to the committee note to reflect these changes.

Judge Dow stated that he was pleased with the process and comfortable with the modified rule. Judge Kayatta suggested changing "the effective date of the new payment" to "the effective

date of the new payment amount" in the first paragraph in (b)(3). The Committee agreed. He also questioned whether using a cross-reference to (b)(1) for the parties to be served was appropriate if the debtor was doing the service, but the conclusion was that the cross-reference worked in that case.

The Subcommittee recommended that this revised amended version of the rule be recommended to the Standing Committee for republication. Although all changes are responsive to comments and republication may not be necessary, the Subcommittee concluded that republication would be helpful and some new provisions, like the explicit authorization of noncompensatory sanctions, might attract significant comment. Because the Forms Subcommittee must review the implementing forms in light of the comments and proposed changes to the rule, the Subcommittee recommended that the revised rule not go to the Standing Committee until June 2023. Judge Bates agreed that republication is appropriate.

Judge Bates asked what changes are being made pursuant to the comments today. Judge Dow said he was comfortable with Professor Gibson making changes in response to the comments, and asked her to identify and repeat the substance of the changes before the Advisory Committee voted on the rule.

The Advisory Committee recommended that the revised rule be sent to the Standing Committee for republication at the June 2023 meeting of the Standing Committee.

(B) ***Consider amendment to Rule 5009(b) (Suggestion 22-BK-D)***

Professor Gibson provided the report.

Professor Laura Bartell submitted Suggestion 22-BK-D, which arises out of research she has conducted concerning individual debtors emerging from bankruptcy without a discharge because of their failure to timely file a statement of completion of a course on personal financial management. In order to reduce the number of these cases, she suggested that the timing of the notice under Rule 5009(b), which reminds the debtor of the need to file documentation of course completion, be moved up to just after the conclusion of the meeting of creditors. This suggestion was considered by the Subcommittee during its August 12 meeting.

Professor Bartell examined all the chapter 7 and chapter 13 cases filed in 2019 on the interactive Federal Judicial Center Integrated Database. She discovered that over 6400 cases—primarily in chapter 7—were closed without a discharge because of the failure to submit a statement of completion of a course concerning personal financial management.

Professor Bartell suggested that, to reduce the number of cases where this problem occurs, the Rule 5009(b) notice should be sent just after the conclusion of the § 341 meeting, rather than 45 days after the first date set for that meeting, and that, to the extent possible, a specific filing deadline be stated.

The Subcommittee shares Professor Bartell's desire to reduce the number of individual

debtors who go through bankruptcy but do not receive a discharge because they either fail to take the required course on personal financial management or merely fail to file the needed documentation of their completion of the course.

The issue for the Subcommittee then was whether sending the Rule 5009(b) notice earlier in the case will increase its effectiveness and thereby decrease even further the number of noncompliant debtors in chapter 7 and 13 cases. Professor Bartell suggested that it will do so because at the conclusion of the meeting of creditors debtors will be focused on their bankruptcy case and likely to still be in contact with their attorneys and reachable by the court.

Additionally, the Subcommittee discussed what should be the timing of an earlier notice. Members concluded that the date should not be expressed as a number of days after the conclusion of the meeting of creditors for two reasons. First, the meeting may be continued and not concluded until after the deadline for filing the certificate of course completion. Second, the clerk's office is generally not aware of when the meeting of creditors concludes. The Subcommittee therefore discussed moving up the time of the Rule 5009(b) notice to a number of days after the filing of the petition or after the first date set for the meeting of creditors. It did not settle on a date, however.

To inform the Subcommittee's decision, Ken Gardner offered to gather information from his staff about when filings in his district occur under the current rule in relation to when the Rule 5009(b) notice is sent. His office sends the notice 90 days after the case is filed. About 85% of debtors comply with the initial notice. Sixteen percent of debtors fail to file within the 45 days. Most filed within 20 days after the reminder. Ninety-five percent of debtors actually file before the case was closed.

The Subcommittee discussed other possibilities like sending two notices, and whether chapter 13 cases should be included. The Subcommittee invited comments from the Advisory Committee.

Judge Isicoff thought chapter 13 should be included. Judge Kahn said that the deadline for filing the certificate should perhaps be moved up, not just the timing for the notice. Professor Gibson noted that the Advisory Committee had previously extended the deadline for filing, thinking it would be advantageous to debtors. Judge McEwen suggested that the course should be taken as early as possible to give debtors the advantages of its content. Judge Connelly said that when the deadline was earlier, more debtors failed to comply. Judge Kahn said perhaps the deadlines should be different for chapter 7 and chapter 13, because chapter 7 is so much shorter. Ken Gardner said that anything we can do to help debtors get their discharge is desirable. A reminder notice is definitely effective. Perhaps a reminder notice should be sent after a plan confirmation in a chapter 13, and after the § 341 meeting for a chapter 7.

The Subcommittee will continue to consider these issues.

6. **Report by the Forms Subcommittee**

(A) ***Consider Suggestion 22-BK-E to amend Forms 309A and 309B to include the deadline for the debtor to file the certificate of completion evidencing completion of the required financial management course.***

Professor Gibson provided the report. Professor Bartell suggested that the forms providing notice of a bankruptcy filing by an individual debtor in a chapter 7, 11, or 13 case be amended to include a provision notifying the debtor of the obligation to file a certificate of completion of a course on personal financial management and stating the filing deadline.

The Subcommittee concluded that the proposed amendment should be made only to the chapter 7 forms – Official Form 309A and 309B – both because the debtors who file under chapter 7 are the most likely to fail to complete the course by the required deadline and because only in chapter 7 is the deadline known at the time the notice is sent out.

Ramona Elliott noted that the vast majority of credit counseling agencies file the certificate, and the language might be interpreted to impose an additional duty on the debtor when the course provider is filing the certificate. Judge Donald asked why the approval process for course providers cannot require them to file the certificate. Ms. Elliott said that changing the approval rules would require a formal rule change. Judge Connelly suggested the language say the debtor must file the certificate "unless the provider has done so." Tara Twomey agreed that this language would be more understandable to the debtors.

The Advisory Committee recommended the amended form and committee note with that change to the Standing Committee for publication.

(B) ***Consider Suggestion 22-BK-C for amendment to OF 410 concerning the Uniform Claim Identifier field.***

Professor Bartell provided the report. The Advisory Committee received a suggestion from Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, that part 1, Box 3 of Official Form 410 be modified to change the line referring to the uniform claim identifier so that it is no longer limited to use in chapter 13. The Subcommittee concluded that the suggestion should be adopted, but expanded even further to permit use of the uniform claim identifier not only in cases filed under all chapters of the Code, but also for payments made other than electronically. Use of the uniform claim identifier remains completely voluntary.

The Advisory Committee recommended the amended Form 410 and the committee note to the Standing Committee for publication.

6. **Report of the Privacy, Public Access, and Appeals Subcommittee**

(A) ***Consider Recommendation to Publish an Amendment to Rule 8006(g)***

Judge Ambro described some of the background on the proposal for direct appeals. Professor Bartell provided the report. At the last meeting of the Advisory Committee, the Subcommittee recommended amendments to Rule 8006(g) suggested by Bankruptcy Judge A. Benjamin Goldgar to make explicit what the Subcommittee believed was the existing meaning of the rule – that any party to an appeal may submit a request to the court of appeals to accept a direct appeal under 28 U.S.C. § 158(d)(2).

At the spring Advisory Committee meeting Professor Struve expressed concern about the interplay between Rule 8006(g) and Fed. R. App. P. 6(c). She suggested that the amendment to Rule 8006(g) be recommitted to the Subcommittee with the recommendation that the Subcommittee work with the Advisory Committee on Appellate Rules to ensure that the two rules work in tandem. The Advisory Committee followed that recommendation.

The reporters for the Bankruptcy Rules Committee and the Appellate Rules Committee conferred and developed coordinated proposals. Although the Appellate Rules Committee will not meet until after the Advisory Committee meeting, Professor Edward A. Harnett intends to present the draft amendments to Rule 6(c) to the Appellate Rules Committee at its next meeting.

The Advisory Committee recommended the proposed amendments to Rule 8006(g) and committee note to the Standing Committee for publication, conditional on the Appellate Rules Committee approving modifications to the appellate rules consistent with the prior discussions among the reporters.

7. **Report of the Restyling Subcommittee**

Judge Krieger congratulated Judge Dow on his leadership of the Advisory Committee. She noted that we are nearing the end of the process, and wanted to praise the efforts of the Subcommittee members, the reporters, and the Administrative Office personnel who worked on this project.

Professor Bartell then gave the report. Parts III-VI were given final approval by the Standing Committee at its meeting in June. Parts VII-IX were published for comments August 15, and comments will be considered at the next meeting of the Advisory Committee.

Since the restyling process has begun, some of the rules that were restyled have been amended substantively in a way that has already become effective or will become effective before the restyled rules are finalized. The Subcommittee has looked at all these rules and has approved the revisions to the amended restyled rules. It does not believe that any of the amendments require republication.

The style consultants are working on a "top-to-bottom" review of the restyled rules (both amended and not) for consistency and any final style changes. All those comments will be reviewed by the Subcommittee and presented to the Advisory Committee in connection with final approval of the restyled rules.

Professor Bartell again thanked the Subcommittee and the style consultants for their work on this project.

Scott Myers asked whether the Advisory Committee is comfortable that republication of the amended restyled rules is not necessary. The Advisory Committee was comfortable with the recommendation of the Subcommittee that republication is not necessary.

8. **Update on the Work of the Pro-Se-Electronic-Filing Working Group**.

Professor Struve gave the report. Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Staff Office and researchers from the Federal Judicial Center (FJC). By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted a study of current practices in various courts with respect to electronic filing and shared it with the working group.

Since 2018 the national rules on filing have set a default principle that pro se litigants can use electronic filing (CM/ECF) only if permitted by court rule or order. Sai has suggested flipping the presumption. John Hawkinson has suggested that in the absence of such a change the rules committees should consider setting reasonable standards for when permission should be granted.

The working group has been meeting on these suggestions and discussing both electronic filing and electronic service.

Electronic Filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access. Quantitatively, the FJC study found that, among the courts of appeals, five circuits presumptively permit CM/ECF access for non-incarcerated self-represented litigants, seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances). The researchers report that, based on the local rules, at least 9.6% of districts

"permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints); 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF." Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts. In courts that have explored alternative electronic routes for self-represented litigants' access, options include both electronic means for submitting filings to the court and electronic noticing programs.

Service on Registered CM/ECF Users

Because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable. Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Should service rules be amended to eliminate this redundant service requirement?

The Working Group invites comments from the various advisory committees. The rules might proceed at different paces for different sets of rules.

Professor Gibson emphasized that most of these electronic access rules do not apply to case-initiation filings. Self-represented debtors should not be able to file a petition through CM/ECF and get the automatic stay. Tara Twomey expressed the view that self-represented debtors should be given access to CM/ECF. Judge Dow said he could not understand why there should be a bar on electronic filing in his bankruptcy court when the district court allows it. Judge Kahn finds the arguments against electronic access unconvincing. Whether it is a physical filing or an electronic filing, the burden is the same on the court. Judge Dow sees this as the next big issue for the Advisory Committee. He also thinks paper service should not be required for those being served through CM/ECF. Ken Gardner said it is more work for the clerk's office if filings are made by paper rather than electronically, and requiring paper filing is discriminatory. Judge McEwen said that when filings are tangible the debtors may claim they are stolen or treated improperly. But she is also concerned about how to deal with self-represented litigants who file improper papers. Judge Bates asked why that is different with paper filings and electronic filings, and said that the system has methods to deal with improper filings. Judge McEwen said that in her district the clerk's office does not accept improper paper filings and requires the debtors to come pick them up. Judge Kahn says that all litigants file things they should not, and we have tools to deal with that. Tara Twomey noted that the U.S. postal service is not operating efficiently right now, and the service issue is critical. Ken Gardner said that the rules require the clerk to accept everything presented for filing. Judge Connelly said access to a courthouse is a barrier if you are in a rural area. Allowing electronic access is important. And if there are multiple courthouses in a district, pro se litigants don't know what address to use. Judge

Krieger said there has been a lot of development of CM/ECF over time, and security has improved dramatically. But there are circumstances where the pro se litigant includes information that should not be publicly disclosed that could harm them or third parties. She asked, who decides what information gets into the public record?

Professor Struve said that this discussion is exactly what she hoped to gain from this meeting. Judge Dow said that the Advisory Committee is on board with the project of advancing the goal of increased electronic filing and service by self-represented litigants and looks forward to participating in the process of rules amendments over time to deal with the issue. Professor Gibson was pleased to hear the enthusiasm for electronic filing from the Advisory Committee.

9. **Future meetings**

The spring 2023 meeting has been scheduled for March 30 (and tentatively, March 31), 2023 in West Palm Beach, FL.

10. **New Business**

There was no new business.

11. **Adjournment**

The meeting was adjourned at 12:35 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. Forms Subcommittee

   (A) Recommendation of no action regarding suggestion 22-BK-B to amend certain versions of Form 309 to provide the deadline for filing an objection under Rule 1020(b).

2. Business Subcommittee

   (A) Recommendation of no action regarding suggestion 22-BK-F from Giuseppe Ippolito to amend Rule 7012(b).

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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

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA BUEHLER CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

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

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2022

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on Oct. 12, 2022. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are attached.

Part I of this report presents one item for action at this meeting. Based on the work of its Discovery Subcommittee, the Advisory Committee presents a preliminary draft of amendments to Rules 26(f) and 16(b) to address concerns about compliance with the "privilege log" directive of Rule 26(b)(5)(A). The Advisory Committee proposes that this preliminary draft be published for public comment in August 2023. It is being presented to the Standing Committee now because the Advisory Committee has concluded that it is ready for publication.

Part I also includes reports on two intercommittee projects that have received substantial attention from the Civil Rules Advisory Committee and other rules committees over the last few years, including considerable research efforts by the Federal Judicial Center Research Division. These efforts addressed the possible need to amend Rule 42 to deal with the timing of appeals in consolidated cases, and a reconsideration of the end-of-the-day e-filing practice. Based on this work, the Advisory Committee has concluded that these projects should be dropped from the agenda, and it is so recommending to the Standing Committee.

Part II provides information regarding ongoing subcommittee projects. The MDL Subcommittee, now headed by Judge R. David Proctor (a former member of the Judicial Panel on Multidistrict Litigation), continues its work on the Rule 16.1 approach that was introduced as an information item during this committee's June meeting. A newly formed Rule 41(a) Subcommittee is addressing concerns (raised by Judge Furman, a former member of this committee, among others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the courts.

Part III describes new or continuing work on a variety of other topics: (A) possible revision of Rule 7.1 regarding disclosure of possible grounds for recusal; (B) possible revision of Rule 45 regarding methods for serving a subpoena; (C) consideration of Rule 55's command that in some circumstances the clerk "must" enter default or a default judgment; (D) possible revision of the rules regarding jury demands; (E) possible rule revisions regarding ifp status; (F) issues raised by an Eleventh Circuit panel opinion regarding "incentive awards" for class representatives; and (G) rule clarifications regarding filing in court under seal.

Part IV identifies matters the Advisory Committee has concluded should be removed from its agenda. One concerns Rule 63's direction that a successor judge "must" sometimes obtain live testimony from witnesses who testified in a trial originally heard before another judge. Another seeks a change in Rule 17(a), seemingly designed to ensure that the proposer is not limited by district judges in Missouri in his efforts to litigate as the real party in interest on behalf of an incompetent plaintiff.

I. Action Items

A. For publication: Amendments to Rule 26(f) and Rule 16(b) to call for development early in the litigation of a method for complying with Rule 26(b)(5)(A)

These amendment proposals deal with what is called the "privilege log" problem. These issues were first brought to the Advisory Committee's attention in mid-2020 by the Lawyers for Civil Justice, and supported by attorney Jonathan Redgrave. These original submissions urged that Rule 26(b)(5)(A) be rewritten to endorse identifying materials withheld on grounds of privilege by category rather than one-by-one.

As explained below, the Discovery Subcommittee carefully examined these ideas and also competing arguments for requiring document-by-document logging in all instances, and

eventually concluded that the better course would be to direct that the parties address these questions in their discovery-planning conference under Rule 26(f) and include that feature in their discovery plan for the case.

Before 1993, Rule 26(b)(1) exempted privileged materials from discovery, and Rule 26(b)(3) did the same for work product materials, but no rule required producing parties to declare that they had withheld responsive materials, much less provide any details about those materials or the ground for declining to produce them.

Rule 26(b)(5)(A) addressed that problem and directed that a producing party must expressly state that responsive materials had been withheld on grounds of privilege and describe the materials in a manner that would "enable other parties to assess the claim." The committee note to the amendment said that the method of providing such particulars could vary depending on the circumstances of the given case.

Despite that comment in the committee note, some courts adopted for practice under Rule 26(b)(5)(A) the "privilege log" idea that had originally developed in litigation under the Freedom of Information Act. In many cases, that approach worked reasonably well, but in some it imposed considerable burdens.

These burdens escalated as digital communications supplanted other means of communication. The volume of material potentially subject to discovery escalated, and the cost of preparing a privilege log for all of them also escalated. Nevertheless, there were also regular objections that these very expensive and voluminous lists did not really provide the needed information.

As noted above, the initial 2020 amendment proposals urged that the rule should provide that it was sufficient for the producing party simply to identify "categories" of materials withheld on grounds of privilege. The burdens of current privilege log practice were emphasized.

A new Discovery Subcommittee (chaired by Chief Judge David Godbey, N.D. Tex., and including Magistrate Judge Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, and Clerk of Court Representative Carmelita Shinn) was formed and it began intense work on this project.

After several online meetings, the Discovery Subcommittee concluded that it should informally solicit comments on the issues raised. Accordingly, in June 2020, it issued an informal invitation for comment on the general problem of compliance with Rule 26(b)(5)(A) and also on three possible rule-amendment approaches to these issues:

- Revising Rule 26(b)(5)(A) to indicate that document-by-document listing is not routinely required, and also to refer in the rule to the possibility of describing categories of documents that need not be identified;

- A revision to Rule 26(f)(3)(D) directing the parties to discuss the method of complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in the scheduling order;
- A revision of Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents, or alternatively to list in the rule "categories" of documents that need not be identified.

In response to this invitation, the Subcommittee received more than 100 written comments. The comments took a variety of positions and raised a variety of issues, which were described in summaries included in the agenda book for the following Advisory Committee meeting. A number supported the concerns identified in the original submissions to the Advisory Committee. Others (including one from a state bar association) urged that Rule 26(b)(5)(A) be amended to require document-by-document listing in every case.

In addition, the Subcommittee received presentations from members of the National Employment Lawyers' Association, the American Association for Justice, and the Lawyers for Civil Justice about experience under current Rule 26(b)(5)(A). Retired Magistrate Judge John Facciola (D.D.C.) and Jonathan Redgrave also organized a two-day Symposium on the Modern Privilege Log that was attended (virtually) by members of the Subcommittee.

This extensive input made a number of things clear. One was that there seemed to be a rather pervasive divide between what might be called the "requesting" and "producing" parties. The former frequently argued that detailed logs were critical to permit effective monitoring of withholding on grounds of privilege and leveled charges of frequent over-withholding. Attorneys who routinely made production demands urged that without the detail provided by document-by-document logs they could not evaluate privilege claims, and also reported that producing parties often abandoned claims of privilege when those were challenged, and that judges often rejected the claims even when they were not abandoned.

Attorneys who are usually on the producing side emphasized the great cost and difficulty of creating logs, even when the other side thereafter pronounced them inadequate. From their perspective, too often requesting attorneys used the privilege log expectation as a club, either to obtain a desired concession in regard to other discovery or to impose added costs on the producing parties. They also emphasized that it was often possible to devise categories of materials that could be exempted from any listing requirement in light of the issues involved in a given case, thereby reducing the burden of logging.

As noted above, another point was that there was great variety in the cases governed by Rule 26(b)(5)(A). The original proposals for amendment came from those mainly involved in commercial litigation and often focused mainly on the attorney-client privilege and work product protection. But the comments submitted in response to the invitation for public comment showed that the rule was important in very different sorts of cases. One example raised in several comments was the excessive force suit against the police. Such cases might involve very different privileges from those that matter in commercial litigation, meaning that the information pertinent to privilege claims would perforce be different. Another category brought to the Subcommittee's attention due

to the public comment already received was medical malpractice — again involving a very different set of privilege criteria.

Yet another point that emerged from this study was the recurrent reality that delivery of a privilege log shortly before the close of discovery could be a recipe for chaos. Resolving any privilege disputes that emerged only at that point could disrupt trial preparation or require that discovery be redone. It would be far better to unearth these issues early on, permitting the parties to work them out or, at least, get them resolved by the court in a timely manner.

Perhaps the most pertinent point was that one size would not fit all cases. Some cases involved only a limited number of withheld documents; for those cases a "traditional" document-by-document privilege log might work fine. Depending on the nature of the privileges likely to be asserted, the specifics necessary in one case might have little to do with the specifics important in another case. Often the type of materials involved and the manner of storage of those materials could bear on the information needed to evaluate a privilege claim.

Taking account of these aspects of the information it obtained through its outreach, the Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose solution to the variegated problems of claiming privileges with regard to variegated materials would not work. Instead, a consensus emerged that the most beneficial rule amendment would be one that would make the parties focus on the best method for compliance for their case carefully at the outset of litigation and also that they apprise the court of their proposed timing and method for complying with the rule. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee became convinced that these small additions to Rules 26(f) and 16(b) promise to significantly reduce difficulties that have occurred due to the requirements of Rule 26(b)(5)(A).

At its October 2022 meeting, the Advisory Committee unanimously recommended publication for public comment of the preliminary draft of the rule amendments set out below (with a slight revision proposed by the Style Consultants).

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

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(f) Conference of the Parties; Planning for Discovery

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(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

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(D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the timing and method for complying with Rule 26(b)(5)(A) and</u> — 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.

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DRAFT COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Those logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

This amendment provides that the parties must address the question how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.

This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials, and to prompt creativity in designing methods that will work in a particular case. One matter that may often be valuable is candid discussion of what information the receiving party needs to evaluate the claim. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility. The 1993 committee note explained:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Despite this explanation, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens. And the growing importance and volume of digital material sought through discovery have compounded these difficulties.

But the Committee is also persuaded that the most effective way to solve these problems is for the parties to develop and report to the court on a practical method for complying with Rule 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials sought, and the range of pertinent privileges.

In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials.

As suggested in the 1993 committee note, in some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. Suggestions have been made about various such approaches. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A). One technique that the parties might discuss in this regard is whether some sort of listing of the identities and job descriptions of people who sent or received materials withheld should be supplied, to enable the recipient to appreciate how that bears on a claim of privilege. Current or evolving technology may offer other solutions.

Requiring that this topic be taken up at the outset of litigation and that the court be advised of the parties' plans in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an accompanying listing of withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution. That resolution, then, can guide the parties in further discovery in the action. In addition, that early listing might identify methods to facilitate future productions.

Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Management.

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(3) ***Contents of the Order.***

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(B) *Permitted Contents.* The scheduling order may:

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(iv) include the timing and method for complying 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;

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DRAFT COMMITTEE NOTE

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words — "and management" — are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes between themselves, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case — type of materials being produced, volume of materials being produced, type of privilege or protection being invoked, and other specifics pertinent to a given case — there is no overarching standard for all cases. For some cases involving a limited number of withheld

items, a simple document-by-document listing may be the best choice. In some instances, it may be that certain categories of materials may be deemed exempt from the listing requirement, or listed by category. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide constructive involvement early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.

B. Rule 42 Consolidation and Appeal Status — Recommendation to Dissolve Joint Subcommittee

Rule 42(a) came onto the Advisory Committee's agenda after the Supreme Court decided in *Hall v. Hall*, 138 S.Ct. 1118 (2018), that when separate actions are consolidated under that rule, the time to appeal begins to run in any of the consolidated actions when a final judgment is entered in that action, without regard to the fact other consolidated actions remain pending in the district court. The Court had earlier made a similar ruling regarding MDL proceedings, holding that a final judgment in any action centralized in an MDL would be immediately appealable even though the MDL proceedings continued for the other actions transferred by the Panel on Multidistrict Litigation. *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015).

Before the *Hall v. Hall* decision, the courts of appeals had taken varying approaches to the timing of appeals in consolidated actions when one reached final judgment but others did not. Some adopted the interpretation later embraced by the Supreme Court — that separate actions are separate for purposes of timing of appeal whether or not they have been consolidated. Others took different approaches.

The Supreme Court recognized that a rule amendment could change its *Hall v. Hall* interpretation of the current rule, and premised its interpretation on what it found to have been practice in the federal courts regarding consolidated cases for more than 200 years. Thus, it was not a decision that articulated a principle that would stand in the way of a rule amendment to change the practice going forward. The Appellate Rules Committee also considered the question, noting concern about the risk of a trap for the unwary should the time to appeal elapse before a litigant knew the time was ripe.

An intercommittee Rule 42 Subcommittee (sometimes called the *Hall v. Hall* Subcommittee) was formed, chaired by Judge Rosenberg. It determined that it would be important to determine how frequently the *Hall v. Hall* type problem — final judgment entered in one consolidated action before other actions within the consolidation reached final judgment — and in particular whether it seemed that the rule announced in *Hall v. Hall* had or might have trapped some unwary litigants.

FJC Research undertook what turned out to be a very challenging empirical project to identify district court cases in which Rule 42(a) consolidation had occurred and then attempt to determine whether there was any indication that, before *Hall v. Hall*, the diverging interpretations of the timing rule had defeated appellate review where sought. The challenging problem was to

identify consolidated cases, which the federal courts do not track as a category. That meant that hundreds of thousands of cases had to be reviewed during the first phase of the research. Eventually it emerged that some 2.5% of civil case filings seemed to involve a Rule 42(a) order, and that around 2% of those consolidated matters involved final judgments in some but not all consolidated cases. But in none of those cases was there a timeliness of appeal problem.

A second phase research effort was undertaken to examine post-*Hall* cases. This time, the focus was only on cases that were appealed, a much smaller number. It revealed that 3.5% of those cases involved Rule 42(a) consolidation. Among those consolidated cases, about 6% involved a final judgment in one but not all of the consolidated cases. Thus the number of cases that might present the *Hall v. Hall* problem was extremely small. But there was no instance in which appeal rights were lost under the *Hall v. Hall* rule.

The Subcommittee met via Zoom and concluded unanimously that there is no reason to proceed with an amendment to Rule 42(a). No problems with operation of the rule as interpreted by *Hall v. Hall* were found. Amending the rule to confirm what *Hall v. Hall* already said seemed not to be useful. Indeed, it might even introduce uncertainty because it might require specifying which district court actions that qualify as "consolidation" (e.g., "consolidation for all purposes," "consolidation only for pretrial purposes," "consolidation only for discovery," "consolidation only for trial") trigger a change in the timing of appeal. Accordingly, the unanimous Subcommittee decision was to recommend that the topic be dropped from the Advisory Committee agenda.

At the October 2022 Advisory Committee, there was some discussion of whether Rule 54(b) could be employed in a way that would address problems emerging from Rule 42 consolidation, but the many factors that may bear on invocation of Rule 54(b) make special treatment for consolidated actions a dubious proposition for rule amendment; existing Rule 54(b) could be employed in a single case or consolidated cases. And it might be needed only when consolidation is "for all purposes," something that may occur formally only rarely. While rule text might be devised to integrate the two, the FJC's finding that the basic problem does not actually arise in practice makes that effort seem unwarranted.

The Advisory Committee concluded without dissent to recommend to the Standing Committee that the joint subcommittee be dissolved without further work.

C. End of E-Filing Day — Recommendation That This Proposal be Dropped From the Agenda Unless Another Advisory Committee Suggests That the Deadline Should be Revised

The Time Project of 2009 amended Rule 6(a)(4)(A) to define the end of the last day for electronic court filings as "midnight in the court's time zone." The same definition was adopted in the Appellate, Bankruptcy, and Criminal Rules.

In response to concerns first emanating from the Appellate Rules Committee, an intercommittee effort was organized to consider whether to direct that filing be completed by some hour before midnight in the court's time zone on the last day when filings were due. One concern

was that permitting electronic filing until midnight interfered with family life. Surveys of lawyers (including DOJ lawyers) indicated a variety of opinions on this subject. There was considerable sentiment that permitting electronic filing until midnight might sometimes be conducive to a full family life, as the lawyer could eat dinner with family and, after dinner, complete and file the document.

Another aspect of this study has been to recognize that the operations of various courts may have particular local features that are not uniform across the federal court system but could affect filing practices. The system includes courts in a range of time zones, meaning that filing by midnight in some might be well after midnight in other districts (e.g., filing in Hawaii from D.C.). In addition, the ability to file after hours by non-electronic means can vary, as are the hours during which the clerk's office is open in various localities.

The Federal Judicial Center completed an extensive study included in the Advisory Committee's agenda book (supported by some 2,000 pages of appendices not included in the Advisory Committee's agenda book) of filing practices of lawyers and of various courts which does not suggest serious problems with the current arrangement. The FJC study does not take account of the impact of the COVID pandemic on the operations described in the study.

During the October 2022 meeting of the Civil Rules Committee, the Department of Justice representative confirmed that the Department prefers to leave the rule as it is. But it was noted that other rules committees might have different views; in particular, the Bankruptcy Rules Committee may have distinctive concerns.

At the same time, another view was that, due to the pandemic (which arose after this initiative began), attitudes on these matters have shifted. "Flexibility in the times that work best for each lawyer is important."

The Civil Rules Committee agreed without dissent that this proposal should be dropped from the agenda unless a problem of disuniformity arises due to a desire by another advisory committee to redefine the filing deadline.

II. Subcommittee Reports

A. MDL Subcommittee

The MDL Subcommittee was originally appointed in 2018 in response to submissions that emphasized how important MDL proceedings have recently become in the federal court system, and asserted that, particularly with regard to very large "mega" MDLs explicit provisions in the rules for those proceedings would be an important improvement.

In particular, the original proposals were that in "large" "personal injury" MDLs there should be fairly intense early "vetting" of claims to screen out "unsupportable" claims. It was also urged that opportunities for interlocutory review should be expanded at least for some highly consequential rulings in such cases. A.O. data were cited indicating that as many as one third or perhaps one half of all civil actions in the federal court system were the subject of a transfer order

by the Judicial Panel on Multidistrict Litigation, and that many of these individual actions seemed to remain pending for a considerably longer time than most other civil actions. In addition, it was asserted, defendants in "mega" proceedings found it impossible to obtain timely appellate review of critical "cross-cutting" decisions on matters such as preemption and admissibility of expert causation evidence. This inability, it was further asserted, actually impeded meaningful settlement discussions because defendants were resistant to making substantial settlement offers based on the decision of a single district judge.

Many of these assertions were vigorously rebutted, and the Subcommittee received numerous very thoughtful submissions on both sides of these issues, particularly interlocutory review. The Rules Law Clerk also did research on experience with interlocutory review pursuant to 28 U.S.C. § 1292(b) in MDL proceedings. Besides interlocutory review, many questions were raised about the most aggressive "vetting" proposals. Some of them resembled features of H.R. 985, passed by the House of Representatives in March 2017, which included uniform and very demanding requirements that claimants in "personal injury" MDLs present evidence of use of the product involved and also of the injury supposedly caused by the product early in the proceedings and that the court, without a defense motion, be required to evaluate those showings very promptly and dismiss all claims found wanting. FJC research indicated that it was very common to use a "plaintiff fact sheet" (PFS) in large MDL proceedings, but also that PFS requirements were tailored to the individual MDL and took considerable time to draft.

The original Chair of the MDL Subcommittee was Judge Robert Dow, and much of the time he chaired the Subcommittee it dealt with these initial issues. They were examined very carefully, including a number of conferences mainly focused on these topics. Some research suggested that the interlocutory review concern ought to be addressed through use of 28 U.S.C. § 1292(b). Eventually, the Subcommittee concluded that a special rule for interlocutory review in MDL proceedings would not be a positive addition to the Civil Rules.

In addition, it seemed difficult to define a subcategory of MDL proceedings that should be eligible for expanded interlocutory review. For example, trying to tie that treatment to the number of proceedings in a given MDL might be confounded if (as some have found) the number of actions in an MDL grew over time. In addition, the possibility that some putative actions might be on a "registry" could further complicate an effort to "count cases" in order to determine which proceedings should be subject to the special rules.

The "personal injury" dividing line also posed problems. One large MDL that seemed not to fit into that category was the *In re: Volkswagen "Clean Diesel"* MDL before Judge Breyer. Another recent example that might confound such a rule standard is *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL no. 3047, which the Panel assigned to Judge Gonzalez-Rogers (N.D. Cal.) on Oct. 6, 2022. These actions charge that various online platforms including Facebook, Instagram, and Google cause addiction and self-destructive behavior in adolescents, seemingly within the "personal injury" category. Whatever the merit of those allegations, it does not seem that the sort of evidentiary showing that might be useful in pharmaceutical or medical products MDL proceedings (e.g., evidence of use of the product involved and development of the specific adverse condition allegedly caused by the product)

would also be appropriate in this sort of MDL. So a uniform requirement of an evidentiary showing sought in pharmaceutical and medical device litigation would not seem readily to fit this MDL.

In short, though there certainly are a variety of MDL proceedings it does not seem that there is a "one size fits all" method of designing a rule-based evidence exchange regime that would be suited to all, or perhaps even most MDLs. Gradually, thinking shifted toward developing a rule provision that focused the court and the parties on the management issues that can effectively move MDL proceedings forward from an early point. One thing that did seem true was a variation of the old notion that "as the twig is bent, so grows the tree" — it can be essential for the court to take an active and informed role in early orientation of an MDL proceeding, and often it is important to focus on a number of issues in MDL proceedings that need not be addressed at the outset of most other actions.[1]

But the specifics of that management effort might vary considerably depending on the specifics of the given MDL proceeding. So the Subcommittee's thinking shifted from the initial focus on "vetting" and interlocutory review toward Rules 26(f) and 16(b), which set the scene for the court's judicial management role in civil litigation, and it produced a sketch of possible amendments to those rules to assist courts in managing MDL proceedings. At the Advisory Committee's March 2022 meeting, therefore, the amendment ideas presented in the agenda book had evolved from its starting point in 2018, focusing on possible changes to Rules 26(f) and 16(b)).

But further discussions and conferences raised doubts about whether the Rule 26(f)/16(b) route held promise. At least two serious problems emerged:

(1) Rule 26(f) conferences probably do not occur as part of MDL proceedings in the same manner the rule says they should occur in individual actions. If they have already occurred in some transferred actions, the rule does not call for them to occur again, but probably the scheduling order for that individual action no longer applies. And after transfer it would be chaotic to expect them to occur in individual actions in which they have not occurred (including later-filed and "tagalong" actions) on the schedule set out in the rule for individual actions.

(2) It would also be desirable to provide a role for the court to consider designating "coordinating counsel" to meet and confer about the topics on which the court needs

[1] The Subcommittee is aware than some multi-party actions not created by an MDL transfer order may also benefit from similar early organization, and expects to include a comment to that effect in a committee note should rulemaking move forward for MDL proceedings. There has been some discussion whether the rule ought to focus on "complex" cases rather than MDL proceedings. But defining "complex" in a rule sounds very challenging. Even the Manual for Complex Litigation does not really attempt a definition of complex litigation. See Manual for Complex Litigation (4th) § 10.11 (advising that "courts should have a method of advising the assigned judge immediately that a case is likely to be complex," but not offering specific criteria for making that identification). And the Introduction to this edition of the Manual acknowledges that the term "complex litigation" is not "susceptible to any bright-line definition." *Id.* at 1.

information prior to the initial case management conference. Otherwise, there may be unsupervised and possibly counterproductive jockeying among counsel.

Prompted by those concerns, the Reporters prepared a sketch of an alternative approach — a possible new freestanding Rule 16.1, directed only to MDL proceedings. The goal of this sketch is to prompt the convening of a meet-and-confer session among counsel before the initial post-transfer case management conference with the court. Such a conference can produce a report providing the court with the parties' views on issues the court may need to address in early case management orders. That sketch was reviewed by the Subcommittee during an online meeting and included in the Standing Committee's agenda book for its June 2022 meeting as an information item. That sketch (again presented below) offered two alternatives to the key provision regarding the required topics for discussion of counsel before the management conference with the court to organize the proceeding.

After the June 2022 Standing Committee meeting, the Subcommittee began to receive reactions to the Rule 16.1 sketch. In particular, on July 11, 2022, members of the American Association for Justice (AAJ) met via Zoom with the Subcommittee to discuss this new approach, and on August 1, 2022, members of the Lawyers for Civil Justice met with the Subcommittee to discuss the same topic. As presented below, both groups offered constructive reactions to the Rule 16.1 approach, though those approaches diverged in some ways.

In addition, further comments have been submitted. Professors Alan Morrison and Roger Trangsrud of George Washington University Law School submitted 22-CV-K, urging that important decisions not be made until permanent leadership counsel are selected, and John Rabiej (formerly head of the A.O. rules office) submitted 22-CV-N, urging that provisions in the rule sketch take account of provisions frequently encountered in management orders in large MDLs.

To introduce the issues, then, this report is in two parts. The first contains the sketch included in the Standing Committee agenda book for the June 2022 meeting. The second part, then, attempts to integrate the AAJ and LCJ reactions during the conferences that occurred before the Advisory Committee's October 2022 meeting, and to identify areas of agreement and disagreement in the presentations of those organizations. It bears emphasis that this attempt at integration reflects the Reporter's assessment and was not vetted with either AAJ or LCJ. As will be seen, the more detailed Alternative 1 in the sketch provided to the Standing Committee did not receive support from either AAJ or LCJ members, but both proposed revisions of Alternative 2.

As noted above, a very considerable proportion of civil actions now pending in the federal court system — perhaps more than half — are subject to a transfer order from the Judicial Panel on Multidistrict Litigation. To some extent, the huge numbers result from one or two enormous litigations; the 3M Earplug MDL pending before Judge Rodgers (N.D. Fla.) is the largest, but the Zantac MDL before Judge Rosenberg, now the Chair of the Advisory Committee, also involves thousands of claims, particularly when the "registry" of putative claims is included. Some have pointed out that there is no reference at all in the Civil Rules to these very important proceedings. Some critics even assert that MDL proceedings are a "rules free" zone.

Another key point is that it appears substantial progress has been made even if disagreements remain. Of course, neither the Subcommittee nor the full Advisory Committee is in any sense obligated to accept comments offered on its work, but a primary goal is to develop a rule, if one is to be adopted, that will work for the people who will need to make it work — experienced lawyers and judges handling MDL proceedings in the future. Unless that seems likely, it may be that rulemaking is not warranted. But as that question is addressed, it is useful to keep in mind Judge Chhabria's comments in *In re: Roundup Products Liability Litigation*, 544 F.Supp.3d 950 (N.D. Cal. 2021), urging this Committee to give serious consideration to providing rules for guidance of transferee judges and of counsel.[2]

During the Advisory Committee's October 2022 meeting, there was discussion about whether a rule is really needed, and concern about adopting a "one size fits all" rule ill-suited to many MDL proceedings, particularly those with a limited number of cases. One illustration is the idea of early designation of "coordinating counsel" to organize the required meeting of counsel before the first management conference with the court, and to submit a report to the court on the various topics to be addressed during the meet-and-confer session. One concern could be described as a "chicken/egg" tension — how can the court meaningfully choose among attorneys so early in the proceedings, but how effectively can designated coordinating counsel develop a useful report for the court if not ultimately appointed to the leadership position? One response to this concern was that the very process of organizing the cases may provide the court with important insights about the strengths of various potential candidates for leadership positions. But a competing concern is that such early designation could become de facto appointment of leadership counsel without the process that might be important in making that selection.

Discussion during the Advisory Committee meeting also addressed the choice between Alternative 1 and Alternative 2 in terms of whether rules should provide a "checklist," perhaps providing a basis for preferring a more general rule provision like Alternative 2. A competing consideration was that Alternative 1 can usefully focus the court on the various topics that regularly need early attention. A further potential advantage of having a rule is that it would provide guidance to judges and attorneys new to MDL practice. Another topic of discussion was the court's role in regard to settlement; unlike class actions, the court is not in a position to "approve" or

[2] Judge Chhabria was particularly focused on the common benefit orders often entered in MDL proceedings. As noted below, input the Subcommittee has received suggests trepidation among some in the bar about a rule dealing with such orders, or at least one that prompts early entry of such an order. Here is what Judge Chhabria said (*id.* at 953):

> The fact that counsel is even requesting such a far-reaching order — a request that has some support from past MDL practice — suggests that courts 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.

"disapprove" a settlement in MDL proceedings, but because settlement looms large in those proceedings it would be desirable to attend to it in Rule 16.1, if that is adopted.

After the October 2022 Advisory Committee meeting, representatives of the Subcommittee attended and made a presentation about the Rule 16.1 idea during the Judicial Panel's Conference for Transferee Judges at the end of October, including a special session devoted entirely to the Rule 16.1 sketch. These events provided extensive reactions to the Rule 16.1 sketch, and suggested that experienced transferee judges supported further consideration of an MDL rule and might prefer a model more like Alternative 1 (with its detail) than Alternative 2.

Further conferences are anticipated with the Lawyers for Civil Justice and American Association for Justice during upcoming meetings of those groups. Representatives of the Subcommittee expect to attend these events.

Meanwhile, the Subcommittee continues to refine its approach to the Rule 16.1 idea, including consideration of the views of the various groups that have offered reactions. The presentation below reflects what was before the Advisory Committee in October. The Subcommittee invites reactions from members of the Standing Committee. The questions whether it is advisable to propose a new Civil Rule, and if so what the rule should say, both remain open. But it may be possible to provide the Standing Committee with a preliminary draft of a Rule 16.1 amendment proposal at its June 2023 meeting.

1. Rule 16.1 Sketch Included in Standing Committee Agenda Book in June 2022

Rule 16.1. Multidistrict Litigation Judicial Management

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge, that judge may [must] {should} schedule [an early management conference] {one or more management conferences} to develop a management plan for orderly pretrial activity in the centralized actions.

(b) DESIGNATION OF COORDINATING COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} designate coordinating counsel to act on behalf of plaintiffs [and defendants in multi-defendant proceedings] during the pre-conference meet and confer session under Rule 16.1(c). [Designation of coordinating counsel does not imply any determination about the appointment of permanent leadership counsel.] {Such appointments are without prejudice to later selection of other permanent leadership or liaison counsel.}

Alternative 1

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to meet and confer through their attorneys or through coordinating counsel designated under Rule 16.1(b) before the initial conference under Rule 16.1(a). [The parties must discuss

and prepare a report to the court on the following:] {Unless excused by the court, the parties must discuss and prepare a report for the court on any matter addressed in Rule 16(a) or (b), and in addition on the following}:

(1) Appointment of leadership counsel, including lead or liaison attorneys, the appropriate structure of leadership counsel, and whether such appointments should be for a specified term;

(2) Responsibilities and authority of leadership counsel in conducting pretrial activity in the proceedings and addressing possible resolution, including methods for providing information to non-leadership counsel concerning progress in pretrial proceedings;

(3) Requirements for leadership counsel to report to the court on a regular basis [on progress in pretrial proceedings];

(4) Any limits on activity by non-leadership counsel;

(5) Whether to establish a means for compensating leadership counsel [including a common benefit fund];

(6) Identification of the primary elements of the parties' claims and defenses and the principal factual and legal issues likely to be presented in the proceedings;

(7) Whether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings;

(8) Whether a master [administrative] complaint or master answer should be prepared;

(9) Whether there are likely to be dispositive pretrial motions, and how those motions should be sequenced;

(10) The appropriate sequencing of [formal] discovery;

(11) A schedule for [regular] pretrial conferences with the court about progress in completing pretrial activities;

(12) Whether a procedure should be adopted for filing new actions directly in the [MDL] proceeding;

(13) Whether a special master should be appointed [to assist in managing discovery, discussion of possible resolution, or other matters]. [; and

(14) Any other matter addressed in Rule 16 and designated by the court.]

Alternative 2

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to meet and confer through their attorneys or through coordinating counsel designated under Rule 16.1(b) before the initial conference under Rule 16.1(a). Unless excused by the court, the parties must discuss and prepare a report for the court on [any matter addressed in Rule 16 (a) or (b),] {any matter addressed in Rule 16 and designated by the court,} and in addition on the following:

(1) Whether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings;

(2) Whether [leadership] {lead} counsel for plaintiffs should be appointed [and whether liaison defense counsel should be appointed], the process for such appointments, and the responsibilities of such appointed counsel, [and whether common benefit funds should be created to support the work of such appointed counsel];

(3) Whether the court should adopt a schedule for sequencing discovery, or deciding disputed legal issues;

(4) A schedule for pretrial conferences to enable the court to manage the proceedings [including possible resolution of some or all claims].

(d) MANAGEMENT ORDER. After an initial management conference, the court may [must] {should} enter an order dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

Notes on Committee Note

(1) This approach is limited to instances in which the Panel grants centralization under § 1407. A committee note can explain why MDL proceedings may present particular judicial management challenges, but also emphasize that such challenges are not true of all instances in which the Panel enters a transfer order or unique to MDL proceedings. Accordingly, it likely will be worth noting that many — perhaps most — MDL proceedings can be effectively managed without resort to Rule 16.1. At the same time, it could also emphasize that similar organizational efforts may be valuable in other multiparty litigation not subject to a Panel transfer order.

(2) Picking a verb: During the March 29 meeting, one thought was that something that says "should consider" is not really a rule, though something that says "must" surely is, and that saying "may" also fits into a rule. To take Rule 16 as a comparison, one could say that it partly adheres to the views expressed during the meeting. Thus, Rule 16(b)(1) says that the court must issue a scheduling order, and Rule 16(b)(3)(A) lists the required contents of that order. Then Rule 16(b)(3)(B) says that the scheduling order "may" also include lots of other things. Rule 16(c)(2), on the other hand, says that at a pretrial conference the court "may consider and take appropriate action on" a long list of things. Perhaps that authorizes action that was not clearly

within the court's authority when this rule was adopted in 1983, but it does not seem much stronger than "should consider." Probably a search through other FRCP rules would identify other instances in which it's difficult to say that the rule either commands action or provides explicit authority for an action that courts previously lacked. Probably the orientation to adopt is "may" for the court but to empower the court to direct that the parties "must" do the things the court directs.

(3) Timing: Rule 16(b)(2) sets a time limit for entry of a scheduling order, triggered by the time when a defendant has been served or appeared. One might insert a time limit in 16.1(a) after the Panel order, but that may not make sense. Moreover, since this is a discretionary rule (unless "must" is used) it would seem odd to have such a mandatory timing aspect.

As adopted in 1983, when case management was a new idea, Rule 16(b) included a time requirement in part to prod judges to act. It is not clear that we are trying to do that. Indeed, it may be that *some* such conference is held in virtually every MDL proceeding even though there is no rule saying there should be such a conference. So a time limit seems unnecessary, and it is hardly clear what the trigger for holding the conference should be. Entry of a Panel order might be considered. Until that order is entered, the transferee judge has no authority to act in this manner. And if something like Rule 16.1 were adopted, perhaps the Panel could call attention to it when it sends the transferee judge whatever introductory information it sends. Particularly given the possible need for the court to designate coordinating counsel to manage the meet-and-confer session that should precede the initial conference with the court, setting a specific time limit for that conference seems unwise.

(4) Rule 16.1(c) is designed to make the parties discuss and share their views with the court on the topics the judge often must address early in MDL proceedings. Before the judge is called upon to make early and perhaps very consequential calls on those things, the parties should be expected to present their positions on these matters. Perhaps the rule should say the parties must submit their report no less than *X* days before the court has scheduled the conference. But given the challenges of putting a time limit on the court's action discussed in (3) above, it is probably best not to try to build in a specific time requirement on this topic either. Alternatively, the rule could say that "unless the court directs otherwise" the report must be submitted *X* days before the initial conference.

The committee note could also observe that this sort of conference resembles a Rule 26(f) conference in some ways, but that the requirements of Rule 26(f) are not really suited to situations in which many separate actions are combined for pretrial treatment in a single MDL docket. In early-filed actions there may have already been 26(f) conferences before the Panel orders a transfer, and Rule 16(b) orders may have been entered in those actions. But it may be that some transferor judges have stayed proceedings in other cases upon learning that a Panel petition is in the works or has been filed. Pre-transfer Rule 16(b) orders are surely subject to revision by the transferee judge, and might often be vacated across the board. Coordinated pretrial judicial management is what should follow instead of a patchwork of scheduling directives for individual actions. Chaos could result from trying to adhere to scheduling orders entered by different judges in cases filed at different times, and might also prevent the benefits of combined pretrial proceedings section 1407 seeks to provide.

(5) Integrating Rule 16.1 with existing Rule 16: The sketch presents alternative approaches to integrating existing Rule 16 with a new MDL-specific Rule 16.1. As a general matter, the question may be whether to direct the lawyers to discuss everything in Rule 16(a) and (b) (excluding Rule 16(c) as being too broad, but also recognizing that Rule 16(b)(3)(B)(vii) invites almost anything under the sun), or to leave it to the court to add specified items from the list of topics in Rule 16.1(c). In that connection, it might be noted that existing Rule 16(b) orders in transferred cases would, in most instances, be superseded by orders of the transferee court. The add-on provisions of Rule 16.1 in no way override the court's authority to act in any way authorized by Rule 16. Rule 16.1(c) is designed to tee these issues up for the judge to make a considered decision whether to enter such orders on various topics.

(6) It may be suitable to limit Rule 16.1 to an initial management conference, in part because 16.1(b)(11) calls for the parties to address the need for and timing of additional conferences, and also because it seems that the main goal is to get this information before the judge at an orderly and informative initial management conference. If we are to maintain flexibility for the judge, it may be inappropriate to seem to direct that additional conferences occur, though it's likely the judge will find those useful and schedule them. On the other hand, on some matters (e.g., appropriate common benefit fund orders) it may be better to defer action for a period of time.

(7) Rule 16.1(b) coordinating counsel may not be needed in many MDLs, but when there are large numbers of counsel it may be critical. A committee note could reflect on the problems that can emerge if the court does not attend to what happens before the initial 16.1(a) management conference, and could mention the "Lone Ranger" and "Tammany Hall" possibilities. To some extent (the "Lone Ranger" problem) this sort of difficulty can appear in multi-defendant cases, suggesting that judicial attention to the defense side's representation in the meet-and-confer session is warranted in some instances. The alternative bracketed last sentences of Rule 16.1(b) may be overly strong, and perhaps a committee note to that effect would suffice. But this issue may be important enough to include in the rule.

On the other hand, it may nonetheless be that appointment of leadership counsel on the plaintiff side is sufficiently distinct from appointment of liaison counsel on the defense side that these topics should be treated separately in a rule. In many instances, there may be only one or a few defendants, making such appointments on the defense side unimportant. But there surely have been MDL proceedings with a large cast of defendants (consider Opioids, for example).

(8) Rule 16.1(d) may be unnecessary. But because any Rule 16(b) scheduling orders entered by transferor courts presumably are no longer in force when all the cases come before the transferee judge, it seemed worth saying. It may be that there are topics to suggest in 16.1(d) that would not be included in the direction regarding the meet-and-confer session called for by 16.1(c), but that is not presently clear.

(9) Unlike prior sketches, there is very little in this one about settlement, though there is brief reference in Alternative 1 of 16.1(c)(2) to the possible role of leadership counsel in achieving "resolution" and the possible appointment of a special master, perhaps to assist in achieving resolution. From what we have heard, it is not clear that there is a need to prod transferee judges

to keep an eye on settlement prospects. Similarly, it is a bit unnerving to think that the judge can authorize leadership counsel to "represent" non-clients in negotiating settlements. Perhaps the committee note can recognize that attention to settlement may loom large in many MDL proceedings, as in other actions (see present Rule 16(c)(2)(I)).

(10) Another subject that might be appropriately addressed in a committee note is the possibility that class actions might be included within an MDL proceeding. It could be somewhat tricky to explicate how class counsel in the class action should collaborate with leadership counsel guiding the MDL proceedings. It is not clear if there are often parallel structures, but it may be that there are sometimes parallel operations. For example, consider an MDL proceeding including class actions for economic loss and consolidated individual damage actions. Although it offers no across-the-board solution, this rule could at least serve to put the issue before the court.

II. Redlining of Rule 16.1 sketch by AAJ and LCJ

The following amalgam is an effort by the Reporter to present the positions offered during the AAJ and LCJ conferences. It bears emphasis that this amalgam reflects the Reporter's assessment and was not reviewed by either AAJ or LCJ. The Subcommittee is indebted to both organizations for their careful attention to the specifics. This kind of thoughtful reaction is invaluable to the Subcommittee as it proceeds with its work. And it is worth emphasizing that the Subcommittee did not provide either group with the reactions offered by the other group, so that this compilation represents their independent thoughts. At the same time, it likely reflects misunderstandings on some points. The Subcommittee continues to discuss these points, and hopes the members of the full Committee will offer their views.

Rule 16.1. [Initial] Management of Multidistrict Proceedings[3]

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge,[4] that judge may[5] [must[6]] {should}[7] schedule [an early management conference] {one or more management

[3] The title has been simplified and slightly rearranged, and the alternative of "Judicial Management of Multiparty Proceedings" has been removed. Neither AAJ nor LCJ favors that alternative.

[4] LCJ suggests substituting "court" for "judge." 28 U.S.C. § 1407(b) says the Panel may order transfer to a judge, and even a judge who does not usually sit in the transferee district. It does not seem that the Chief Judge of that district can "reassign" the MDL to a different judge.

[5] AAJ prefers "may."

[6] LCJ prefers "must."

[7] The verb choice here remains open. There may be good reason to use "should" here. Even in the "simpler" MDLs, it is probably important to get organized at the outset. For one thing, orders entered by transferor judges, such as Rule 16(b) scheduling orders, probably ought to be supplanted by a combined

conferences} to develop a [schedule[8] and] management plan for orderly pretrial activity in the centralized actions.

(b) DESIGNATION OF [INTERIM] {COORDINATING} COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The court may[9] designate coordinating[10] [interim] counsel to act on behalf of plaintiffs [and defendants in multi-defendant proceedings][11] during the meet and confer session under Rule 16.1(c). Designation as [interim] {coordinating} counsel is without prejudice to later appointment of leadership counsel[12] and does not imply any determination about whether leadership counsel should be appointed.[13]

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management plan developed by the transferee judge. Indeed, because the 26(f)/16(b) sequence the rules direct for "ordinary" actions doesn't really work in MDL proceedings, there seems a pretty strong reason for the court to hold such a conference. Whether it also directs the parties to meet and confer under 16.1(c), and perhaps appoints interim counsel under 16.1(b), are somewhat separate. Those steps may not be indicated in some MDL proceedings.

[8] LCJ proposes adding "schedule" here.

[9] At this point "may" seems the way to go. Both AAJ and LCJ favor "may." Surely "must" is too strong, and in many MDL proceedings "should" is also too strong. If there are only two or three lawyers on the plaintiff side, "should" would be too strong. But it is valuable (on analogy to Rule 23(g)(3)) for a rule to make it clear that the court can designate somebody to organize and orchestrate the discussions covered by 16.1(c).

[10] LCJ did not balk at "coordinating," but AAJ did. Switching to "interim" (like Rule 23(g)(3)) might send the right signal.

[11] Whether to keep this idea remains open. AAJ wants it out. The LCJ folks did not seem to balk on Aug. 1. But on the defense side there may be more resistance to judicial control than on the plaintiff side, at least from the clients themselves. So putting it into a rule that one defendant gets its lawyer appointed to run the show for all may prompt some resistance, but the reality is that when liaison counsel are appointed that is likely the consequence.

Separately, we have the debate about whether the plaintiff side lawyers must permit the defendants to have a say on who is designated lead counsel for the plaintiffs, mentioned again below. In class actions, defendants may have a valid interest in ensuring adequate representation (particularly in the settlement posture). As Professor Lynn Baker has pointed out in a recent article, in mass settlement situations the defendants often like having a special master devise the formula for distribution in order to deflect challenges to the deal by plaintiffs who argue that their lawyers have sold them short in favor of other "clients." These are sticky points.

[12] The word "permanent" has been dropped.

[13] This is an attempt, as suggested during the July 11 call, to combine the statements in the two alternatives we originally presented. LCJ did not state a preference. AAJ tried to combine the thoughts. Here is what we presented in our sketch:

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should}[14] direct the parties to meet and confer through their attorneys or through [interim] {coordinating} counsel designated under Rule 16.1(b) before the [initial][15] conference [or conferences][16] under Rule 16.1(a). Unless excused by the court,[17] [If the court directs the parties to meet and confer,] the parties must[18] discuss and prepare a report for the court on [any matter addressed in Rule 16(a) or (b),] {any matter addressed by Rule 16 and designated by the court}[19] and in addition on the following:

[Designation of interim counsel does not imply any determination about the appointment of leadership counsel] {Such appointments are without prejudice to later selection of leadership counsel}.

The amalgam in text seems cumbersome. The word "permanent" has come out. On the other hand, as pointed out during the July 11 AAJ session, it seems useful to say both that the appointment of interim counsel does not mean that this person will be appointed to leadership, and also to say that the appointment of interim counsel does not necessarily mean the court will later appoint leadership counsel.

[14] Both AAJ and LCJ favor "may" here. There is good reason to have the verb here be "may," but perhaps "should" is more appropriate. Rule 26(f) requires counsel to meet and confer in every case unless the case is in a category exempted from initial disclosure. But that 26(f) process seems not to work in MDL proceedings. So saying "should" here would be softer than 26(f) in ordinary cases, and it seems that often it will be desirable for the court to direct the parties to meet and report back before the court is called upon to make important early rulings.

[15] Whether "initial" should be retained here is uncertain. Originally, the idea was that the court could, having been advised by the parties at the initial case management conference following the meet-and-confer session, make a determination about how to proceed from there. On the other hand, 16.1(a) speaks in one alternative of "one or more management conferences." LCJ favors "early management" in place of "initial."

[16] This is added in brackets for parallelism with 16.1(a), but it seems that the main focus is before the first conference with the court. On the other hand, assuming there is a somewhat protracted process of selecting lead counsel it may well be that interim counsel will have a role to play for some time. LCJ appears to favor a singular "initial conference," perhaps because it also favors adopting a schedule for later activities and decisions.

[17] It appears that both LCJ and AAJ favor this locution to the bracketed phrase from our sketch.

[18] Here we want "must." Both AAJ and LCJ seem to accept this verb. The court is not required to do things, but the rule should say that if the court chooses to direct them to meet and confer they have to do so and report to the court.

[19] Both AAJ and LCJ left untouched our alternatives presented here. This may be useful to emphasize that existing Rule 16 remains important, but could give rise to tricky questions about which rule applies to what. At least Rule 16(c)'s very capacious list should be left out of consideration.

740 **(1)** [Whether the parties should be directed to] {A schedule for}[20] exchange {of}
741 information [and evidence[21]] about their claims and defenses at an early point in
742 the proceedings[22];

743 **(2)** Whether [leadership] {lead[23]} counsel for plaintiffs should be appointed [and
744 whether liaison defense counsel should be appointed[24]], the process for such

[20] Though both AAJ and LCJ addressed exchange of information, they did so in different ways. AAJ adheres largely to the approach in the sketch in the Standing Committee agenda book, raising this possibility. LCJ proposes that such exchange be mandatory, and that "and evidence" be added. On this subject, it might be noted that it is not clear whether defendants will often have much to exchange, but the LCJ folks stressed that this was not a "one way" proposal.

[21] LCJ would add this provision. It seems clear LCJ wants plaintiffs to have to provide some backup up front, and that it continues to regard a prime objective as vetting "unsupportable" claims. Saying "information" seems more in keeping with the discovery rules, which emphasize that material sought through discovery need not be admissible to be discoverable. Using "evidence" might invite arguments about whether what plaintiffs were required to proffer would have to satisfy the rules of evidence. In the background is the reality that a PFS is not a *Lone Pine* order, which often leads to an argument about whether proposed expert evidence on causation is admissible. We have studiously avoided any suggestion that *Lone Pine* orders are a suitable starting point for an MDL proceeding.

[22] If this provision is to be written as LCJ suggests — requiring the parties to propose a schedule — it is not clear why it should also say "at an early point in the proceedings." Surely that does not restrict the court's choice of a suitable schedule. Indeed, it may often be that the court will need more information to set up a suitable schedule and leave that open at the initial management conference. To the extent this provision is regarded as mainly imposing burdens on plaintiffs, the "early point" language might be viewed as strengthening the defendants' preference for an early due date. Recall that H.R. 985 in 2017 had a very short fuse on the plaintiffs' obligation to present evidence, and then a further short fuse on the court's required sua sponte evaluation of that showing. The reality seems to be that these sorts of requirements for presentation of specifics by plaintiffs differ from what LCJ appears to prefer.

First, there does not appear to be any appetite among transferee courts for a self-starter role; and second, the courts of appeals have been troubled by dismissals for failure to comply, and have sometimes reversed even when transferee judges dismissed. For some recent examples of appellate decisions in such situations, see *In re Cook Medical, Inc.*, 27 F.4th 539 (7th Cir. 2022) (upholding dismissal); *Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173 (3d Cir. 2021) (reversing dismissal with prejudice); *In re Deepwater Horizon*, 988 F.3d 192 (5th Cir. 2021) (reversing dismissal with prejudice); *In re Taxotere (Docetaxel) Products Liability Litigation*, 966 F.3d 351 (5th Cir. 2020) (upholding dismissal). There are surely more cases to be considered, if needed, and probably many instances in which defendants have moved to dismiss claims by plaintiffs who missed deadlines but transferee judges have denied those motions. These citations simply happened to be at hand, and provide illustrations of possible reasons to proceed with care.

[23] LCJ seems amenable to either "leadership" or "lead" counsel, but AAJ prefers "leadership."

[24] LCJ did not object to this bracketed provision, but AAJ sought to have it removed. AAJ members expressed worries about permitting defense counsel to have any say on selection of plaintiff leadership. On Aug. 1, the LCJ folks did not offer any examples of such activity by defense counsel, though it was noted

appointments, and the responsibilities of such appointed counsel, [and whether common benefit funds should be created to support the work of such appointed counsel[25]];

[The AAJ/LCJ differences on (3) seem to merit separation in this presentation; surely some amalgam could be devised but for present purposes this seems a clearer way to proceed]

(3) [AAJ] Whether the court should adopt a schedule for ~~sequencing~~ discovery, or deciding[26] disputed legal issues <u>including remand</u>;[27]

(3) [LCJ] ~~Whether the court should adopt~~ <u>A</u> schedule for sequencing discovery, ~~or~~ deciding disputed issues<u>, and dispositive motions; and</u>[28]

(4) A schedule for pretrial conferences to enable the court to manage the proceedings [including <u>trial plans, trials in exigent circumstances, and</u>[29] possible resolution of some or all claims[30]].

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that the judge might turn to them and ask if they have any objections to the appointments being considered by the court.

[25] Both AAJ and LCJ object to inclusion of this bracketed provision. The AAJ folks said it's too early to decide at the initial conference. One might say that Judge Chhabria's 2021 common benefit fund order, cited above, tends in that direction.

[26] AAJ proposes to drop "sequencing," but it is not clear why. Perhaps the concern is that early discovery would too often make more demands on plaintiffs than defendants. On the other hand, there might be a tendency among transferee judges to favor common discovery — often, one would think, from defendants — over individualized discovery from plaintiffs.

[27] AAJ wants remand displayed prominently. It is not certain, but it seems this means remand to the transferor court (something only the Panel can order). But it might mean remand of removed cases back to state court. LCJ did not say that its members wanted early consideration of remand (probably focusing on remand to transferor courts not to state courts, since the removed cases would be in federal court because defendants wanted them there), though some defense-side attorneys in conferences have spoken in favor of remand instead of "forced" global settlement efforts.

[28] It is not surprising that "dispositive motions" is a term the defense side likes. It is not clear why "deciding disputed legal issues" is not sufficient. Perhaps the idea is that individual motions for summary judgment would be "dispositive motions" but not involve "disputed legal issues."

[29] AAJ adds this language. LCJ did not touch our sketch.

[30] AAJ would delete the bracketed language.

[Again, setting out the AAJ and LCJ approaches to (d) separately may aid comprehension. The AAJ proposal changed only the verb, favoring "may." LCJ did more.]

(d) MANAGEMENT ORDER. [AAJ] After an initial management conference, the court may ~~[must] (should)~~ enter an order dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

(d) MANAGEMENT ORDER. [LCJ] After ~~an~~ the ~~initial~~ early management conference and allowing an opportunity for parties not represented by coordinating counsel designated under Rule 16.1(b) to be heard, the court ~~may~~ [must] ~~(should)~~ enter an order establishing deadlines and dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

* * * * *

This effort is clearly a work in progress, if indeed it is progress. The foregoing observations in Part II (largely in footnotes) represent principally reactions of the Reporter, not the Subcommittee. But they may call attention to issues deserving further attention. Members of the Subcommittee were able to participate at the Judicial Panel on Multidistrict Litigation Conference for Transferee Judges in October, which included an opportunity to hear some judicial reactions to this new direction.

B. Rule 41 Subcommittee

The Rule 41(a) issue was initially raised by Judges Furman and Halpern (S.D.N.Y) (21-CV-O), and raised again by Messrs. Wenthold and Reynolds (former law clerks in the W.D. Ky.) (22-CV-J). These submissions address a conflict among the courts about the scope of Rule 41(a)(1)(A) right for plaintiffs to dismiss unilaterally without prejudice. The rule says that the plaintiff "may dismiss *an action* without a court order" (emphasis added). In brief, the disagreement among courts is about whether Rule 41(a)(1)(A) always requires dismissal of the entire action against all parties, or could be used to dismiss only certain claims, or only as to certain parties, leaving the action still pending in the district court as to other claims or parties.

A Rule 41 Subcommittee was appointed, chaired by Judge Cathy Bissoon. It has begun work and identified a number of issues, but its work remains at an early stage. One starting point is that, before Rule 41 was adopted in 1938, the practice in many states permitted plaintiffs to dismiss without prejudice when the litigation was well advanced, sometimes even at trial, and recommence the litigation in another court. Now Rule 41(a)(1) permits dismissal without prejudice only if the plaintiff dismisses before any defendant files an answer or a motion for summary judgment. After that point, unless the defendant stipulates, the plaintiff may dismiss without prejudice only pursuant to court order under Rule 41(a)(2).

Giving a "plain meaning" reading to Rule 41(a)(1), as Judges Furman and Halpern explained, some courts permitted use of this device only when the plaintiff dismissed the entire

action and nothing remained pending in the district court. Messrs. Wenthold and Reynolds cite the submission from Judges Furman and Halpern, and say that the issue is a "recurring circumstance," citing the Federal Practice & Procedure treatise for the proposition that "there is a certain amount of inconsistency in the cases" (§ 2362), which they characterize as "an understatement." They suggest that the solution would be to add three words: " . . . dismiss an action or a claim without a court order . . ."

Rules Law Clerk Burton DeWitt provided a research memo on the issues raised by Judges Furman and Halpern. He found that the courts had interpreted "action" in Rules 41(a)(1) and (a)(2) substantially identically. And the most common issue that turned up in the reported cases arose when plaintiffs in multi-defendant cases sought to dismiss as to some but not all defendants. On this question, the circuits are split. Similar issues have arisen in multi-plaintiff actions in which some but not all plaintiffs wish to dismiss. As to dismissal of some but not all claims against a given defendant, no circuit has explicitly permitted Rule 41(a)(1) to be used to effect such a dismissal, though intra-circuit splits have developed at the district-court level. His conclusion was that the rule should be amended to resolve the existing circuit split about whether the rule may be used to dismiss all claims against some but not all defendants in multi-defendant cases. He also suggested that there might soon be a split among the circuits on whether the rule can be used to dismiss some but not all claims against a given defendant.

Rules Law Clerk DeWitt also provided a brief memorandum about state-court practices regarding situations analogous to those governed by Rule 41(a)(1)(A). Of course, state practice is not controlling in federal court. Indeed, the 1938 adoption of original Rule 41(a) was designed in part to supplant state practice, which often permitted unilateral dismissal by plaintiff until late in the proceeding, sometimes even during trial. The current variety in state practice means that no revision to Rule 41(a)(1)(A) would bring it into concord with all state practices. And the current rule is largely as in the original 1938 rules:

> Federal Rule of Civil Procedure 41 has been amended seven times since it was promulgated in 1938. The amendments, however, have been substantively insignificant. It is doubtful that a single case would have been decided differently if the Rule remained as it was in 1938, although in some cases it is quite possible that its former text would have made it more difficult to achieve the same results or would have created some constructional problems.

9 Fed. Prac. & Pro. § 2361 at 471.

Rule 41(a)(1) currently provides:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) ***By the plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(a), 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 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.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Rule 41 Subcommittee consideration

The Rule 41 Subcommittee has held two online meetings. But it has not reached a consensus on whether an amendment should be pursued, or what amendment should be considered if there is to be an amendment proposal. One view on the Subcommittee is that the literal reading of Rule 41(a)(1)(A) is right — in order to utilize the Rule 41(a)(1) option the plaintiff must dismiss the entire action. So no amendment should be pursued. Other Subcommittee members are more receptive to introducing greater flexibility.

The heart of the problem is that Rule 41 speaks about dismissal of an "action" in (a)(1)(A), and then, in (a)(1)(B), focuses on whether the plaintiff earlier dismissed an "action based on or including the same *claim*," in which event the dismissal of the current "action" operates as an adjudication on the merits (unless the court directs otherwise under Rule 41(a)(2)). In addition, the rule makes no particular mention of dismissal of either an action or a claim by one (but not all) of multiple plaintiffs or against one (but not all) of multiple defendants. And beyond that, Rule 41(c) appears to say that it applies to dismissal of claims, not actions, while Rule 41(a) is about dismissal

of actions (as the title of the rule — "Dismissal of *Actions*" — implies). That is the problem that Judges Furman and Halpern brought to our attention, and also that Messrs. Wenthold and Reynolds have raised.

To illustrate these points, an Appendix to this section of the report provides footnotes exploring the variety of points that might be made about the terminology used in the current rule, including Rule 41(c).

Additional wrinkles merit mention. One is that, as to plaintiffs, Rule 15(a)(1)(B) permits amending a complaint once as a matter of course within 21 days of service of an answer or Rule 12 motion. So this method could be used by a plaintiff to drop (or add) plaintiffs or defendants even after an answer is served, though service of an answer cuts off the Rule 41(a)(1)(A)(i) option. And there might be some reason to limit dismissal without prejudice whenever a Rule 12 motion is filed, since preparing such a motion may require considerable effort by the defendant. But Rule 15(a)(1)(B) nevertheless permits plaintiffs to amend without stipulation or leave of court. Another possibly pertinent rule is Rule 21, which says that the court may, at any time and without a motion, "add or drop a party." Finally, it might be mentioned that Rule 11(c)(2) also contemplates unilateral action by plaintiffs threatened with a Rule 11 motion during the 21-day "safe harbor" period, for it says a claim may be "withdrawn."

One might urge that dismissals without prejudice should never be permitted unless the court so orders. But that outcome seems too severe; suppose plaintiff files the action on Day 1 and decides not to serve it or otherwise pursue it on Day 2. In order to avoid preclusion should the action be filed in another court, must the plaintiff seek a court order of dismissal without prejudice? Even after an answer or motion for summary judgment is filed, Rule 41(a)(2) presumes that the court's order of dismissal is without prejudice unless the order states otherwise.

The Subcommittee might pursue a simple project or a more elaborate one, possibly moving beyond Rule 41(a) and considering other parts of the rule. The Appendix identifies a variety of questions that might be raised. It is not clear that there is a consistent policy or set of policies to inform a more ambitious Rule 41 project, and the Subcommittee's initial orientation has been to limit its attention to Rule 41(a)(1). Though the Subcommittee is not convinced that any change is really needed, the existing (and possibly impending) circuit conflicts suggest a number of possible amendment routes. So deciding that an amendment is not needed is also a route under consideration. The fact that this report includes exemplars of possible rule-amendment ideas does not signify any commitment to proceed with any amendment proposal.

The Advisory Committee's discussion of Rule 41 during its October 2022 meeting concluded with many options remaining open. One focus of discussion was the existence of inconsistent circuit decisions, suggesting that clear guidance was needed. At the same time, consensus has not been reached on what the policy objectives of any change should be beyond resolving existing disagreements about the proper interpretation of the current rule. Given the option of a Rule 15 amendment of complaint to drop specific claims or parties without the need for a court order, it may be that sufficient options already exist to enable parties to reconfigure their cases.

The following enumeration of possible directions for work suggests the range of possibilities if rulemaking is pursued. Standing Committee members' experience would be valuable in the effort to choose among these alternative routes. The Subcommittee will continue its work.

1. Adopting the minority "literal" view

Rules Law Clerk Burton DeWitt's memo reported that three circuits read the rule literally to require dismissal as to all defendants. That could be made clear relatively easily:

(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 federal statute, the plaintiff [or plaintiffs][31] may dismiss an entire 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.

The multi-plaintiff problem would be partly addressed by the bracketed language but would still exist as to multiple defendants unless the Subcommittee ultimately lands on all or nothing ("an entire action") as the right solution. No. 4 below takes a more global approach to the multi-party problem.

2. Adopting the majority view

The Rules Law Clerk's original memo says that the majority approach is that a single plaintiff may dismiss all claims against some but not all defendants.

(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 federal statute, the plaintiff [or plaintiffs] may dismiss an action as to [any] {a} defendant[32] without a court order by filing:

[31] An alternative would be: "all ~~the~~ plaintiffs may dismiss an entire action . . . ."

[32] Under current style conventions, "a" is regarded as including "any," but given the purpose of this possible amendment it may be preferable to use "any."

(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.

Of course, a rule amendment is not bound by the courts' interpretation of the current rule, since by definition it's amending the rule. One suggestion that has been made would go further — "the plaintiff may dismiss an action or a claim or party from the action by filing * * *" That has more moving parts, and it seems that the majority view is expressed in terms of one plaintiff and multiple defendants, with plaintiff wanting to drop some defendants but continue to pursue the others. A more expansive effort is presented in no. 6 below.

3. Adding some Rule 12 motion cutoffs

Another moving part is the handling of the cutoff. One might try to borrow from Rule 15(a)(1)(B), which cuts off the right to amend once 21 days after service of some Rule 12 motions:

(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 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~~ a motion under Rule 12(b), (e), or (f), an answer, or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

This approach seems potentially out of step with Rule 15(a)(1)(B), for that rule permits filing an amended complaint within 21 days after service of one of those Rule 12 motions.

4. Addressing the multi-party case

(a) Voluntary Dismissal.

(1) ***By ~~the~~ Plaintiffs.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, [any] {a} ~~the~~ plaintiff may dismiss an action as to [any] {a} defendant without a court order by filing:

(i) a notice of dismissal before [any defendant] {the defendant to be dismissed} ~~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.

5. Addressing the dismissal of fewer than all claims[33]

(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 federal statute, the plaintiff may dismiss any claim ~~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.

A committee note could mention Rule 18, and also that this rule says nothing about whether claim preclusion or issue preclusion might limit the plaintiff's pursuit of dismissed claims after entry of a final judgment in this action.

6. Combining multiple plaintiffs and multiple claims

This variation builds on something included in the March 2022 agenda book:

(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 federal statute, [any] {a} ~~the~~ plaintiff may dismiss any claim or party from the action ~~an action~~ without a court order by filing:

(i) a notice of dismissal before the [defendant or defendants to be dismissed] {any defendant} ~~opposing party~~ serve[s] either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

[33] The variety of uses of the word "claim" in the rules counsels caution here.

This may be the most plaintiff-friendly version. Whether that is a good idea may be debated.

* * * * *

There are surely additional permutations, but this may provide a starting point. It is not clear whether all these permutations flow from the decisions surveyed by the Rules Law Clerk's original research memo. And some of the variations above could be combined. Thus, for example, the "any plaintiff" and "any defendant" approach (no. 4) could readily be combined with the addition of the Rule 12 motions additions (no. 3). Alternatively (see no. 1) it's possible to insist that the rule means what it says. A committee note could mention that Rule 15(a) may provide an alternative route to a very similar result.

7. Focusing also on Rule 41(c)

As suggested in the Appendix, considering the changes discussed above regarding Rule 41(a)(1) might lead to discussion of possible changes to Rule 41(c) as well. But no submission has suggested changes to this rule. And Rule 41(c) does not appear to have generated much controversy.[34] As noted in the Appendix, it is somewhat curious that Rule 41(c) says "this rule" applies to unilateral dismissals of counterclaims, crossclaims, and third-party claims even though none of those inherently will involve dismissal of an entire "action."

The Federal Practice & Procedure treatise addresses Rule 41(c) by saying that it includes an "exception" for "voluntary dismissals," as follows:

> Federal Rule of Civil Procedure 41(c) provides, with an exception for certain voluntary dismissals discussed below, that the other subdivisions of Rule 41, which state the procedure for and the consequences of voluntary and involuntary dismissals, apply to the dismissal of a counterclaim, a crossclaim, or a third-party claim. Thus, subject to the voluntary dismissal exception, the [rule's provisions regarding dismissals] are applicable to the dismissal of a claim asserted by a defendant under Federal Rules of Civil Procedure 13 or 14 just as they are to claims asserted by a plaintiff.

9 Fed. Prac. & Pro. § 2374 at 952. One may be left to wonder why a unilateral dismissal of a "claim" by a defendant is not a "voluntary dismissal." Indeed, the last sentence of Rule 41(c) says it applies to a "voluntary dismissal under Rule 41(a)(1)(A)(i)," subject to the time limit stated in Rule 41(c), but does not say this must result in the dismissal of the entire "action." Given the seeming absence of litigation about this topic, however, it may be best not to venture into these waters.

[34] In the Federal Practice & Procedure treatise, for example, the discussion of Rule 41(a) occupies nearly 200 pages, and the discussion of Rule 41(b) on involuntary dismissals fills nearly 270 pages. The discussion of Rule 41(c) is about three pages long, largely occupied with the material quoted in text above.

The Federal Practice & Procedure treatise nevertheless does suggest that revising Rule 41(c) might be worthy of attention:

> The exception in Rule 41(c)'s second sentence for certain voluntary dismissals was necessary because the right of dismissal by notice, given by Rule 41(a)(1)(A)(i), is terminated by an answer or a summary judgment motion. This does not work for counterclaims, crossclaims, or third-party claims, since the defendant ordinarily will assert these with, or subsequent to the filing of, an answer. For this reason, Rule 41(c) provides that a voluntary dismissal by a defendant, or another claimant, of a counterclaim, crossclaim, or third-party claim must be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing. * * *
>
> In 1948, * * * [Rule 41(a)(1)(A)(i)] was amended to provide that a summary judgment motion also terminates the right to dismiss by notice. A similar change should have been made in Rule 41(c). If a summary judgment motion defeats the right of a plaintiff to dismiss an action, a similar motion should defeat the right to dismiss a counterclaim, crossclaim, or third-party claim. This parallelism was overlooked, however, in the 1948 amendments and the matter remains uncorrected.

Id., § 2374 at 952-54.

Correcting this oversight 75 years ago may warrant current action to achieve parallelism. Doing so might be more important if (as discussed above under heading 3) Rule 41(a)(1) is revised to terminate the unilateral power of plaintiffs to dismiss upon the service of certain Rule 12 motions, possibly magnifying the need for parallelism. On the other hand, retaining the requirement that the entire "action" be dismissed under Rule 41(a)(1)(A)(i), but permitting unilateral dismissals of "claims" by other parties may be warranted by the fact that parties in a defensive posture ordinarily do not choose the time or location of litigation.

APPENDIX — ILLUSTRATION OF ISSUES

The Subcommittee could look farther than the problem called to its attention by these two submissions. Indeed, a variety of questions might be raised by the current rule. This Appendix illustrates that point with footnotes to the current rule. It is offered here only to illustrate the range of questions the Committee might choose to address.

Rule 41. Dismissal of Actions[35]

(a) Voluntary Dismissal.

(1) ***By the plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(a), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff[36] may dismiss an action[37] 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;[38] or

(ii) a stipulation of dismissal signed by all parties who have appeared.

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[35] The title of the rule is not fully accurate, since at least Rule 41(c) refers to dismissals of claims rather than the entire action. It may be that adding "or Claims" would suffice. In multiparty litigations, dismissal as to one plaintiff or one defendant can be viewed as a dismissal of a claim.

[36] Note: This provision does not seem to take account of the possibility that there is more than one plaintiff, or that when that is true one but not all plaintiffs want to dismiss unilaterally without prejudice.

[37] Note that this provision does not say the plaintiff may dismiss some but not all claims, and continue the action with regard to the remaining claims.

[38] This cuts way back on an old common law attitude under which plaintiff could pull the plug without prejudice after the action had proceeded to an advanced stage, perhaps even to trial.

But it could be tightened up. For example, perhaps unilateral dismissal should not be allowed if the defendant has filed a motion to dismiss. Such an exception might exclude motions under Rule 12(b)(1), (2), (3), (4), or (5) which do not challenge the merits of the claim asserted, or perhaps (7) (Rule 19(a) party not joined). Rule 12(b)(6) does nowadays attack the merits of the claim asserted. If the idea is that the defendant should be heard before dismissal without prejudice because it has invested effort into the case, it may often be that a Rule 12(b)(6) motion involves such effort.

On the other hand, other motion proceedings that can involve a great deal of effort by defendant may occur before the time to plead has arrived. A prominent and old example is *Harvey Aluminum, Inc. v. American Cyanimid Co.*, 203 F.2d 105 (2d Cir. 1953) (extensive proceedings on motion for preliminary injunction did not cut off plaintiff's right to dismiss without prejudice after the court denied the motion but before defendant filed its answer). The Subcommittee is not inclined to try to deal with this sort of situation in the rule. *See D.C. Electronics, Inc. v. Narton Corp.*, 511 F.2d 294 (6th Cir. 1975) ("The defendant can protect himself by merely filing an answer or motion for summary judgment."). And the Second Circuit seems largely to have limited the *Harvey Aluminum* decision to its facts.

It is also worth noting that Rule 15(a)(1)(B) permits the plaintiff to file an amended complaint once after service of "a motion under Rule 12(b), (e), or (f)."

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff[39] previously dismissed any federal- or state-court action[40] based on or including the same claim,[41] a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action[42] may be dismissed over the defendant's[43] objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

[39] Again a singular plaintiff.

[40] If "action" should be changed to "claim," should this provision be changed?

[41] This time, it's "claim." So perhaps a prior "action" was not dismissed, but the claim asserted in the present case was voluntarily dismissed from that earlier action. If the earlier action reached final judgment, that may preclude the assertion of the claim in this action if it is regarded as the same "claim" for claim preclusion purposes. See Restatement (Second) of Judgments, § 24 (adopting "transactional" approach to whether the current action involves the same claim). To the extent the issues raised and necessarily decided in the earlier action are identical with issues in the current action, issue preclusion might also apply.

[42] Again, it's "the action." But the rule goes on to say that perhaps the defendant's counterclaim remains pending, which suggests that the "action" is not really dismissed. This possibility raises the question whether the ongoing litigation is no longer the same "action." Does it get a new case number in the district court?

[43] Again, only a single defendant, not any defendant's objection.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule[44] applies to the dismissal of any counterclaim, crossclaim, or third-party claim.[45] A claimant's[46] voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served;[47] or

(2) if there is no responsive pleading, before evidence is introduced at a trial or hearing.[48]

III. Continuing work information Items

Besides the subcommittee projects described in Part II above, the Advisory Committee is addressing a number of additional issues, mainly in response to submissions.

A. Rule 7.1 — Recusal Disclosure

Recusal issues involving judicial ownership of stock in companies that are involved in litigation have recently received a great deal of attention, including from Congress. For example, the Courthouse Ethics and Transparency Act (Pub. L. 117-125, May 13, 2022), amends the Ethics in Government Act of 1978 and provides for establishment of "a searchable internet database to enable public access to any report required to be filed under this title by a judicial officer, bankruptcy judge, or magistrate judge," scheduled to become available on Nov. 9, 2022.

Meanwhile, the Judicial Ethics and Anti-Corruption Act of 2022 has been introduced in both the Senate and the House (S. 4177 and H.R. 7706). Section 2 would place limits on judicial ownership of securities. Section 4 would place limits on judicial participation in privately funded educational events. Section 6 of this bill would add a new subsection (g) to 28 U.S.C. § 455 to require an online listing of speeches by federal judges. Section 7 would provide an "oversight process" for judicial disqualification and permits any litigant to request disqualification of a judge.

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[44] "This rule" seems to mean Rule 41(c), not the rest of Rule 41. But if it means Rule 41(a), how can it apply unless the entire "action" is dismissed? The Federal Practice & Procedure treatise quoted above under heading 7 addresses this point.

[45] As above with regard to plaintiff's initial claim against defendants, it is not clear from the rule's language that this voluntary dismissal may be done unilaterally if there are multiple responding parties on the counterclaim [remember that Rule 13(h) permits the counterclaimant to add additional parties under Rule 20 to a counterclaim or a crossclaim).

[46] This term is expansive to include the initiating party with regard to lots of different sorts of claims.

[47] Again, one might change this provision to include a Rule 12(b), (e), or (f) motion.

[48] This deadline is a lot like the old-fashioned liberty accorded plaintiffs to dismiss without prejudice right up until trial.

Whether this bill will advance is uncertain, but ongoing legislative attention to the general issues seem likely.

Two submissions to the Advisory Committee have addressed related concerns. 22-CV-H, from Judge Ralph Erickson (8th Cir.), addresses concerns raised by a number of judges about their holdings in Berkshire Hathaway. One problem is a result of this holding company's wide ownership of other companies. The example given is that, if Orange Julius is a party to a suit before a judge, under current Rule 7.1 Orange Julius would have to disclose that it is wholly owned by International Dairy Queen. But that disclosure would not go farther, even though Dairy Queen is wholly owned by Berkshire Hathaway, so the disclosure would not alert the judge to the problem if the judge had Berkshire Hathaway holdings.

This is not to suggest that Berkshire Hathaway is the only company that might present such problems; Judge Erickson points out that CitiGroup has a controlling interest in some 300 companies. So a judge who had shares of CitiGroup could face similar problems. Judge Erickson suggests that it would be useful to consider an amendment to Rule 7.1 to require disclosure of companies that hold the parent corporations in a parent relationship.

Currently, Rule 7.1 requires nongovernmental corporate parties to identify "any parent corporation and any publicly held corporation owning 10% or more of its stock." That would not seem to reach Berkshire Hathaway in the Orange Julius example, for the "parent corporation" was Dairy Queen. The fact Berkshire Hathaway apparently owns 100% of the stock of Dairy Queen would not seemingly make it a "parent corporation" of Orange Julius.

Whether there is a suitable way to describe additional entities that must be disclosed and solve the notice problem Judge Erickson identifies is not certain. Phrases like "grandparent corporation" may be suitable. Perhaps it would suffice to say something like ". . . and any parent corporation of any such parent corporation and any publicly held corporation owning 10% or more of the stock of any such parent corporation." But even that might not reach "great-grandparent corporations."

Magistrate Judge Barksdale (M.D. Fla.) proposed that Rule 7.1 be amended to add a certification requirement that appears to build on the soon-to-be-available database on judges' stock holdings, requiring a disclosure statement that:

> certifies that the party has checked the assigned judge or judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure.

This proposal does not appear to address the corporate "grandparent" issue identified by Judge Erickson.

It may be that somewhat similar issues could be raised for the Appellate Rules Committee and the Bankruptcy Rules Committee, but this advisory committee may be a suitable venue for initial consideration of these questions. Whether the disclosure requirements of Rule 12.4 of the

Criminal Rules raise similar issues is less clear. But it does seem clear that difficult and delicate issues are presented, so considerable careful study seems necessary.

At the outset, it may be possible to identify certain issues that likely will arise. A starting point is 28 U.S.C. § 455(b)(4), which requires recusal when the judge "individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding." Section 455(c) adds that a judge "should inform himself about his personal and fiduciary financial interests." It does not appear that party disclosures modify these judicial recusal obligations, but an expanded disclosure rule could assist a judge in monitoring holdings for possible recusal requirements in a way current Rule 7.1 may not provide. Given the statutory mandate, it is likely that a rule change would not attempt to abridge the statutory recusal mandate even if a party made an incomplete disclosure or failed to check the judge's financial disclosures or did not give notice of a possible conflict within a certain period of time.

Failure of a party to check the judge's financial disclosures or to file a motion to recuse within 14 days (Magistrate Judge Barksdale's proposal) likely would not affect the statutory requirement to recuse, but that does not mean that amending the rule is unwise. For example, the amendment to Rule 7.1 that went into effect on Dec. 1, 2022, was designed to alert the judge to the possible absence of diversity resulting from having an LLC as a party to a diversity case. If there is no diversity of citizenship, the judge must dismiss (though sometimes the non-diverse party can be dropped and the case can continue among the remaining parties). The basic point is that the mandatory language of § 455(b) might be more effectively implemented by expanding the duty to disclose under Rule 7.1.

The fact that the database required by the Courthouse Ethics and Transparency Act has only recently begun to operate may be a reason for awaiting some experience with that database, at least before considering a rule that requires parties to consult it. It might also be relevant that those who request information from this database reportedly may have to provide information about themselves that is shared with the judge whose disclosure report is requested. On that score, one might say that the recent amendment to Rule 7.1 to deal with LLC issues might seem to focus on a party best able to provide the needed information, while a certification requirement imposed on parties with regard to possible judicial interests in other parties might not seem similarly targeted. But perhaps parties are better positioned to determine whether their interests are somehow tied to the judge's interests.

A July 1, 2022, New York Times story illustrates possible future developments. "Why Judges Keep Recusing Themselves From a N.Y.C. Vaccine Mandate Case," by Benjamin Weiser, reports that plaintiffs challenged the assignment of a case about requiring teachers to be vaccinated against COVID to three judges. Using disclosure forms, plaintiffs successfully challenged the first two judges on the ground they owned some Pfizer stock. The third judge refused to recuse herself on the ground that, though it seems she once did own such stock, she no longer owned it. Plaintiffs responded that she should "certify" that she no longer owns such stock.

At the October 2022 Advisory Committee meeting, these issues were introduced. Some concern was expressed about a rule requiring parties to certify that they have checked the judge's disclosures. At least some parties — self-represented litigants, for example — might experience difficulty in complying. And the likelihood that failure to check the judge's disclosures, or to file a recusal motion, would have no bearing on whether the statute required recusal was noted. Another possibility raised was whether these issues are well suited to resolution through the Rules Enabling Act process, or whether another Judicial Conference committee might more suitably address these problems. And it may be that some circuits are engaged in improving their systems for financial disclosures by judges.

A contrast drawn during the Advisory Committee meeting was to the conflicts checks needed in large law firms. Experience from those burdensome efforts at large law firms suggests that they might be more onerous for small law firms, much less self-represented litigants. Though shifting some responsibility to the parties to assist the court in this effort may be attractive, it may also be unduly burdensome for some parties, and some smaller law firms.

Another point made was that the Berkshire Hathaway example, though intriguing, may not convey the true complexity of such problems. As a holding company, it may have a singular profile in regard to its holdings. Other corporations may have substantial holdings in companies that have substantial holdings in other companies. With regard to LLCs, the focus of the recent amendment to Rule 7.1, one complication was that the "members" of LLCs are often themselves LLCs; the spider web can spread wide.

This report is intended only to introduce the issues possibly presented. Further work will be needed before any specific action is proposed. It may be that the Civil Rules Advisory Committee could take the "lead" in working on these issues, which may affect other sets of rules. In any event, it would be very helpful to learn the views of members of the Standing Committee on how to proceed with these matters, and perhaps guidance on who should proceed with them.

B. Rule 45 — Service of Subpoena

Judge Catherine McEwen (liaison to Civil Rules from Bankruptcy Rules) has submitted 22-CV-I, recommending an amendment to Rule 45(b)(1) on service of a subpoena. At present, Rule 45(b)(1) provides:

> **(1)** ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

Judge McEwen's submission addresses the requirement of "delivering a copy to the named person," and suggests that service by U.S. Mail or overnight courier should be added as sufficient under this rule. She attaches copies of two cases from her district:

SEC v. Rex Venture Group, LLC, 2013 WL 1278088 (M.D. Fla., March 28, 2013) (holding that service by federal express and certified mail sufficed because the witness stated that he received the subpoena and "the purpose of service * * * has been effectuated").

Corrington v. Anheuser-Busch, Inc., 1999 WL 1043861 (M.D. Fla., Oct. 15, 1999) (finding service by U.S. Mail was sufficient and disagreeing with *In re Nathurst*, 183 B.R. 953, 955 (M.D. Fla. 1995), which stated that "a subpoena cannot be effectively served by mail even if sent by certified mail").

This is not the first time this provision of Rule 45(b)(1) has been raised. In 2016, the State Bar of Michigan raised the question (16-CV-B); in 2009 William Callahan, president of Unitel did so (09-CV-C), and in 2005 a committee of the New York State Bar Association submitted a 20-page memo on the question (05-CV-H).

It is worth mentioning at the outset that the method of serving a subpoena comes up in other sets of rules:

Bankruptcy Rule 9016: "Rule 45 F.R. Civ. P. applies in cases under the Code."

Fed. R. Crim. P. 17(d): "A marshall, a deputy marshall, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance."

One more thing worth noting at the outset is that Rule 45 applies to discovery subpoenas and subpoenas to appear and testify in court. It may be that the issues differ in the two contexts — testimony in court seems less flexible, both temporally and geographically.

A starting point, then, is the history of this issue before the Advisory Committee.

2009-13 Rule 45 project

Rule 45 was extensively revised effective 2013, the fruit of a multi-year project. At the beginning of this project, the Discovery Subcommittee (then chaired by Judge Campbell) reported at the Committee's April 2009 meeting that it had identified 17 possible issues to be studied (April 2009 agenda book at 255-73). No. 11 on that list was:

Whether hand delivery of the subpoena should be required. Comments received in the Committee's inbox had initially raised this issue. Although service of a summons and complaint may be made in any manner permitted by Rule 4, Rule 45 requires personal hand delivery to the person subpoenaed. Should the provisions for service be the same?

As the Rule 45 project moved forward, the Subcommittee focused more precisely on various issues. The minutes of the October 2009 Committee meeting reflect the following discussion pertinent to the current issue (p. 25):

In-hand service: The earlier discussion noted the question whether in-hand service should be required for nonparty subpoenas. Judge Campbell [then Chair of the Discovery Subcommittee] noted that in-hand service may serve an important purpose. The nonparty is, after all, not a party to the action. Often that nonparty will not have a lawyer. The penalty for noncompliance is contempt. "We need a dramatic event to signal the importance of the subpoena."

Professor Marcus observed that a recent decision held service by certified mail sufficient.

The analogy to service of summons and complaint on an intended defendant was questioned by observing that it would be odd to allow substituted service of a subpoena on a state official in the mode often used in long-arm statutes.

Meanwhile, the Rule 45 Project moved forward on a number of issues, including making the duty to give notice to the other parties prior to serving the subpoena more prominent, permitting the "issuing court" to be the court in which the action was pending, reorganizing the place of compliance provisions into a new Rule 45(c) which made the place of service unimportant in determining where the subpoenaed person must appear, and authorizing transfer of a motion to compel in the district where compliance was demanded to the district where the underlying action was pending. A preliminary draft with proposed amendments addressing these matters was published in 2011 and, after modification in light of public comment, adopted with effective date of Dec. 1, 2013.

The "delivery" question was discussed during the March 2010 Committee meeting. For that meeting, the Subcommittee agenda report identified items among the 17 originally considered that were considered "off the list." At p. 14, the minutes of that meeting reflect the following:

No Change: Two issues seem ready to be put aside without further work. One is whether Rule 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods of service, the issue seems to be a theoretical point, "not a real problem." When service is on a nonparty, "the drama of personal service may be useful." * * *

Discussion began with the means of serving a subpoena. It was noted that there is a good bit of district-court law allowing "Rule 5-ish" service. These rulings are made in response to objections to service by means other than delivery in hand. Do we want somehow to rein that in? It was further observed that Rule 45(b)(1) is ambiguous. It says only that "[s]erving a subpoena requires delivering a copy to the named person * * *." "[D]elivering" can easily encompass delivery by means other than in-hand service. If indeed it is wise to limit service to in-hand delivery, a couple of words could be added to the rule to make that direction unambiguous. Lawyers seem to think in-hand delivery is not a big problem.

Discussion continued by asking whether the possible ambiguity is creating unnecessary work for courts — are they being asked to resolve the problem by ruling on motions to quash, or motions to compel? Do we need to add the "two words" to close this down? The response was that this does not seem to be a huge problem in terms of burdening the courts.

The issue may be a problem for the lawyer who cannot accomplish in-hand service. Sometimes other means of service are made with the judge's blessing. The most obvious problem arises when a nonparty is evading service. One response is to adopt state-court methods of service.

It was further noted that in practice, subpoenas are often mailed when the lawyer expects there will be no objection. In-hand service tends to be reserved for cases in which resistance is expected. The Subcommittee will consider this question further.

The issue disappeared from the record.[49]

Ongoing debates about manner of service
under Rule 45

It does seem that the current language in Rule 45(b)(1) is less than crystal clear. Consider, for example, *Hall v. Sullivan*, 229 F.R.D. 501 (D. Md. 2005), in which Judge Paul Grimm (also a former Chair of a Discovery Subcommittee) said (*id.* at 504, quoting *Doe v. Hershmann*, 155 F.R.D. 630, 631 (N.D. Ind. 1994)):

> Nothing in the language of the rule suggests in-hand personal service is required to effectuate "delivery," or that service by certified mail is *verboten*. The *plain* language of the rule requires only that the subpoena be delivered to the person served by a qualified person. Delivery connotes simply "the act by which the res or substance thereof is placed within the actual . . . possession or control of another."

As the 2005 submission from the New York State Bar Association showed, this ambiguity has received attention for some time. But comments during the Rule 45 project suggested the problem was not significant.

Possible solutions
U.S. Mail and Overnight Courier

Judge McEwen suggests that the rule could be rewritten to clarify that service by U.S. Mail or overnight courier suffices for service of a subpoena. Something like that might be accomplished along the following lines:

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[49] It might be worth noting that the Subcommittee held a mini-conference on Oct. 4, 2010, and that the notes to that event (in the agenda book for the November 2010 Committee meeting at 130) include the following:

> Another issue was the manner of service — should it be by hand delivery or by mail? This is handled differently in different cases. It was noted that the Subcommittee did discuss these issues, and concluded that there seemed no need for immediate action. A participant noted that "Some people prefer mail, regarding personal service as an intrusion."

> **(1)** ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by in-hand delivery or by United States Mail that requires a return receipt or by commercial carrier and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

It seems that use of U.S. Mail has been common but is far from universal. Whether "commercial carrier" would be specific enough in a rule could be debated — is Sam's Delivery Service as good as FedEx? A rule cannot appropriately name acceptable commercial carriers and exclude others (perhaps not yet founded at the time the rule is adopted). And some commentary during the Rule 45 project suggested that informal exchanges among counsel often hit upon solutions acceptable to the participants. It could prove challenging to devise an appropriate description for service by a means other than in-hand delivery or U.S. Mail.[50]

It may be that subpoenas to testify in court should be treated differently from subpoenas to attend a deposition or produce documents. During the 2009-13 examination of the rule there was some discussion of moving the use of subpoenas for discovery out of Rule 45 and into the 26-37 series, but that change seemed to present significant obstacles, and lead to unwanted duplication.

At least with subpoenas to testify in court, it may be that the court wants hand delivery before it is asked to hold a person who does not appear in contempt or issue a bench warrant. (Such concerns might be more important under Criminal Rule 17(d).[51]) But it is also worth noting that were Rule 45 to be changed nothing would prevent parties from relying on in-hand delivery,

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[50] Provisions elsewhere in the civil rules or in other rules may be useful referents. Here are some examples:

> Civil Rule 4(f)(2)(C)(ii), regarding service of summons outside this country, permits "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt."
>
> Appellate Rule 25(c)(1), regarding non-electronic service: "(B) by mail; or (C) by third-party commercial carrier for delivery within 3 days."
>
> Bankruptcy Rule 7004(a) authorizes service of a summons and complaint in an adversary proceeding by any means authorized by multiple provisions of Civil Rule 4. Rule 7004(b)(1) authorizes service within the United States "by fist class mail postage prepaid * * * by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession."
>
> Criminal Rule 17(d) (also quoted in text) provides, with regard to service of a subpoena: "The server must deliver a copy of the subpoena to the witness and must also tender to the witness one day's witness-attendance fee and the legal mileage allowance."

[51] It might be noted that subpoenas to testify in criminal trials are not subject to geographical limitations like the ones that apply to subpoenas under Rule 45.

particularly if time was short or they anticipated a possible need to apply to the court for assistance in compelling compliance with the subpoena.

A consideration raised during the prior Rule 45 project was to ensure that the person subject to the subpoena is effectively notified of what it demands be done. During the public comment on the 2018 change to Rule 23(c)(2)(B), permitting notice of certification to a Rule 23(b)(3) class to class members to be sent by "United States mail, electronic means, or other appropriate means," public commentary included reports that some Americans (particularly those born after 1990?) may pay no attention to things received by U.S. Mail.

So there may be reasons to prefer the old-fashioned delivery in hand to U.S. Mail. If that were clearly correct, the rule could be amended to say so: "Serving a subpoena requires delivering a copy of the named person by in-hand delivery . . ."[52] That would seem to overcome the ambiguity in the current rule. At least for trial subpoenas and subpoenas to testify during a court hearing, it might be preferred.

An additional issue might be when service by alternative means is deemed effective. Relying on an "overnight courier" seems to ensure relatively prompt efforts to deliver to the location specified by the sender. Whether U.S. Mail is similarly prompt could be debated. Particularly for hearings in court, however, time may be of the essence. And delivery by U.S. Mail or overnight courier is no better than the address given by the party seeking service of the subpoena. In light of the possibility the address is wrong, that could be a reason to favor an explicit requirement of hand delivery.

Related issues might arise with Rule 45(b)(4), providing:

> **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement, including a return receipt signed by the witness or a commercial carrier's proof of delivery to the witness, showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

Perhaps a return receipt obtained by the U.S. Postal Service would suffice as providing the "names of the persons served." Certified or Registered mail could provide similar assurance, particularly if it directed that delivery should only be to the named addressee. Devising a reliable directive could produce some challenges.

Permitting service under Rule 4

As mentioned at the beginning of this memo, one approach offered in 2009 was to make the requirements for service of a subpoena the same as for service of a summons and complaint under Rule 4. Certainly one can suggest that the stakes for a witness are not often as large as they

[52] Perhaps a model would be Rule 4(f)(2)(C)(i) for service outside this country in the absence of an international agreement on means of service — "delivering a copy of the summons and of the complaint to the individual personally."

are for a defendant, but Rule 4 service is permitted in a variety of manners not requiring delivery in hand.

One consideration is that service of a summons and complaint does not necessarily call for such immediate action as some subpoenas do. If a defendant does not file an answer or Rule 12 motion in time, the plaintiff can seek entry of default. But under Rule 55, courts are generally relatively lenient in setting aside such defaults, particularly if defendant raises some non-frivolous reason to doubt proper or effective service. Usually courts will set aside a default unless the plaintiff can show significant prejudice resulting from the failure to respond by the due date. And plaintiffs often agree to extend the time to respond. So a summons and complaint may in reality offer considerable lag time as compared, for example, with a subpoena to appear and testify at trial a few days after service.

Putting aside those considerations, it does seem that several provisions in Rule 4 might not be suitable for a subpoena.[53] Additional provisions of Rule 4 deal with serving corporations,

[53] Here are some examples:

Rule 4(d): This rule permits a defendant to waive service (and thereby to get extra time to respond) by completing and sending in a form. Defendant then must have at least 30 days "after the request was sent * * * by first-class mail or other reliable means" to waive service. Waiver is not the same as service, and Rule 4(d) should not apply to a subpoena.

Rule 4(e)(1) permits service as permitted by state law in the state where the district court is located. In California, at least, that would seem to permit use of Cal. Code Civ. Proc. § 415.40:

> A summons may be served on a person outside this state * * * by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of summons by this form of mail is deemed complete on the 10th day after such mailing.

That is not the method specified by § 1987(a) of the California Code for serving a subpoena: "the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally." It may be that research about methods of service of subpoenas in various state courts would be useful.

Rule 4(e)(2)(B) permits leaving a copy of the summons and complaint at "an individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." That might be suitable under many circumstances, but what if the person subject to the subpoena is on the opposite coast, and the subpoena calls for action before the scheduled return from that travel?

Rule 4(e)(2)(C) authorizes service on "an agent authorized by appointment or law to receive service of process." Whether such authorization extends to service of a subpoena might be debated. In particular, if the appointment is due to the absence of the person from the jurisdiction for business or a vacation would not seem sufficient to compel compliance with a subpoena.

Rule 4(f): When service is on a person outside this country, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents may be used or, if not available, among other things, "delivering a copy of the summons and of the complaint to the individual personally."

partnerships, and governmental entities. It seems unlikely they are frequently subpoenaed to give testimony at trials, though a Rule 30(b)(6) deposition might be considered. In that instance, however, the entity is authorized to pick the person to deliver testimony, so service on the entity should not present great difficulties.

More general revision of service methods
to permit use of electronic means under Rule 4

As emphasized in the public comment period about the 2018 amendments to Rule 23(c) on giving notice to class members in 23(b)(3) class actions, the reality is that there has been a sea change in American methods of communication. That change may not matter for service of a subpoena. As introduced above, the solemnity and clarity of in-hand service may be important for subpoenas.

But the idea of permitting use of alternatives found sufficient for service of the summons and complaint may call for inaugurating a more comprehensive review of Rule 4's service methods.

For example, 21-CV-Y (from Joshua Goodbaum) proposes that Rule 4(d) on waiver of service be amended to permit the request to waive be served electronically. He says that is in fact used regularly.

In somewhat the same vein, district courts have authorized service by electronic means on defendants located outside this country under Rule 4(f)(2) or (3). *See, e.g.*, *Rio Properties, Inc. v. Rio International Interlink, Inc.*, 284 F.3d 1007 (9th Cir. 2002) (service by email); *Lexmark Int'l, Inc., v. INK Technologies Printer Supplies, LLC*, 295 F.R.D. 259 (S.D. Ohio 2013) (service by email); *St. Francis Assisi v. Kuwait Fin. House*, 2016 WL 5725002 (N.D. Cal., Sept. 30, 2016) (service by Twitter). In *Water Splash, Inc. v. Menon*, 137 S.Ct. 1504 (2017), the Court held that because the Hague Convention uses the verb "send" in connection with service of process, service by mail on a defendant residing in Canada was not forbidden by the Convention.

There are also signs of possible problems along this line. *See, e.g.*, *Anova Applied Electronics, Inc. v. Hong King Group, Ltd.*, 334 F.R.D. 465 (D. Mass. 2020), holding that service by email is inconsistent with the Hague Convention. In *Keck v. Alibaba.com, Inc.*, 330 F.R.D. 255 (N.D. Cal. 2018), the court held that plaintiff did not make an adequate showing to justify an order authorizing electronic service on a Chinese company because it had not tried to find the defendant's physical address or shown that service pursuant to the Hague Convention would not work.

Rule 4(g) deals with serving a minor or incompetent person and directs reliance on state law. Whether subpoenas are often used for such persons is unclear.

The Standing Committee approved emergency Rule 87(c)(1) at its June 2022 meeting. That rule provides another possible model for case-specific orders:

> The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2) — or a minor or incompetent person in a judicial district of the United States — by a method that is reasonably calculated to give notice.

This rule is largely modeled on the current provisions of Rule 4(f) for persons outside the United States. As noted above, that rule has been found to provide authority (on a sufficient showing) to support service by electronic means.

Experience in drafting Rule 87(c)(1) suggests it may soon be time to consider authorizing electronic service more generally of the summons and complaint. Under Rule 5(b), electronic service has become commonplace, and there have been submissions urging that pro se litigants be authorized to file electronically. Undertaking this study would likely involve considerable time and effort, and it is not clear that the time to do so has arrived.

* * * * *

In sum, these submissions raised a number of possible dispositions:

(1) Leave Rule 45(b)(1) as it is because it has proven sufficiently flexible.

(2) Revise Rule 45(b)(1) to specify that service by U.S. Mail, overnight courier, or some similar means suffices for a subpoena.

(3) Revise Rule 45(b)(1) to require hand delivery because that has an important signaling function.

(4) Commence a more general study of manner of service of the summons and complaint as well as of subpoenas.

During the Advisory Committee's October 2022 meeting, members were uncertain about actual experience or difficulties resulting from current Rule 45(b)(1). There were also suggestions of caution in proceeding before the Advisory Committee feels comfortable about the larger question of expanding the methods for service of original process under Rule 4.

The Advisory Committee's Discovery Subcommittee is expected to address these issues, and would benefit from any insights from members of the Standing Committee.

C. Rule 55 — Clerk "must" enter default, and sometimes default judgment

Questions have been raised about directives to court clerks in Rule 55 on entry of default and default judgment. As relevant, the rule presently provides:

> **(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.

Though these provisions have been in the rule for a long time, initial reports indicate that in some courts the clerks do not often do what the rule says they "must" do, particularly as to entering judgment. At least in other circumstances, clerks are not asked to make determinations about such things as whether service was properly effected, whether the party against whom default was sought has failed to "plead or otherwise defend," and whether the claim is for "a sum certain or a sum that can be made certain by computation."

Compare Rule 41(a)(1) on voluntary dismissal, which requires that the clerk dismiss on plaintiff's application in the absence of a court order to that effect. The Federal Practice & Procedure treatise explains why only an unconditional dismissal will do:

> Because Rule 41(a)(1) operates in this simple and routine fashion, the plaintiff may not attach conditions to the voluntary dismissal. If conditioning a notice were allowed, the clerk would have to construe the condition "and perhaps even become a fact-finder to determine when the condition is satisfied."

9 Fed. Prac. & Pro. § 2363 at 517, quoting *Hyde Const. Co. v. Koehring Co.*, 388 F.2d 501, 507 (10th Cir. 1968).

One recent case suggests that Rule 55 could present similar challenges for the clerk. In *Leighton v. Homesite Ins. Co. of the Midwest*, 580 F.Supp.3d 330 (E.D. Va. 2022), there were two defendants. One of them filed an answer, but the other one did not. Plaintiff obtained entry of default from the clerk against the defendant that failed to respond. Plaintiff then moved the court for entry of judgment against the defaulted defendant.

Plaintiff's claim in the *Leighton* case was for damage to his property, asserted against both the moving company (which was in default) and the insurance company that issued plaintiff's policy of homeowner's insurance. It was not entirely clear whether plaintiff claimed that the two defendants were jointly liable or severally liable. But it was clear from the insurer's answer that it

intended to defend against liability, including raising the possibility that plaintiff's losses were actually the result of his own wrongdoing. Presumably this was not a suit for a sum that could be made certain by computation, but even if it were that might not have resolved the problem.

The district court refused to enter judgment by default, noting that Rule 54(b) says that "when multiple parties are involved the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." In this case, the judge found that there was a reason for delay under *Frau v. De La Vega*, 82 U.S. 552 (1872), because there was a risk of inconsistent judgments against different defendants.

The FJC is gathering experience from various courts about their interpretation of Rule 55. It may be that an amendment to the rule would save the clerk from becoming a "fact-finder." And it also may be that something useful can be learned by exploring the reasons that have led some courts to depart from the rule text, often to allow only a judge to enter a default judgment, and at least in some courts to allow only a judge to enter a default. During the Advisory Committee's October 2022 meeting, there was a brief discussion including an example of a court in which the clerk enters defaults but judges enter default judgments, and another in which judges enter both defaults and default judgments.

Further information from the FJC is expected. Any experience or insights from members of the Standing Committee would assist the Advisory Committee.

D. Rules 38, 39, and 81(c) — jury trial demand

At the Advisory Committee's March 2022 meeting, there was a report about consideration of proposals to consider changes to the current rule provisions on demanding a jury trial. One submission (15-CV-A) raised concerns about the 2007 style change to Rule 81(c)(1) regarding removed cases. Another (16-CV-F, from Judge Susan Graber and then-Judge Neil Gorsuch) proposed "switching the default" in Rule 38 into accord with Criminal Rule 23(a), which mandates a jury trial whenever the defendant is entitled to a jury trial unless the defendant waives in writing, the government consents, and the court approves. A concern was that one possible explanation for the declining frequency of civil jury trials has been failure to make a timely jury demand.

The FJC undertook docket research regarding the frequency of jury trial demands in civil cases, the frequency of termination after commencement of a civil jury trial, and the frequency of orders for a jury trial despite failure to make a timely demand. The initial FJC report did not show that the rule requirements to demand a jury trial are a major factor in whether jury trial occurs. Type of case seems more prominent. For example, more than 90% of product liability cases show a jury demand, while only about 1% of prisoner cases show such a demand. And the incidence of actual jury trials is affected by settlement. An action may settle before the deadline for demanding a jury. Nor does the study show whether settlement occurs more frequently in cases in which a timely jury demand was not made, something that may not appear on reviewing docket entries. And the effect of facing a prospect of jury trial might be ambiguous in terms of affecting willingness to settle.

This FJC report will become part of a more general report on civil jury trials focusing in part on the variation (or lack thereof) in jury trial rates across districts. That work is ongoing, and these items remain on the Committee's agenda. The declining rate of civil jury trials is much lamented, but it is not clear that the Civil Rules concerning jury demands contribute to that decline. The FJC's ongoing study is a major project mandated by Congress about different rates of jury trials in different districts. During the October 2022 meeting of the Advisory Committee, it was noted that this study has already progressed to a point that shows that jury trials have occurred in some cases even though the docket for those cases does not show a jury demand. It may be that completion of the FJC study will not shed further light on the desirability of amending Rule 38 or Rule 81(c), but the topics remain on the agenda pending completion of the FJC study.

E. Standards and procedures for deciding ifp status

Disparate practices in handling in forma pauperis applications have recently received academic attention. One example is Professor Hammond's article Pleading Poverty in Federal Court, 128 Yale L.J. 1478 (2019). Professor Hammond (Indiana U.) and Professor Clopton (Northwestern) have submitted 21-CV-C, raising various concerns about divergent treatment of ifp petitions in different district courts.

There is strong evidence of divergent practices that seem difficult to justify. But it is far from clear this is a rules problem: it appears that no Civil Rule presently addresses these issues,[54] and ifp status is generally set by statute. It is thus not clear that there is a ready rules solution to this problem.

Devising a nationwide solution would prove very challenging. For example, the stark disparities in cost of living in different parts of the country make articulating a national standard a major challenge. And in terms of court operations, there may be significant inter-district differences (such as whether there is a sufficient supply of *pro se* law clerks to evaluate applications for fee waivers) that bear on how ifp petitions are handled. But one might have difficulty explaining significant divergences between judges in the same district in resolving such applications.

At least some districts have recently paid substantial attention to their handling of ifp petitions, sometimes involving court personnel with particular skills in resolving such applications. Those efforts may yield guidance for other districts.

Though the case can be made for action on this front, then, the content of the action and the source for directions are not clear. The Administrative Office has convened a working group examining these issues. It may well emerge that the Court Administration and Case Management

[54] Professor Hammond's article, cited in text, does focus on Rule 4(c)(3) and also mentions Rule 83, but those rules do not prescribe criteria or procedures for ifp determinations. Professor Hammond also mentions Appellate Rule 24(a), which imports into appellate practice the district court determination regarding ifp practice. A major focus of the article, however, is on A.O. forms used by different courts (perhaps by local rule; see Rule 83).

Committee is the appropriate vehicle for addressing these issues rather than the somewhat cumbersome Rules Enabling Act process. Presently, for example, there is some concern about the varying application of different Administrative Office forms that are used in different districts to review ifp applications. Those forms do not emerge from the Enabling Act process.

During the Advisory Committee's October 2022 meeting, attention was drawn to prisoner cases, and also to an Administrative Office memorandum to court clerks about when to close prisoner cases. In cases governed by the Prison Litigation Reform Act, it is said, the filing fee becomes the minimum settlement value. It was also suggested that the Court Administration and Case Management Committee is better equipped than the rules process to address ifp practices. No specific further action is presently contemplated, but the Advisory Committee would benefit from the views of the Standing Committee.

For the present, the topic remains on the agenda pending further developments.

F. Class representative awards

Discussion during the October 2022 meeting raised an issue not initially included on the Advisory Committee's agenda — the ongoing viability of "incentive awards" to class representatives in class actions.

In *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), a panel of the Eleventh Circuit, by a 2-1 vote, held that "incentive awards" for class representatives in class actions were prohibited under two 19th century Supreme Court decisions. In 2022, the court of appeals voted not to rehear the case *en banc*. *Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138 (11th Cir. 2022). Meanwhile, the Ninth Circuit and the Second Circuit took a different view of incentive awards. See *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022); *In re Apple Device Performance Litigation*, 50 F.4th 769 (9th Cir. 2022). At least some lower courts resisted the Eleventh Circuit's conclusion. *See, e.g.*, *Somogyi v. Freedom Mortg. Corp.*, 495 F.Supp.3d 339, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or the Third Circuit bans incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.").

A petition for certiorari regarding the Eleventh Circuit decision has been filed in the Supreme Court. *See Johnson v. Jenna Dickenson* (no. 22-389) (Oct. 25, 2022). During the Advisory Committee's October 2022 meeting, the issue received some discussion. One suggestion was that "service award" would be a more appropriate term than "incentive award." It is impossible to determine the importance of this development at this time, and the topic will be carried forward on the Advisory Committee's agenda pending developments.

G. Filing under seal in court

The Advisory Committee has received several submissions urging that it consider rule amendments to recognize that there is a difference between the grounds sufficient to justify a Rule 26(c) protective order guarding the confidentiality of materials exchanged in discovery and the grounds for sealing court records, which are affected by both common law and First

Amendment considerations relevant to public access to court proceedings and court records. The Discovery Subcommittee has considered possible amendments to Rule 26(c) and Rule 5(d) to recognize the disparate issues involved. The Administrative Office has embarked on a more general study of filing under seal, and the Subcommittee has stayed its hand pending completion of that effort. The general subject continues to receive attention in Congress as well.[55]

IV. Items to be removed from agenda

A. Rule 63 — Successor Judge

Submission 21-CV-R from Judge Richard Hertling of the U.S. Court of Federal Claims was prompted by the interpretation of Rule 63 of the Rules of the Court of Federal Claims in *Union Telecom, LLC v. United States*, 2021 WL 3086212 (Fed. Cir., July 22, 2021). This rule of the Court of Federal Claims, Judge Hertling notes, is "parallel and identical" with Civil Rule 63.

Judge Hertling suggests that, "in light of the broader use of technology that has been accelerated by the pandemic," it might be useful to consider a small change to Rule 63 to clarify the latitude available to a district judge when the original judge cannot continue and a party asks the new judge to recall a witness already heard by the original judge.

This submission was initially presented at the Advisory Committee's March 2022 meeting. Some Committee members then expressed concern that Rule 63 might be applied to require recalling a witness when the circumstances did not justify recall. It was retained on the agenda to afford a chance to consider that possibility. Among other things, one of the law clerks for Judge Flaum (7th Cir.) provided a research memo on Rule 63 experience. Though that memo relates to work that may in the future be appropriate with other rules, it does not point up any existing difficulty with Rule 63 that might call for action presently. This report, therefore, is provided to apprise the Standing Committee of possible future issues regarding other rules, particularly Rule 43(a).

By way of background, as suggested by Judge Hertling, it is useful to consider the recent genesis of Rule 87, which involved discussion of similar issues with regard to other rules in which the question seems to arise considerably more frequently than under Rule 63. Specifically, the CARES Act Subcommittee, chaired by Judge Jordan, gave considerable attention to whether the Rule 43(a) requirement that witnesses testify live in person during trials and hearings in the courtroom should be softened.

Besides directing that "the witnesses' testimony must be taken in open court," Rule 43(a) does also say: "For good cause in compelling circumstances and with appropriate safeguards, the

[55] Section 12 of the proposed Judicial Ethics and Anti-Corruption Act of 2022, S. 4177 and H.R. 7706, is entitled "Restrictions on Protective Orders and Sealing of Cases and Settlements." It would add a new 28 U.S.C. § 1660, placing limits on judicial orders granting confidentiality in cases in which "the pleadings state facts that are relevant to the protection of public health or safety." It is not clear whether this legislation will move forward.

court may permit testimony in open court by contemporaneous transmission from a different location." That provision is strikingly more restrictive than the Rule 63 provision on recalling witnesses. Reports in the legal press indicate, however, that remote testimony was actually used in many proceedings that have occurred since March 2020, including some trials.

After considerable discussion, the CARES Act Subcommittee concluded that there was no need to propose that after a declaration of a judicial emergency by the Judicial Conference, an "Emergency Rule 43(a)" be applied to relax the ordinary constraints on remote testimony during hearings and trials. In large measure, this decision reflected the considerable latitude available under the current rule, which had seemingly well addressed the set of problems the pandemic imposed on the courts. Subsequent reports about remote proceedings appear to confirm this view.

At the same time, there was also discussion of the question whether there should be serious consideration of amending Rule 43(a), without regard to emergency conditions, to relax its limits on remote testimony. A related question was whether Rule 30(b)(4) should be amended to facilitate taking remote depositions.

This submission is not about either Rule 43(a) or Rule 30(b)(4), which proved to be the pressure points during the CARES Act Subcommittee deliberations. Changing those rules could be very important and could affect a large number of cases. Indeed, "Zoom depositions" occurred hundreds of times, or more probably thousands of times, during the pandemic, and it is likely that at least dozens and maybe hundreds of witnesses provided remote testimony at trials or hearings. It may soon be worth reconsidering the provisions in those rules outside the emergency context.

Rule 63 does not appear to deal with issues of similar consequence, although there is surely a parallel between a judicial decision based on the recorded testimony of a witness who testified before a different judge and reliance on remote testimony in a court proceeding.

Rule 63 provides, in full:

> 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.

The problem identified by Judge Hertling is that the rule does say the successor judge "must" recall a witness under some circumstances. Before turning to the Federal Circuit decision that prompted the submission, it seems useful to consider the latitude already built into the rule. The judge "must" recall a witness whose testimony is "material" and "disputed" and who is "available" to testify "without undue burden." To substitute "may" for "must" in the rule would virtually nullify that sentence of the rule, so it could be deleted, and the last sentence could be retained without the words "also" and "other," so that it would read: "The successor judge may

recall any witness." Perhaps "must" could be replaced by "should," but the cited unpublished Federal Circuit decision does not offer strong support for such a change.

Union Telecom v. United States, 2021 WL 3086212 (Fed. Cir., July 22, 2021), involved a claim for a tax refund paid in relation to sales of prepaid phonecards. There was a three-day bench trial before a judge who subsequently retired, and the case was reassigned to a different judge of the Court of Federal Claims. But since the judge who presided over the trial had not yet decided the case when she retired the decision fell to the successor judge.

Union Telecom argued the successor judge had to recall two witnesses who had testified at the trial. The successor judge assured the parties he was familiar with the record and well-positioned to render a decision without rehearing witnesses. But he did not invoke the rule's criteria when refusing to recall the witnesses.

The Federal Circuit noted that the rule says "must," and that "there are only three listed exceptions: (1) the testimony is immaterial, (2) the testimony is undisputed, or (3) there would be an undue burden on the witness." But the successor judge "did not mention any of the three exceptions in its opinion. * * * Because the trial court must find one of the three exceptions in order to refuse to recall witnesses, we hold that the trial court erred in its reasoning."

Immediately after finding this error, however, the court of appeals also said the error was harmless: "None of the testimony that the plaintiff requested be reheard could have altered the outcome of the case." That certainly sounds like saying the testimony would not have been material. The refund claim was defeated by uncontradicted evidence that no taxes had been paid. The request to recall witnesses named witnesses who had no knowledge whether the taxes had been paid. The error was failure to articulate this conclusion in the vocabulary of Rule 63.

As noted above, Rule 63 could be rewritten on this point to change "must" to "should." Perhaps that change would afford useful protection in some instances to trial court latitude to decide whether to recall witnesses.

But there seems little reason to make this change. To begin, the change would not have affected the ultimate resolution of the unreported case that prompted the submission. In addition, it appears that Rule 63 is involved in very few decisions. The entire coverage of Rule 63 in the Federal Practice & Procedure treatise occupies 14 pages. By way of contrast, the treatise devotes about 950 pages of text and 250 pages of pocket parts to Rule 26. Most of the discussion of Rule 63 in the treatise is about standards for recusal, evidently the main reason why cases are reassigned (not due to retirement or health problems). See § 2922 (9 of the 13 pages on the rule). The pocket part to this bound volume (published in 2012) cites one case on Rule 63 during this ten-year period.

Regarding the issue raised by this submission, the treatise has only one sentence, repeating what the rule says about recalling witnesses and citing no cases involving this provision. See § 2921 at 740. In order to determine whether there was a problem not reflected in the treatise, the Committee was able to obtain the research help of one of the law clerks for Judge Flaum (7th Cir.). Though her memo certainly raises issues about the sorts of concerns that have arisen under

Rules 43(a) and 30(b)(4), mentioned above, and about the possible desirability of considering rule changes to facilitate and perhaps regulate remote proceedings, it does not identify a current problem with Rule 63. Instead, as the memo's conclusion notes, it is "part of a broader policy choice on the extent the judiciary wishes to carry forward remote testimony." That is an important topic, but Rule 63 is not the vehicle to consider it.

At its October 2022 meeting, the Advisory Committee removed the proposal from its agenda without dissent.

B. Rule 17(a) and (c)

Christopher Cross submitted a proposal to amend Rule 17(a) or (c). As presently written, Rule 17(a)(1) and (c)(1) address the requirement that a case must be prosecuted in the name of the real party in interest:

> **(a) Real Party in Interest.**
>
> **(1)** ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:
>
> * * * * *
>
> **(C)** a guardian;
>
> * * * * *
>
> **(c) Minor or incompetent person**
>
> **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or incompetent person:
>
> * * * * *
>
> **(A)** a general guardian;
>
> **(B)** a committee;
>
> **(C)** a conservator; or
>
> **(D)** a like fiduciary.
>
> * * * * *

Mr. Cross asserts that he is "a duly appointed legal guardian of an adult ward with severe disabilities" pursuant to Mo. Rev. Stats. § 475.120.3. Accordingly, he asserts, under Rule 17 he may file and litigate a case in federal court as real party in interest for the benefit of the ward.

It does seem that Rules 17(a)(1)(C) and 17(c)(1)(A) should enable Mr. Cross to do these things. Though the determination is made under Rule 17, it seems that the Missouri statutory authority he cites would cover him:

> State substantive law usually provides that the general guardian of a minor or incompetent has the right to maintain an action in the guardian's own name for the benefit of the ward. Under a rule or statute of this type, the general guardian is the real party in interest for purposes of Rule 17(a)(1).

6A Fed. Prac. & Pro. § 1548.

Mr. Cross's signature block says he holds the following degrees: M.A., C.M.A., and D.S.P. and that he is a "Court appointed guardian, with full powers & Federally appointed payee." Nevertheless, Mr. Cross asserts, "two federal trial court judges I have encountered have flat out refused to comply with the rule." He also says that even though he presented one judge with "8th Circuit case law on the subject," that judge "refused to permit me to litigate the case for damages and injuries that I suffered, and those that my ward also suffered."

Mr. Cross therefore purposes that Rule 17(a) and (c) "must explicitly state that the guardian is duly entitled to act pro se in filing and litigating a case for and on his own behalf" independent of naming the ward as well.

In terms of the real party in interest rule, it does not seem that Mr. Cross sees any actual problem with the current rule but believes some district judges are not following it. Perhaps an appeal is his correct remedy; a rule change does not seem to be a cure since the rule already appears to authorize what he wants. Indeed, he recognizes that the rule does what he wants but he says some judges refuse to follow it.

It appears that the difficulty Mr. Cross has encountered in part is that judges insist that he obtain an attorney to act on behalf of the ward rather than proceeding in propria persona. So he also urges that the rule be amended to "state in explicitly clear terms that a duly court appointed legal guardian is permitted to act pro se in filing and litigating the case." Beyond that, he says that "if a trial court is to assert that the guardian must be represented by an attorney, then the trial court shall (not may, or can) appoint the guardian an attorney."

The rules recognize that parties may proceed without counsel. *See, e.g.*, Rule 11(a) (requiring that every paper filed in court be signed by counsel "or by the party personally if the party is unrepresented"). Whether a court may limit representation by a guardian who acts without counsel might be debated, but Rule 17(a)(1) says such people may "sue in their own names," which would presumably include doing so without counsel. 28 U.S.C. § 1654 also generally permits parties to "plead and conduct their own cases personally or by counsel." There seems to be no reason to believe Rule 17 was intended to interpret § 1654, one way or the other. The proper interpretation of that statute seems better left to the courts than addressed in a rule.

There may be some inherent authority for a court to insist that a litigant be represented by counsel, but nothing in the Civil Rules appears to address that question directly. And to the extent there is such authority, Mr. Cross does not seem to want a Civil Rule to limit it.

Instead, the main thing Mr. Cross proposes is that the rules require courts to appoint (and pay for?) legal representation when they insist upon it. There are statutory provisions about appointment of counsel to represent parties in civil cases in some circumstances, and many district courts have made local arrangements for counsel available to be appointed when necessary. But these arrangements are not required or regulated by the Civil Rules.

At its October 2022 meeting, the Advisory Committee decided without dissent to remove this matter from its agenda.

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

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

* * * * *

(3) ***Contents of the Order.***

* * * * *

(B) *Permitted Contents.* The scheduling order may:

* * * * *

(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of

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

privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words — "and management" — are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may

identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes between themselves, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case — type of materials being produced, volume of materials being produced, type of privilege or protection being invoked, and other specifics pertinent to a given case — there is no overarching standard for all cases. For some cases involving a limited number of withheld items, a simple document-by-document listing may be the best choice. In some instances, it may be that certain categories of materials may be deemed exempt from the listing requirement, or listed by category. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide constructive involvement early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.

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

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:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and — if the parties agree on a procedure to assert these claims after production — whether to

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

ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Those logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

This amendment provides that the parties must address the question how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.

This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials, and to prompt creativity in designing methods that will work in a particular case. One matter that may often be valuable is candid discussion of what information the receiving party needs to evaluate the claim. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility. The 1993 Committee Note explained:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Despite this explanation, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens. And the growing importance and volume of digital material sought through discovery have compounded these difficulties.

But the Committee is also persuaded that the most effective way to solve these problems is for the parties to develop and report to the court on a practical method for

complying with Rule 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials sought, and the range of pertinent privileges.

In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials.

As suggested in the 1993 Committee Note, in some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. Suggestions have been made about various such approaches. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A). One technique that the parties might discuss in this regard is whether some sort of listing of the identities and job descriptions of people who sent or received materials withheld should be supplied, to enable the recipient to appreciate how that bears on a claim of privilege. Current or evolving technology may offer other solutions.

Requiring that this topic be taken up at the outset of litigation and that the court be advised of the parties' plans in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can

create serious problems. Often it will be valuable to provide for "rolling" production of materials and an accompanying listing of withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution. That resolution, then, can guide the parties in further discovery in the action. In addition, that early listing might identify methods to facilitate future productions.

Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.

TAB 5B

Draft Minutes
Civil Rules Advisory Committee
October 12, 2022

The Civil Rules Advisory Committee met at the Administrative Office on October 12, 2022. Two members participated by remote means. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C. Boal; Hon. Bryan M. Boynton; David J. Burman, Esq.; Judge David C. Godbey; Judge Kent A. Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer (remotely); Ariana Tadler, Esq. (remotely); and Helen E. Witt, Esq. Professor Richard L. Marcus participated as Associate Reporter and Professor Edward H. Cooper participated as Reporter. Judge John D. Bates, Chair; Professor Catherine T. Struve, Reporter; and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. H. Thomas Byron III, Esq.; Bridget M. Healy, Esq.; S. Scott Myers, Esq.; Allison A. Bruff, Esq; Christopher I. Pryby, Esq.; Brittany Bunting–Eminoglu; and Nicole Y. Teo represented the Administrative Office. Dr. Emery G. Lee and Tim Reagan, Esq. (remotely) represented the Federal Judicial Center.

Members of the public who joined the meeting in person or remotely are identified in the attached attendance list.

Judge Dow opened the meeting with greetings to all observers, both those attending in person and those attending remotely. He noted newcomers. Judge Hannah Lauck, of the Eastern District of Virginia, is a new Committee member. Judge D. Brooks Smith, of the Third Circuit, is the new liaison from the Standing Committee, but was unable to attend today's meeting. Allison Bruff has joined the Rules Committee Support Office as counsel for the Civil and Criminal Rules Committees, while Christopher Pryby is the new Rules Law Clerk and Nicole Teo is an intern from Smith College. Judge Dow added thanks to the observers, both for their present interest in the Committee's work and for the great help that many of them and their organizations have provided in the past and can be counted on to provide in the future.

Judge Bates announced further "comings and goings." Judge Dow is leaving the Committee to become Counselor to the Chief Justice. This position is very demanding and responsible. It involves administration not only in the Supreme Court but throughout the federal judiciary, working as a leader along with the Executive Committee of the Judicial Conference, the Director of the Administrative Office, and others. Judge Dow was present and participating in all the Committee meetings that Judge Bates attended, demonstrating tremendous inspiration for the rulemaking process. Congratulations are due to him, and well wishes for his new role.

Judge Bates also welcomed Judge Rosenberg as the new Committee Chair. She will be another great leader. She has done fantastic work as chair of the Multidistrict Litigation Subcommittee, and will be another creative and inspiring leader.

Judge Dow responded with thanks, noting that he became involved in the Rules Enabling Act process in 2010 with his appointment to the Appellate Rules Committee. Professor Struve was Reporter for that Committee; her reappearance as Reporter for the Standing Committee has been a delight. He gave heartfelt thanks to all Committee members and staff for the experiences of his seven years with this Committee.

Judge Dow then reported on the Standing Committee meeting last June. The other advisory committees generated a lot of work for the Standing Committee, while this Committee presented relatively less work. The CARES Act emergency rule, Civil Rule 87, was presented in tandem with the parallel proposals for emergency rules in the Appellate, Bankruptcy, and Criminal Rules. All were approved for adoption. Amendments to Civil Rules 15 and 72 also were approved for adoption.

The Judicial Conference approved for adoption new Rule 87; amendment to Rule 6 for adoption without publication to add Juneteenth National Independence Day to the list of national holidays; and amendments to Rules 15 and 72. Judge Dow noted that the CARES Act provisions for emergency practices in criminal prosecutions had been very helpful in managing cases during the pandemic, and that some judges are still using them.

Rules "in the pipeline" were noted. An amendment of Rule 7.1 requiring diversity disclosure and the new Supplemental Rules for reviewing individual claims for Social Security benefits are on track to take effect this December 1. The Social Security Rules were "a pretty heavy lift." Amendments of Rules 6, 15, 72, and new Rule 87, are moving toward taking effect on December 1, 2023. Rule 12 is the only rule now on track for taking effect on December 1, 2024.

Later in the meeting, Judge Roslynn R. Mauskopf (Director of the Administrative Office) appeared to offer a greeting and welcome. She thanked the committee for all of its hard work. "The work is so important for judges. It is instrumental to ensuring the promise of Rule 1, the search for civil justice." There are a lot of difficult issues on the agenda.

Legislative Update

The legislation update by Judge Dow and Christopher Pryby was brief. A good number of bills that would affect civil procedure have been introduced in this session of Congress. Some of them would mandate adoption of new rules, or directly affect current rules. None of them have yet passed in either house. In addition to Civil Rules, some bills would affect Bankruptcy, Criminal, and Evidence Rules.

March 2022 Minutes

The draft minutes for the March 29, 2022, Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Draft

Discovery Subcommittee

Judge Godbey delivered the report of the Discovery Subcommittee.

The Subcommittee recommends that amendments of Rules 16(b)(3) and 26(f)(3) be recommended for publication. The drafts are consistent with the drafts discussed at the most recent two Committee meetings. They advance a modest proposal.

The proposals address practices in preparing the descriptions required by Rule 26(b)(5)(A)(ii) when a party withholds information from discovery by invoking privilege or work-product protection. The rule text directs that the withholding party describe the nature of the things not produced "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." These words capture the intent of the rule without providing much guidance on how to accomplish the desired description. Efforts to craft rule text that provides better practical guidance, however, have proved fruitless.

Rather than attempt to revise Rule 26(b)(5) itself, then, the Subcommittee has focused on the advantages to be gained by encouraging the parties to confer about the timing — and the method to be used — for generating what are often called "privilege logs." Important advantages can be won by early discussions aimed at shaping case-specific methods for generating privilege logs, and at prompting early release of at least a partial privilege log to set the stage for any further discussions that may be needed.

To this end, the same new words are proposed for both Rule 26(f)(3)(D) and Rule 16(b)(3). The caption of Rule 16(b) also would be revised to include one new word to emphasize the role of case management in general: "(b) Scheduling and Management." The new language can be illustrated through Rule 26(f)(3)(D):

> A discovery plan must state the parties' views and proposals on: * * *
>
> (D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing for and 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;

This language has been polished repeatedly by the Reporter, working with the Subcommittee, to achieve a successful synthesis of the many comments that emerged from discussions with lawyer groups.

The practicing bar has strong interests in this rule. The interests of producing parties often diverge from the interests of requesting parties. But the values of early discussion aimed at case-

specific protocols are widely recognized and shared. The values of producing at least a partial privilege log relatively early in the discovery period are also recognized and shared.

Judge Dow noted that the Subcommittee process worked very well. Great help was provided by the lawyer members. "We could not do it without them."

Judge Bates suggested that this "is a modest, but a great, proposal." The Committee Note provides background information, and offers suggestions for implementation. Generally a Note this extensive is prepared for "meaty" amendments, such as the 2015 discovery amendments or Evidence Rule 702. Is there a risk that this Note, prepared to illuminate a modest proposal, will stir the very divisiveness that the Subcommittee fears would be stirred by a more detailed amendment of rule text?

The general resistance to using committee notes as practice manuals was noted. But this amendment originated as a proposal to amend Rule 26(b)(5)(A) itself, "to put some meaty things there," such as describing withheld matters by category. A fulsome note provides what could be useful background. "We spent a lot of time on this." The bar and judiciary will not be shy about commenting on this Committee Note. "The Note may evolve, but for now it is useful to explain what is intended and why."

Professor Coquillette noted that "this is a historic concern of mine." If some committee notes include best-practices advice while others do not, questions will be raised about the different approaches.

The discussion concluded with the observation that "the bottom line is we will see what the public comments say." Privilege logs are contentious. The tendency in framing rules amendments is to move toward what can be achieved by consensus.

The Committee voted without dissent to recommend that these draft rules be approved for publication. Special thanks were expressed for the work of Judge Godbey and Professor Marcus.

Rule 42 Consolidation - Appeal Finality

Judge Rosenberg introduced the report of the Rule 42 Subcommittee, a joint subcommittee of Appellate and Civil Rules Committee members. The recommendation is to remove this topic from the Committee agenda.

The Supreme Court, in *Hall v. Hall*, 138 S. Ct. 1118 (2018), ruled that complete disposition of all claims among all parties in what began as an independent action is an appealable final judgment, even though further work remains to be done in another action that was consolidated with the now-concluded action. At the same time, the Court suggested that if problems emerge from this approach, improvements could be made through the Rules Enabling Act process.

The Subcommittee was formed largely because of fears that this wrinkle on final-judgment appeal doctrine might remain obscure to many lawyers, causing loss of any opportunity for

appellate review by failure to take a timely appeal. The Federal Judicial Center was enlisted to study the effects of the rule in actual practice.

The FJC study was led by Dr. Emery Lee. The first phase studied all district court filings from 2015 to 2017. The earlier cases provided an opportunity for comparison because the circuits had generated three different approaches to this question, with a modest variation on one of them. The approach adopted by the Court was followed only in a minority of circuits.

The first phase of the FJC study examined all actions on the dockets of all the districts, excluding MDL consolidations. After identifying all consolidated actions, a sample was studied for appeal experience. Appeals were taken in only a small fraction of all consolidated cases. And there was no indication that any party had forfeited the opportunity to appeal for ignorance of the newly uniform rule.

The second phase of the FJC study examined all appeals filed in 2019 or 2020, identifying appeals in consolidated actions. Once again, there was no evidence that opportunities to appeal had been lost for ignorance of the rule established by *Hall v. Hall*.

Dr. Lee observed succinctly that "problems do not arise."

Further discussion noted that the FJC study showed that nearly half of all district court consolidation orders did not identify the purposes of the consolidation. That habit might prove difficult to dislodge by amending Rule 42(a) in an attempt to encourage district courts to think ahead to the possible appeal complications that might arise upon the future complete disposition of one of the originally independent actions embraced by the consolidation. Consolidation is ordered to achieve more efficient and better management of parallel actions. That is the immediate focus. Predicting the twists and turns that may follow in the ensuing proceedings would be difficult. The FJC study shows that what were labeled "original action final judgments" were relatively rare.

The uncertainty about the character of many consolidations makes it difficult to consider the possibility that the parties, district court, and appellate court could gain by a rule that brings consolidated actions into the partial final judgment provisions of Rule 54(b). The possible gains are illustrated by a simple example. Two plaintiffs might join in an action against the same two defendants. Complete disposition of all claims between one plaintiff and one defendant is not a final judgment unless the court, considering the many factors that inform Rule 54(b) orders, directs entry of a partial final judgment. Rule 54(b) has worked well in this setting. Why should it be different if the same litigation begins with two separate actions that are then consolidated for all purposes?

The problem is that there is no apparent reason to invoke Rule 54(b) when cases are consolidated for fewer than all purposes. Rule 42(a)(1) permits joining cases for hearing or trial. Rule 42(a)(3) authorizes "any other orders to avoid unnecessary cost or delay" when actions before

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the court involve a common question of law or fact. Combined discovery would be an obvious example.

An attempt to integrate Rule 54(b) with Rule 42(a), in short, would have to grapple with the need to address only orders that consolidate two or more cases for all purposes. A satisfactory resolution as a matter of rule text might be within reach, but it would depend on an explicit statement of the purposes of consolidation, either when consolidation is ordered or perhaps when the court comes to believe that complete disposition of an originally independent action is — or is not — a desirable occasion for immediate appeal. The risks of stirring undue complications and confusing appeal doctrine seem too great to be incurred.

The Committee concluded without dissent to recommend to the Standing Committee that the joint subcommittee be dissolved without further work.

Multidistrict Litigation Subcommittee

Judge Rosenberg introduced the report of the Multidistrict Litigation Subcommittee. She noted that, at the time of the meeting last March, the Subcommittee had been working on possible amendments that would address multidistrict litigation through Rule 26(f) party discussions and Rule 16(b) case management orders. After that meeting, however, the Subcommittee came to believe that it would be better to address the possibility of MDL-specific rule provisions in a new rule if there are to be any rule provisions. A draft framed as a new Rule 16.1 was presented to the Standing Committee last June, not for discussion but to illustrate the approach that would be considered with the help of interested groups over the summer. An incidental effect of this approach is that it avoids the need to consider coordination of any Rule 26(f) and 16(b) amendments with the proposals recommended this morning to address privilege log practice.

The core of the Rule 16.1 approach is to prompt a meet-and-confer of the parties before the initial MDL case management conference. Over the summer the Subcommittee had separate remote meetings with lawyers designated by the American Association for Justice and Lawyers for Civil Justice. The focus was on alternative versions of subdivision (c). Alternative 1 provides a lengthy list of matters the court might direct the parties to discuss as a basis for a report to the court. Alternative 2 provides a much condensed list, at points drawn in more general terms. Both groups preferred Alternative 2, and each provided a "redlined" version that would revise Alternative 2. As might be expected, the redlined versions differed from each other. The Subcommittee discussed the redlined versions, and Professor Marcus undertook to annotate the rule draft with explanations of the issues that have been identified by the Subcommittee and the redline suggestions. This expanded version appears at page 179 in the agenda materials.

Further review of the draft will be sought by presenting it to a group of MDL judges at the upcoming conference of MDL judges in early November. It will be quite different from the proposal considered in the same setting four years ago. The proposal then focused on issues, such as expanded opportunities for interlocutory appeals, that now are on the back burner.

Discussions of MDL procedure always are complicated by the proposition that not only do the cases consolidated in the many different proceedings comprise a large part of the federal docket; they range across a broad range of case numbers, from only a few to thousands or even tens of thousands. Many of them are readily managed under the general Civil Rules. But the small number of outsized consolidations, perhaps 20 or 25 of them at any one time, present enormous challenges.

The potential value of a rule specifically framed for the MDL proceedings that are too complicated for easy management under ordinary practices is enhanced by several factors. The Judicial Panel on Multidistrict Litigation is actively seeking to draw new judges into MDL assignments. New MDL judges need to be educated in MDL management. Education is often provided, and to good effect, by the experienced MDL lawyers who regularly appear in MDL proceedings. But less interested guidance also may be important. MDL judges, moreover, are actively engaged in efforts to draw new lawyers into the MDL world. The new lawyers also will benefit from guidance on the distinctive management needs of the more complex MDL aggregations.

One approach can be to resist the temptation to propose any new MDL-specific rule. Reliance might be placed on other sources of best practices, including the Manual for Complex Litigation. The Manual, however, although a great resource, is not keyed solely to MDL proceedings and is no longer up to date. A project to update the Manual has recently been launched, but several years will be required for completion. The Judicial Panel works hard to support MDL judges, including the annual conference at which the Rule 16.1 proposal will be presented in November.

The question is whether these alternative sources of support for MDL judges should be bolstered by new provisions in the Civil Rules. The Rule 16.1 proposal reflects the possibility that much can be gained by a rule that prompts lawyers and the court to consider the distinctive and often complex issues that arise in the more challenging MDL consolidations.

Rule 16.1(a) provides for an early management conference to develop a management plan for orderly pretrial activity.

Rule 16.1(b) provides for designating "coordinating counsel" to act on behalf of the parties — plaintiffs, and perhaps defendants — in the conference provided for by subdivision (c). It further provides that designation as coordinating counsel does not weigh in the future determination of appointments as leadership counsel.

Rule 16.1(c) is presented in alternative versions. As noted, Alternative 1 is more extensive and detailed. Alternative 2 is condensed, identifying such core subjects as early exchanges of information; whether to appoint leadership counsel, including the process for appointment and leadership responsibilities and common benefit funds to support leadership work; and schedules for sequencing discovery or deciding disputed legal issues.

At many points, the draft offers choices for the words of command. "Must" and "may" are the more common alternatives, but "should" also figures in some alternatives. The Subcommittee has shied away from "must" at many steps, recognizing that lawyers are creative and may develop better ways of doing things than can fit within a mandatory rule text. At the same time, the "must" command may be appropriate at some points.

Judge Dow noted that, in addition to the sessions with AAJ and LCJ lawyers, suggestions have been received from other observers. Professors Morrison and Transgrud joined in one, and another provided by John Rabiej offers detailed commentary. More will be learned from MDL judges at the upcoming conference. It seems that judges are more interested than lawyers in having a new rule. In part, that reflects the fact that "not everyone reads the Manual" or other sources of best practices advice. But "everyone reads the Civil Rules." A good rule could be an important guide that helps utilize the immense staffing required for a big MDL. The Rule 16.1 draft is dramatically different from the drafts considered four years ago. "There will be a lot of eyes on this." The Subcommittee deserves full compliments for its work.

Professor Marcus added two observations. Some participants are wary of using "may" in rule text as a discretionary word that may not seem adequately mandatory. Quite separately, the Rule 16.1(b) provision for coordinating counsel has seemed a "which should come first" conundrum to some observers. Organizing the proceedings will require leadership counsel with authority to engage with the court on behalf of others. How can there be lead counsel to advise on who should become lead counsel? Even if designated as "interim" leadership, how is the court to know whom to designate — does there have to be a coordinated presentation, or can the court solicit applications and perhaps entertain comments on the applicants as a way to sort out coordinating counsel?

A committee member provided a reminder of "how we got here." Many MDL judges and lawyers have said we do not need a rule. No one-size-fits-all procedure can be set for all MDLs. But we also hear that there is a need. We should look for a balance that does not constrain, but points to key topics that should be considered. A rule can be designed to focus attention and prompt discussion.

Another member observed that initial proposals for adopting an MDL rule came from groups, one or another, looking for advantage. The proposal to expand opportunities for interlocutory appeals is an example. Proponents looked for rules that would place a thumb on the scales. The discussion with MDL judges in 2018 was on these topics. With this new proposal, "we need to hear from these judges again." The question about interim coordinating counsel is an example of the competing fears: plaintiff-side counsel fear that however described, an initial designation of interim coordinating counsel will give an advantage that risks ripening into a full leadership designation, and also fear that a rule may give defendants a voice in designating plaintiff leadership. Defendants' counsel also have partisan views on these issues. "Organizations can be more vociferous." We need to hear from those on the ground in settings that are not filtered through their organizations.

This member continued by suggesting that "today I would favor (c) Alternative 1." It is a long and helpful list of the things that must be considered to successfully start an MDL. "If you start well, you're likely to finish successfully."

A different member said that the process of generating successive rules drafts has been informative. "I am not really persuaded there should be a rule." We need to hear from lawyers who engage in all types of MDLs. And we need to be careful about how many items we include in a rule. Many of the details might better be shifted to the Committee Note.

The same member continued to observe that in designating leadership it is important that the judge learn not only who wants to be a leader, but who the leaders really are. Early candidates may be useful members of the final team, but others must be considered as well. Gathering input from the MDL judges at their upcoming meeting will be useful.

A judge said that sometimes the initial process is useful because some lawyers shine, while others flop — perhaps because they do not play well with others. The authority conferred on lead counsel limits the role of the other lawyers, but virtual proceedings can enlarge the number of nonlead lawyers who can participate effectively.

Another judge expressed worries about "mission creep." Relying on an extended committee note to guide practice may be a mistake. The note may be too long. And these are rules, not Federal Suggestions for Civil Procedure. A note that suggests thinking about this, thinking about that, thinking about another thing might accomplish nothing more than a rule that advises judges and lawyers to consult the Manual for Complex Litigation. "This doesn't feel like a rule." Reliance on "may" provisions illustrates the lack of a need for such rule provisions. "No one doubts the authority to do what we might include in a list of things the court 'may' do." So the organizations that advised the Subcommittee over the summer prefer the shorter list in (c) alternative 2.

Another participant suggested a broader context for the concern about reliance on Committee Note discussion in place of more detailed guidance in rule text. The discussion earlier this morning about the Committee Note for the privilege log proposal was a beginning. Historically, the advisory committees have resisted extended checklists, often described as "laundry lists," in rule text. Earlier explorations of class-action questions included a draft that proceeded through more than a dozen paragraphs of factors to be considered in evaluating a proposed settlement. That approach was abandoned; the general formula that emerged, and that was polished in more recent Rule 23 amendments, seemed better. One of the grounds for resisting multifactor lists in rule text is the fear that lawyers will feel compelled to address every factor in every case, even though only a few — and perhaps none — may be useful or even relevant in a particular case. At the same time, detailed rule text can provide the intended guidance for judges and lawyers, especially those newly come to MDL practice. It will be important to make sure that either alternative of Rule 16.1(c) is drafted to make it clear that the lawyers are directed to consider only the elements that the court selects from the list that follows.

A judge noted that the Subcommittee has been hearing from "the high end of the MDL bar and judges." The choice between a manual and a rule troubles lawyers because a rule passes some control from the lawyers to the judge. That may be why lawyers have resisted the more detailed (c) alternative 1. The lawyers have long had a powerful role in educating new MDL judges in the practices that the concentrated MDL bar has developed across many years of experience in many MDLs, from small to the largest. They do not want to give up this advantage. "We want to give judges what they need."

Another judge noted that lawyers prefer (c) alternative 2 because it is more concise. They assert that it will better enable judges to manage the proceedings.

Professor Marcus provided a reminder that the first proposals for MDL rules were made by lawyers involved in defending the small number of very large MDLs. "They did not like the direction of the prevailing winds."

A third judge noted that at one of the conferences arranged for the Subcommittee, Judge Chhabria described his experience as a newcomer to a very large MDL. He and his clerks researched MDL practices extensively. But he believed that he had gone wrong in establishing provisions for a common-benefit fund. He could have done better "if I knew then what I know now." He has suggested that an explicit Civil Rule for MDL proceedings would help judges. So it will help if we get lawyers involved at the beginning in informing the judge about what needs to be considered in initially organizing the MDL. And "it seems better to make clear that the judge controls what is to be discussed."

A fourth judge observed that "we hear a lot about how different MDLs are" from one another. There is a wide variety. But the federal courts deal with a wide variety of cases, and the Civil Rules address an equally wide range. The Subcommittee process has been great. Subdivision (c) alternative 1 may be safer than alternative 2, because it addresses more elements that may be important in managing one or another variety of MDLs. And there is a visible danger in adopting an extensive Committee Note. There may be a temptation, encountered elsewhere in the rulemaking process, to use a note to address matters that seem too sensitive to address in rule text. An example is settlement. Could a note say simply that settlement plays a very important role in most MDLs? Could it go on to suggest what the judge may and may not do? If it says anything, the risks are saying too much or too little. Another example is the interplay between Rule 23 class actions and MDLs. "There are some real issues there." Framing the note "will not be an easy process."

Judge Dow echoed this observation. "Settlement has been a difficult question all along." Academics have proposed adopting for MDLs the settlement review procedures that Rule 23 adopts for class actions. But we have come to understand that judges cannot become involved in the merits of settlement proposals in MDLs that are not resolved as class actions. At the same time, judges may have an important role in managing the process of settlement. One example might be a case management order provision that any lawyer who has more than XY cases in the MDL must show up in court to explain the process that led to an impending settlement.

Judge Dow concluded the discussion by noting that the Rule 16.1 proposal "needs and will get more attention from all sides."

Rule 41 Subcommittee

Judge Bissoon delivered the report of the Rule 41 Subcommittee. The first questions presented to the Committee arise from the word "action" in Rule 41(a)(1)(A): "the plaintiff may dismiss an *action*" without court order and without prejudice. Most circuits that have considered one set of questions have ruled that a single plaintiff who dismisses all claims against one of plural defendants has dismissed the action. So if one of two plaintiffs dismisses all claims against all defendants, that dismisses the action. Some circuits, however, have taken different positions. And district courts remain divided on a parallel question: if one plaintiff wants to dismiss fewer than all claims against a single defendant, does that dismiss the action? A majority say it does not, relying on the "plain meaning" of "the action." That view seems to contradict the meaning attributed to "action" in the cases that address complete dismissal as to only one defendant or plaintiff. But other district courts have ruled that Rule 41 authorizes a plaintiff to dismiss without prejudice a single claim against a single defendant.

The Subcommittee has not yet worked its way through to a recommendation. It hopes to be guided by any lessons from experience that can be provided by Committee discussion. Should there be an amendment? Should it aim only to adopt the majority views announced in the cases, without attempting to search out underlying policies that have not been articulated in the opinions? Should it undertake to consider other aspects of Rule 41 that may deserve attention?

Professor Marcus suggested that there are too many Rule 41 balls in the air to count. Rule 41 remains largely unchanged since its adoption in 1938. It was intended to move away from the variety of state court practices incorporated through the Conformity Act; some states allowed unilateral dismissal without prejudice at an advanced stage of an action, even into trial. The purpose to require court approval after an early point in the proceedings has been accomplished. It would be possible to go further to require court approval for any voluntary dismissal without prejudice, but that has not been proposed.

These themes were expanded upon. Rule 41 could be amended by a simple process that does no more than achieve uniformity by adopting the majority views of what it means to dismiss the action. A somewhat more ambitious approach would look behind the tacitly conflicting views of plain meaning to ask what underlying policies might, for example, distinguish between dismissal of only some claims between a pair of adversary parties and dismissal of all claims between them. Still greater ambition might suggest that if Rule 41 is to be taken on, other nagging questions also might be considered. One prominent question is whether the provision that terminates the plaintiff's right to dismiss on an answer or a motion for summary judgment should be expanded to include motions under Rule 12(b), (e), or (f), in parallel with the provision in Rule 15(a)(1)(B) that uses those motions to trigger the time limit for amending a pleading once as a matter of course. The provisions in Rule 41(c) that address dismissal of claims by parties other than the plaintiff might also deserve some consideration.

Judge Bissoon noted that the materials in the agenda book illustrate a variety of possible alternative rule amendments. Voluntary dismissal questions may be particularly important in complex litigation that involves many parties and claims. She asked what might be learned from Committee group experience?

Discussion was opened by a participant who "does not see a problem." The simplest example is truly minor. Rule 41(a)(1)(B) refers to previous dismissal of an action that includes the same "claim" as the present action. Use of "claim" here is mandated by the context, and does not shed any light on the meaning of "action" in (a)(1)(A). It is simply a shorthand reference to "transaction or occurrence." So too the reference to dismissing a counterclaim or the like in Rule 41(c) provides no implications for interpreting "action" — a defendant cannot dismiss the action. The questions raised by partial dismissals in the context of multiple claims or parties are a problem for Rule 15(a) — the plaintiff need only amend the complaint to omit whatever claims or parties it wants to dismiss. There is no reason to amend Rule 41 to accomplish what can be done through Rule 15. Rule 41 should be reserved for "calling the whole thing off." So too, adding Rule 12 motions to the events that cut off the right of voluntary dismissal does not make sense; "some of them may be what gives the understanding of the need to dismiss." We should leave it to the courts to resolve interpretive disagreements.

A judge observed that the circuits "do approach it differently," and that the title of Rule 41 is "Dismissal of Actions." Further, "we do get motions to dismiss less than the full action, and tend to sign off on them." The inconsistent circuit decisions are a warning. Clear guidance could be useful for MDL proceedings.

In response to a question, Judge Bissoon said that she had never encountered a problem raised by the "without prejudice" element of Rule 41(a).

Another participant noted a local district rule that requires court approval for any dismissal without prejudice.

Another judge addressed the provision of Rule 41(a)(2) that requires court approval of a dismissal after the Rule 41(a)(1)(A) cutoff. The dismissal is without prejudice "unless the order states otherwise." "Sometimes I get an objection and approve dismissal only if it is to be with prejudice." Things become complicated "if you want to do more than the rule says."

The possibility of adding Rule 12 motions to the events that cut off the plaintiff's unilateral right to dismiss was brought back by an observation coupled with a question. The defendant expends money and effort to make the motion. Is it a fair outcome to allow the plaintiff to respond by dismissing without prejudice, holding open the opportunity to bring the same claims another time?

Discussion concluded with the reminder that the Subcommittee "is still at work."

Pro Se e-Filing

Professor Struve led discussion of the rules that govern electronic filing by unrepresented parties. Civil Rule 5(d)(3)(B)(i) was adopted in tandem with parallel provisions in the Appellate, Bankruptcy, and Criminal Rules. It provides that a person not represented by an attorney "may file electronically only if allowed by court order or by local rule." (Rule 5(d)(3)(B)(ii) provides that an unrepresented party "may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions." That provision is not being reviewed.)

A working group of reporters has devoted almost a year to opening study of the question whether the presumption against electronic filing by unrepresented parties should be replaced by a presumption that electronic filing is permitted unless prohibited by order or a local rule. The Federal Judicial Center has conducted an extensive study of practices across all federal courts, culminating in a formal report that is included in the agenda materials.

The FJC study shows wide divergence in practices across the country. Five circuits, for example, presumptively permit e-filing by unrepresented parties who are not incarcerated. Other circuits take different approaches. In the district courts, fewer than ten percent of all districts have local rules that presumptively permit e-filing. Others have local rules that unrepresented parties may not file electronically. Bankruptcy practice includes a bankruptcy-specific form of electronic submissions.

The difficulties of opening a new case in the CM/ECF system are among the concerns that impede willingness to allow electronic filing by unrepresented parties. Some courts do not allow even attorneys to open a new case. After a case is opened, however, successful electronic filing by unrepresented parties can gain all the advantages the system affords. Transmitting notice and serving registered users are high among them.

The meaning of "file electronically" in Rule 5(d)(3) and the parallel rules is not certain. Several courts accept filings that unrepresented parties deliver to the court by electronic means, including email or attachments to email messages. The clerk's office translates the message into the court's CM/ECF system. This task may be at least as convenient for the clerk's offices as the task of entering paper filings. But concerns remain about the risks of computer viruses and malware. Particular concerns arise in bankruptcy courts, which regularly encounter unrepresented parties who seek to upload excessive or inappropriate files, or to file documents under inappropriate names. But expanded access to CM/ECF systems is being considered for bankruptcy courts.

A bankruptcy judge observed that "I do a lot of social work with pro se litigants." Relatives and family members file documents with the wrong names, without a power of attorney, or simply inappropriate things — one person uploaded a picture of a dead body. There are really weird mortgage filings by debtors intended to fake payment in full and discharge. The dangers of electronic filing are more work and expense for creditors and court staff. But "I give sufficient

time to make their responses." On the other hand, "forms may be different." It might work to adopt a presumption for electronic filing of some forms.

Another observation was that the present provision allowing electronic filing by court order invites different practices by different judges on the same court. If the presumption is reversed, will the outcome be much different? Or will judges who now do not enter orders that permit electronic filing simply switch to entering orders that deny it?

A committee member asked "who should drive this process?" Is this subject suitable for the rules committees? Or is it better addressed by the Judicial Conference technology committee, or by the Court Administration and Case Management Committee? The FJC study shows substantial concerns in many quarters that electronic filing by unrepresented parties will not work. "Should we get into this at all?" A response observed that these questions affect the interests enshrined in Rule 1, affecting access to the courts. Rule 5 and its analogs do address electronic filing. "The momentum is there." And the reply expressed agreement, but asked whether now is the time to take these issues up again. "We can say whatever we want, but if it doesn't work it doesn't matter. We need better understanding of how things work." But we can at least begin by thinking about what we would like courts and unrepresented parties to be able to do.

Judge Bates observed that "we are gathering information so we can initiate this process with the other institutions that need to be brought in. A coordinated effort by the rules advisory committees to find out what we might aspire to is important." One factor to be kept in mind is that the CM/ECF system is subject to a process of continual change. One likely outcome is a report to other actors that asks whether we should amend the rules.

Another judge reported that the clerk of her court recommends that the rules not be amended. The advice is that most courts are not equipped for CM/ECF access by unrepresented litigants, nor for other means of electronic filing. "We do not have the ability." And unrepresented parties make more docketing errors. Particular problems arise with prisoners, who are often switched from one prison to another — there are five different facilities in her district. New procedures would have to be devised to deal with electronic filing by unrepresented parties.

Another problem was identified. Some troublesome litigants are subject to orders that impose special procedures for permission to file new actions. That would be an added complication. And there are risks that documents that should not be publicly available will be filed in the public record. But there also are real advantages to electronic filing, such as disseminating notice.

The advantage of electronic noticing led to a reminder of another current issue. Once a filing by an unrepresented party is added to the court's CM/ECF system, notice is sent to all registered users. Many courts interpret the present rules to require the party to send a separate paper notice to registered users who already have received notice from the court. That seems to impose an unnecessary and perhaps heavy burden on the unrepresented party. Some local rules address these issues. For that matter, even an approach that would require paper notice only to

parties that are not registered users would work better if the unrepresented party can rely on clear identification of which parties are not registered users.

Judge Dow expressed the Committee's thanks to Professor Struve for undertaking the heavy work to lead the working group's efforts and for leading the present discussion.

Rule 45(b)(1)

Professor Marcus led the discussion of a Rule 45(b)(1) question that has repeatedly reappeared on the agenda. Rule 45(b)(1) says that: "Serving a subpoena requires delivering a copy to the named person * * * ." Going back at least to 2005, various groups have pointed out that most courts interpret "delivering" to mean in-hand service. Some courts, however, accept mail as a means of delivery. The suggestions have ranged from recognizing mail — including, more recently, commercial carrier — to adopting the means of serving a summons and complaint under Rule 4.

This question was considered at some length during the long and careful process that revised Rule 45 to simplify subpoena practice by directing that all subpoenas issue from the court where the action is pending, and authorizing the court where compliance is required to transfer an enforcement proceeding to a different court that issued the subpoena. The question was put aside then, in part from concerns that in-hand service is important as an assured means of actual notice. In-hand service also impresses the importance of the duty to comply, particularly on a nonparty. The importance of understanding the duty is underscored by the severity of contempt, the sanction for noncompliance.

So the question is whether we should take up this question once again. Is the present somewhat-muddled practice acceptable, recognizing that delivery by mail is a common practice, particularly among the parties to an action? Or should this question be deferred while the Committee decides whether the time has come to undertake a broad review of the means of serving a summons and complaint under Rule 4?

A judge remarked that different judges on the same court may adopt different views. Rule 4 service presents many more issues. In bankruptcy practice, service can have serious consequences.

Discussion concluded inconclusively, with a judge's observation that judges generally are forgiving when faced with questions of improper service. There is yet no sense of actual experience with potential problems in serving subpoenas.

Rule 7.1

Two suggestions focus on expanding the Rule 7.1 provisions for disclosures designed to flag potential conflicts of interest that may require recusal of the judge assigned to the case.

One suggestion would expand disclosure beyond "parent" corporations to include what may be called "grandparent" corporations. A party may identify its parent corporation. But the parent corporation may itself have a parent. Some of these grandparent corporations have many children, and judges may not be aware of the tie between their holdings in the grandparent and the identified parent.

A second suggestion is that all parties should be required to review publicly available information about the financial interests of the judge assigned to a case.

Discussion began with the observation that "judges are feeling a lot of heat." Widespread publicity has been given to a study that found well over a hundred cases in which judges failed to recuse themselves, although almost certainly inadvertently, for conflicting interests that were not pointed out to them. Congress has recently enacted added reporting requirements.

The question whether parties should be required to review a judge's stock holdings is not easy. "How much help can we get from them?" Is it appropriate to require a party to make public all financial interests it may have in common with a judge?

Professor Marcus elaborated by noting that the Wall Street Journal investigation of judges' stock holdings included holdings by family members. It did find many cases without recusals that should have been made.

The grandparent problem was illustrated in the suggestion by pointing to Berkshire Hathaway as an entity that is parent to a great many other corporations that themselves are parents of still other corporations. Judges who made favorable investments in Berkshire Hathaway may be understandably reluctant to divest these assets. Nor, for that matter, is it suitable for a rule of procedure to explore such questions as what sorts of suitably dispersed or blind investments are better suited for judges. The challenges presented by capital gains taxes are even further from rulemaking.

The recent proposed addition of diversity disclosure provisions is supported in part by the absolute obligation to ensure the subject-matter jurisdiction of a federal court. It is much better to ensure that the judge has that information at the beginning of the action.

The proposal that would require all parties to check publicly available information about an assigned judge's financial information sets a 14-day deadline. As with diversity jurisdiction, it is better to have recusal information available at the beginning. But is this an undue burden on the parties? Or at least on parties not represented by counsel?

These questions "are not going to go away."

Judge Dow noted that this Committee has been nominated to take the lead for the other advisory committees. A first question will be whether we think a joint committee is needed. A related question is whether these issues are best suited for consideration in the Rules Enabling Act

process, or whether some other Judicial Conference committee might be a better resource. He also noted that the Seventh Circuit is developing a new plan for financial disclosures by judges. It is not clear what financial information about judges is available now, nor whether parties know where to look for it.

Another judge suggested that it would place an extraordinary burden on a party to require it to track down information that may not be readily available, and to reveal information that is not otherwise public.

A lawyer member said that with big clients, checks for conflicts of interests are worthwhile. "But for represented litigants in smaller stakes cases, it could be too much work." Checking for conflicting interests among clients must be done, and it is complex, including "who's on the other side." It is further complicated because it is important for SEC purposes to guard against learning insider information. So for the grandparent example used for expanded recusal disclosures, we do look upstream from the corporation that is a party's parent, but this example "is prominent in corporate databases." In other settings "it can be very hard."

A judge agreed that there are many corporations whose affiliations are harder to track than Berkshire-Hathaway. "A rule might not accomplish much."

A different lawyer member agreed that conflicts checks can be difficult. "We often represent unsophisticated clients," and clients with no assets. But the firm has the resources required to do conflicts checks, and has a "whole team" that does them. Information also is collected from the lawyers. Conflicts checks are expensive. Many firms may not have the resources to do that.

A judge agreed that resources are an important part of the ability to find the information that's required now. "Courts are under scrutiny," but it is difficult to know whether a rule will help.

Yet another lawyer confirmed that firm practice asks clients to make sure the firm has complete information.

A judge observed that shifting responsibility to the parties could help judges.

Discussion turned to the next steps to be taken in considering recusal disclosures. There are issues that need further attention and work. It may be that the Standing Committee should become responsible for directing work by all advisory committees. The proposals should be kept on the Civil Rules agenda.

A subcommittee might be appointed for further study. There have been several subcommittees recently, and they have had several meetings. "We can take stock of what resources are available." It may be useful to appoint a small subcommittee to continue gathering information.

A committee member observed that there are many moving parts. The proper approach is not clear.

The possibility of a small subcommittee was noted again, with a judge and a lawyer and perhaps only one more member. The committee chair can open discussions with the Financial Disclosures Committee. "I doubt this is something for a Rules answer."

Discussion concluded with an analogy to the questions raised by third-party litigation funding. The questions remain on the agenda, but in an inactive status. They will not go away, just as these recusal disclosure questions will not go away. And here, it will be useful to find time to coordinate with other committees.

Rule 55

Professor Marcus introduced the Rule 55 questions that have been carried forward on the agenda. Rule 55 says that court clerks "must," in described circumstances, enter defaults and then default judgments. But practice in many districts does not adhere to this directive. Work is underway to explore the reasons why many districts require that all default judgments be entered by a judge, and why a few seem to require that the initial default also be entered by a judge.

Dr. Lee stated that the FJC has begun work to explore actual practices across the districts and to find the concerns that have led some courts to shift to judges responsibilities that Rule 55 assigns to clerks. Initial work has shown that clerk's offices find some default questions to be routine, readily handled by the office, while others present real challenges.

Brief discussion provided an example of a court that has defaults entered by the clerk, but has judges enter default judgments. Another example noted a court that has judges enter both defaults and default judgments.

Rules 38, 39, 81

Judge Dow noted that questions surrounding the rules that govern demands for jury trial have lingered untended on the agenda for several years. There is a clear potential for further study, but the committee capacity for creating subcommittees has been fully devoted to other projects.

Professor Marcus focused on a proposal submitted to the Committee the day after the Standing Committee meeting in June 2016. The discussion in the Standing Committee focused on questions raised by the jury demand provisions for cases removed from state courts. Then-Judge Gorsuch and Judge Graber, Standing Committee members, proposed that the jury demand requirement be dropped. They pointed to Criminal Rule 23, which allows a bench trial only if the government, defendant, and judge agree to proceed without a jury. They were concerned that the demand procedure at times leads to inadvertent forfeiture of the right to a jury trial. They pointed to satisfactory experience in state courts that do not require demands. And they suggested that

making jury trials automatically available in all cases with a right to jury trial might increase the number of cases actually tried to juries.

The first question is whether the demand procedure actually reduces the number of jury trials. The FJC is conducting a study of jury trials that could inform the answer.

Dr. Lee said that the ongoing study of jury trials focuses on factors that may explain the different rates of jury trials in different districts. The study was undertaken in response to a direction from Congress. Good information can be developed from court dockets, because Rule 39(a) provides that an action must be designated on the docket as a jury action when a jury trial has been demanded under Rule 38. The information gathered so far is presented in the tables presented in the agenda materials. The rate of jury trials varies by case types, and is higher when the parties are represented by counsel. Surprisingly, jury trials occur in cases that do not have a jury demand noted in the docket — the rate of actual jury trials in such cases is 2.7%, double the rate in cases with jury demands noted in the docket. Perhaps the mystery can be explained as simple failure to make docket notes of actual demands. It also appears that some judges are eager to grant belated requests for jury trials, waiving the demand requirement, while others look for good reasons to justify waiving the requirement.

The agenda history was elaborated upon. Jury-trial-demand practice first came to the current agenda by a suggestion that focused on the 2007 Style Project's revision of one word in Rule 81(c)(3)(A). Before the revision, this provision established the procedure for demanding a jury trial in an action removed from a state court before a demand was made in the state court. It was framed to address the circumstance that arises if state law "does" not require an express demand. It was restyled to say "did" not require an express demand. The suggestion argued that the change created an ambiguity that led to a different meaning. The question arises in cases removed from state courts that do require a demand, but set a deadline at a point after the time of removal. The report to the Standing Committee was designed only as an information item about this question, including the information that this Committee was considering a possible amendment that would simplify the procedure in removed cases by requiring a jury demand under Rule 38 whenever a jury trial had not been demanded in the state court before removal.

These topics remain on the agenda for further consideration after completion of the FJC study.

End of the Day for e-Filing

The Time Project in 2009 amended Rule 6(a)(4)(A) to define the end of the last day for electronic filing as "midnight in the court's time zone." The same definition was adopted in the Appellate, Bankruptcy, and Criminal Rules.

A suggestion to reconsider this definition was made a few years ago. The concern was that enabling midnight filing was inhumane. Lawyers, often young associates, were required to work late, disrupting personal and family life. A large-scale FJC study was planned, and has been completed with a vast amount of information about actual filing practices. The study had also

contemplated searching interview efforts, but they were postponed because of pandemic disruptions and then abandoned because the pandemic encouraged broad changes in practice by remote means.

Judge Dow opened the discussion by observing that this inquiry has been going on for some time. The pandemic may have affected practices in important ways. An interesting datum is the recent remark of a big-firm lawyer that the firm has 600 lawyers without an office for them to work from. We have heard from various sources that family life may indeed be improved by the midnight deadline — family dinner and bedtime can be enjoyed before turning to the final polishing of a midnight filing. Work and filing practices may remain in disarray because of the pandemic's changes in the ways people work. There is a wide disparity in views. It may be time to abandon this question.

One example was offered of a phone call to the Rules staff from a lawyer in the New York area who opined that a 5:00 p.m. deadline would worsen his family life.

The Department of Justice prefers to leave the rule as it is.

It is not certain whether other advisory committees have different views. The Bankruptcy Rules Committee may have distinctive concerns.

A lawyer was pleased that the Committee recognizes that the world has changed for lawyers and their clients. "Flexibility in the times that work best for each is important." It will be good to drop this item from the agenda.

The Committee agreed without dissent that this proposal should be dropped from the agenda unless a problem of disuniformity arises from a suggestion by another advisory committee that the deadline should be redefined.

In Forma Pauperis Standards and Procedures

Judge Dow briefly summarized earlier discussions that reflect broad agreement that there are serious problems with addressing requests to proceed in forma pauperis. The standards to qualify vary widely, not only among districts, but also among different judges on the same court. And the practices for applying the standards vary as well, assigning primary responsibility to different actors in different courts. But there are grave reasons to doubt whether the need for improvements can be addressed effectively through the rulemaking process.

Another judge noted that "filing fees are handled differently, especially in prisoner cases." Orders to show cause are sometimes used. The Administrative Office has prepared a memorandum to court clerks on when to close prisoner cases. The Court Administration and Case Management Committee is involved with these questions. They even affect the allocation of pro se law clerks to the districts.

Draft

Judge Dow noted that the Administrative Office has a working group for i.f.p. cases, and that it remains at work. The Prison Litigation Reform Act requires filing fees; if fees are not waived, the fee becomes the minimum settlement value. "We have to charge a fee, and there is a huge number of these cases." There is a strong prospect that the Court Administration and Case Management Committee is better able than this Committee to address i.f.p. practice.

Class Representative Awards

A topic not on the agenda was introduced by Judge Proctor. A longstanding and widespread practice has recognized modest awards to class action representatives to compensate for the work they do on behalf of the class. A panel decision in the Eleventh Circuit, however, has recently relied on Supreme Court decisions from the 1880s to rule that such fees cannot be awarded. Rehearing en banc was denied by a 6–5 vote. The dissent offered persuasive reasons to rehear the case, and concluded that Congress or this Committee should restore the practice followed elsewhere. Since the decision, lawyers have observed that if they have a choice, they will file a class action in the Fifth Circuit, not the Eleventh. Denial of representative awards "will add to the feeling that class actions are lawyer-driven, not party-driven." And in fact class representatives are commonly called upon to do work on behalf of the class — they are consulted on the prosecution of the action, and are involved in responding to discovery. "We need them." "I move that this topic be added to the agenda."

Judge Dow agreed that a Committee member can recommend that the Committee consider an issue. The Seventh Circuit would have a different view than the Fifth Circuit. In a class action, "I know if a named plaintiff has done work." And he denies certification if he thinks the named plaintiff will not do work.

Professor Marcus suggested that the Committee should consider whether this question can be addressed by Rule 23. It may indeed have an effect on where class actions are filed.

A lawyer member noted that a petition for certiorari to the Eleventh Circuit has been filed. "This is an important question." The Second Circuit has already disagreed with the Eleventh, and approved service awards.

Another judge agreed that this is an interesting and important issue that warrants review of the history and where other circuits stand now. The Committee ordinarily does not jump in to correct a single aberrant decision. And it is appropriate to pause to see whether certiorari is granted.

A lawyer member suggested that even the terminology is important. The current description of representative fees is "service award."

This topic will be carried forward on the agenda.

Rule 17(a) and (c)

Professor Marcus introduced this proposal as one made by a nonlawyer who wishes to proceed to litigate as a duly appointed guardian on behalf of his ward. He complains that the district court has required that he be represented by an attorney, and urges that Rule 17 should be amended to make it clear that he can proceed without an attorney.

Rule 17(a)(1)(C) provides that a guardian is among those who "may sue in their own name without joining the person for whose benefit the action is brought." Rule 17(c)(1)(A) provides that a general guardian "may sue or defend on behalf of a minor or an incompetent person."

The rule ensures the capacity to sue. There is no reason to amend it simply because this litigant did not get what he wanted.

This proposal was removed from the agenda without dissent.

Rule 63

Rule 63 provides that when a judge conducting a hearing or trial is unable to proceed, another judge may proceed on determining that the case may be completed without prejudice to the parties. The second sentence further provides:

> 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.

A proposal was submitted to suggest that it may be desirable to amend the second sentence to reflect the proposition that the availability of audio- or video-recorded testimony may affect the decision whether to recall a witness. The suggestion was prompted by a nonprecedential decision of the Federal Circuit interpreting the cognate provision in the Court of Federal Claims Rules. The case involved an audio recording, but the decision did not turn on that. Instead, the opinion first noted that the successor judge had erred in deciding not to recall two witnesses without explaining the decision by reference to the factors enumerated in the rule text. But the decision then went on to rule that this error was not prejudicial because the testimony of each of the two witnesses was irrelevant. There was no dispute as to the controlling facts.

Discussion of this proposal at the March 2022 meeting expressed some concern that Rule 63 may unduly limit a successor judge's ability to decide that a witness need not be recalled. Judge Dow recruited Allison O'Neill, a Seventh Circuit law clerk, to do volunteer research into Rule 63's application in practice. Her thorough and thoughtful memorandum is included in the agenda materials. It does not show any need to amend the rule. There is no apparent reason to amend the rule because of an opinion that says a successor judge should explain a determination not to recall a witness.

Committee members were asked whether there is any experience that suggests a need to examine Rule 63 further. No one offered any reason to go further.

This proposal was dropped from the agenda without dissent.

Mandatory Initial Discovery Pilot Programs

Dr. Lee noted that the FJC has been studying the mandatory initial discovery pilot programs in the District of Arizona and the Northern District of Illinois since 2016. "It's not over yet" for him or for his partner, Jason Cantone. But the report is almost done. The current draft runs to 130 pages. The plan for distributing the completed report will be developed in consultation with this Committee. Until it is completed, however, it is better not to attempt to summarize the findings.

Judge Dow noted that this was the only pilot project considered by the Committee that found willing participants, and only two districts took on this one. In the Northern District of Illinois, about two-thirds of the judges participated, offering an opportunity for comparisons within the same court that may support more robust findings.

The model for the pilot projects is described as discovery, but it is an "all cards on the table" version of initial disclosure. It was readily accepted by the judges and lawyers in Arizona, where state practice has adhered to a highly similar model for many years. It met resistance in Illinois from defense lawyers who protested that it requires a great deal of work that may be wasted if a motion to dismiss is later granted. The model was revised in midstream in Illinois to provide that an answer must state whether the defendant plans to make a motion to dismiss. That addition enables the judge to decide whether to suspend the mandatory initial discovery. "It's not for every case." Some lawyers resisted, and it seems likely that in some cases the lawyers for all parties tacitly agreed to act as if they had exchanged mandatory initial discovery without actually doing it.

Dr. Lee noted that "cases in the program do terminate earlier." But he could not yet say how much earlier.

Closed-case attorney surveys continue. The responses include many open-ended comments. "There is a lot of information there." These are big districts, with lots of cases. There is "a ton of data." The third part of the report provides a sampling of what the pilot cases looked like, including whether there was a lot of satellite litigation over discovery (there does not seem to have been a lot).

A member noted the three somewhat similar information-exchange protocols developed with IAALS support. Each was hammered out in intense discussions between plaintiff-side and defense-side lawyers. The first was for individual employment actions. The next two were for Fair Labor Standards Act cases and first-party property insurance disputes that arose from a hurricane. They have been adopted in several districts, and gained favorable reviews.

Experience with the first version of Rule 26(a)(1) mandatory initial disclosure also was noted. The effects in the first years were studied by the RAND Institute. Although the analysis fell a fraction of a point short of the 95% confidence level required to show statistical confidence, there were strong indications of favorable effects.

Added background was provided for new members. The pilot projects grew out of the subcommittees that proposed the 2015 discovery rules amendments in the wake of the 2010 conference at Duke Law School. The next step was to ask whether still more ambitious revisions should be considered. Pilot projects are attractive because they can provide a controlled environment that supports rigorous analysis of the results. It was good to enroll two districts; it would have been better yet if more volunteers could be found.

Dr. Lee noted that his FJC colleague, Tim Reagan, did great work in preparing training videos for the pilot projects. Judge Dow agreed, observing that the training was so good that only one judge dropped out of the pilot.

The next meeting is scheduled for March 28, 2023.

Judge Dow thanked all participants for their interest and hard work.

Judge Bates thanked Judge Dow for his many years of service on rules committees, inspiring a wave of applause.

Respectfully submitted,

Edward H. Cooper
Reporter

Draft

In-person observers

1) Panida A. Anderson, Bailey & Glasser, LLP
2) Alex R. Dahl, Strategic Policy Counsel
3) William T. Hangley, Hangley Aronchick Segal Pudlin & Schiller
4) John Hawkinson, freelance journalist
5) Kaiya Lyons, American Association for Justice
6) John Rabiej, Rabiej Litigation Law Center
7) Jonathan Redgrave, Redgrave LLP
8) Jerome Scanlan, Equal Employment Opportunity Commission
9) Daniel K. Steen, Lawyers for Civil Justice
10) Sue Steinman, American Association for Justice
11) Christine Zinner, American Association for Justice

Remote observers

1) Lea Bays, Robbins Geller Rudman & Dowd LLP
2) Jason Cantone, Federal Judicial Center
3) Danielle Cutrona, Burford Capitol
4) Burton DeWitt, former Rules Law Clerk
5) Gary M. DiMuzio, Simmons Hanley Conroy
6) Ross M. Gotler, Paul Weiss Rifkind Wharton & Garrison LLP
7) Thomas M. Green, American College of Trial Lawyers
8) William Hubbard, University of Chicago Law School
9) Robert L. Levy, Exxon Mobil Corporation
10) Allison O'Neill, former Law Clerk for Judge Flaum
11) Nate Raymond, Reuters
12) Tim Reagan, Federal Judicial Center
13) Sai, pro se litigant
14) Crystal Williams, (no affiliation)

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

REBECCA BUEHLER CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 9, 2022

I. Introduction

The Advisory Committee on Criminal Rules met in Phoenix, Arizona, on October 27, 2022. 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 one proposed amendment, provided feedback on issues being considered by a cross-committee working group, and heard multiple speakers who discussed their views and experiences as they related to a proposed amendment.

II. Information Items

A. Rule 49.1 and the CACM Guidance Referenced in the Committee Note (21-CR-I)

After extended discussion, the Committee unanimously accepted the Rule 49.1 Subcommittee's recommendation that it take no further action on Judge Jesse Furman's suggestion (21-CR-I) that it amend Rule 49.1 and its committee note.

1. The proposal

By way of background, in *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that CJA form 23s (and related affidavits)—submitted by criminal 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 Judicial Conference's CACM Committee. It states:

> The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:
>
> > The following documents 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;
> >
> > * * * * *
>
> [T]he 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).[1]

[1] 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.

Judge Furman wrote that this 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.

2. The Committee's decision

The Committee discussed and then unanimously accepted the recommendation of its Subcommittee to take no further action on the proposal.

The Committee concluded that the current note did not pose a sufficiently serious problem to warrant an amendment. The Subcommittee had reviewed the cases considering requests for disclosure of the financial affidavits in question, and it found that with a single exception the reference to the CACM guidance in the committee note was not playing a central role in the courts' analysis or precluding them from considering all of the relevant issues. Indeed, the note was seldom discussed, and did not appear to be short circuiting the courts' analysis. Moreover, Judge Furman's opinion in *Avenatti* has now been published, and it sets forth his analysis for courts that confront the issue in the future.

Members also emphasized that the text of Rule 49.1(d) gives the courts full discretion, providing that they "may" order filings to be made under seal, and the courts have been considering the issues raised and employing that discretion in the cases in which disclosures have been sought. Indeed, the note itself merely quotes the CACM guidance.

The Committee was also concerned that the proposed amendment would be read as taking a position on issues of substantive law, which are not within its jurisdiction under the Rules Enabling Act. Whether these financial affidavits are judicial documents subject to disclosure under the First Amendment or common law right of access presents substantive legal issues. The Committee recognized that Judge Furman's proposed amendment was intended to be neutral, referring to "any applicable right of public access." But members thought amending the rule would inevitably be perceived as putting a thumb on the scales, sending a signal that the Committee disagreed with, or at least wished to distance itself from, the CACM guidance. During the consideration of the proposal a defense practitioner published an article opposing it, and members understood that the amendment would be opposed by the defense bar.

The proposed amendment also raised another concern: in essence, it reminded courts to consider the constitutional and common law rights of public access. But the inclusion of such a provision in one rule is problematic because it suggests that similar language would be needed in other rules as well to avoid negative implications. Professor Coquillette agreed that it was problematic to add such a provision.

Finally, the Committee recognized that the adoption of the proposed amendment and an accompanying note could not fully remedy the problem identified by Judge Furman. There is no mechanism for removing or amending an earlier committee note. Amending the rule and adding a new note would not remove the original committee note. Similarly, even if CACM were to revise its guidance, that would not change the original note.

For these reasons, the Committee voted unanimously not to proceed further with the proposal.

B. Rule 49 and Pro Se Access to Electronic Filing (21-CR-E)

The Committee discussed but reached no final conclusion on three issues being considered by the cross-committee working group that has been convened to consider a proposal to expand pro se access to electronic filing:

- whether to change the default rule that defendants proceeding pro se may file electronically only with the court's permission,
- whether to change the rule that pro se defendants are required to make paper service on parties who are on CM/ECF, and
- whether to encourage the use of other forms of electronic filing, such as filing by email or uploading to a court drop box.

Professor Cathie Struve, who is leading the cross-committee working group, attended the meeting and participated in the discussion.

The Committee recognized that very few defendants in federal criminal cases would be affected by a change in the default rule precluding them from using CM/ECF without the court's permission. Even defendants proceeding pro se generally have standby counsel who can use CM/ECF. Moreover, many defendants are incarcerated and lack access to facilities for electronic filing. Finally, the FJC survey noted at least one court reported already granting a non-represented defendant permission to use CM/ECF. Thus a change in this portion of the criminal rule was not seen as a high priority.

There was greater interest in a change in the rule now requiring paper service on parties who are already on CM/ECF, and discussion turned to practical questions, such as how a defendant would know whether others (such as co-defendants) were on CM/ECF. Concerns were also raised about the possible burdens such a change might impose on the clerk's office. Both Professor Struve and the Subcommittee to which the pro se filing proposal had been referred expressed interest in following up to learn how the districts that have local rules are handling these issues.

Finally, members expressed interest in greater use of alternative means of electronic filing, such as filing by email or uploading to a drop box. Members stressed the value of employing technology to allow persons representing themselves to take advantage of the benefits of electronic filing, though it was not clear how this could be accomplished.

C. Expansion of Rule 17 Third-Party Subpoenas (22-CR-A)

The remainder of the meeting was devoted to consideration of some of the issues raised by a proposal from the White Collar Crime Committee of the New York City Bar to significantly expand the availability of third-party subpoenas. The Committee invited eleven experienced practitioners to participate, including defense lawyers in private practice, Federal Defenders, and representatives of the Department of Justice. Each had been recommended as a person with particular experience with Rule 17 Subpoenas. The participants were:

Michael Carter, Executive Director, Federal Community Defenders Office, Eastern District of Michigan

Robert (Rob) Cary, Williams & Connolly, Washington, D.C.

Mary Ellen Coleman, Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina, Asheville Division

Donna Elm, Criminal Justice Act panel attorney for appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the Ninth and Eleventh Circuits

James E. (Jim) Felman, Kynes, Markman & Felman, P.A., Tampa

Mike Gill, Criminal Chief, Eastern District of Virginia, and Chair, Criminal Chiefs Working Group

Angie Halim, criminal defense trial attorney representing indigent federal criminal defendants, Philadelphia

Ellen Leonida, BraunHagey & Borden, San Francisco

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice

Dimitra Sampson, Assistant United States Attorney, District of Arizona

Stephen (Steve) Wallin, Criminal Justice Act panel attorney, Phoenix

The Committee's goal was to learn more about the current use of third-party subpoenas in federal criminal cases. It conducted this portion of the meeting in a conference format, with each participant making initial remarks and then responding to questions and comments from members. The Committee focused first on two foundational questions.

What are the standards for securing third-party subpoenas, and how difficult is it for the defense to meet those standards? What specific problems had practitioners encountered in their efforts to meet those standards?

> What role does judicial oversight play? In the participants' experience, were judges exercising oversight in approving third-party subpoenas and/or in filtering information received from a third party? Had that oversight caused problems or been beneficial, and, if so, why?

The Committee then turned to a variety of other issues that had been raised by the participants in their earlier informal submissions to the Rule 17 Subcommittee. It devoted the final portion of the meeting to general discussion.

Some of the main points that emerged were the wide variety of approaches in different districts (and in some districts from judge to judge), concerns about the rule's ambiguity, a consensus among defense participants that an amendment is needed to clarify the standard and expand the availability of third-party subpoenas, and a range of views among participants concerning the role of judicial oversight.

The Committee is very grateful to the participants for volunteering their time and expertise. Members found the presentations, responses to members' questions, and the general discussion to be extremely valuable. They will provide an excellent basis for the Rule 17 Subcommittee's consideration of the New York City Bar proposal.

TAB 6B

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 27, 2022
Phoenix, Arizona

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on October 27, 2022, in Phoenix, Arizona. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via Microsoft Teams)
Judge Michael J. Garcia
Lisa Hay, Esq. (via Microsoft Teams)
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq. (via Microsoft Teams)
Susan M. Robinson, Esq.
Michelle Morales, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Gary S. Feinerman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine T. 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:

H. Thomas Byron III, Esq., Secretary to the Standing Committee
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Christopher I. Pryby, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Nicole Y. Teo, Intern, Rules Committee Staff (via Microsoft Teams)

Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on page 15 of these minutes, when they introduced themselves to the Committee.

Draft

Opening Business

Judge Dever opened the meeting with administrative announcements, noting it was his first meeting as chair after one year off the Committee. He thanked the staff at the Administrative Office for making all of the arrangements and Judges Bates and Feinerman for attending on behalf of the Standing Committee. Noting that Judge Feinerman had served as a member of the Committee for seven years, Judge Dever said it was terrific that he has returned as our liaison to the Standing Committee.

Ms. Morales attended to represent the Department of Justice, and Judge Dever welcomed her, noting that she had represented the Department at several prior meetings.

Judge Dever noted that several members would be participating via Microsoft Teams: Dean Roger Fairfax, Ms. Hay, Ms. Recker, and Ms. Noble. Professors Struve and Coquillette were also participating on Teams.

Judge Dever also noted that Judge McGiverin had experienced multiple travel delays, but would arrive as soon as he could.

Finally, Judge Dever welcomed and introduced several new members of the Rules Committee Staff Office. Tom Byron is the new Secretary to the Standing Committee and head of the Rules Support Office. Allison Bruff is our new counsel, assigned to both the Civil and Criminal Rules Committees. The new Rules Law Clerk is Chris Pryby, and the new Rules Committee intern is Nicole Teo. Judge Dever concluded by welcoming the members of the public who were viewing the meeting on Microsoft Teams.

After covering some housekeeping details, Judge Dever asked Ms. Bruff to provide an update on the status of the various rules amendments. She directed the Committee's attention to the table beginning on page 216 of the agenda book, which tracked the various proposed amendments, new rules, and official forms. She noted that the proposed amendments to Rule 16 are scheduled to go into effect December 1 of this year absent congressional action, and the status of other rules in process was listed.

Mr. Pryby then gave a brief update on legislation affecting the Criminal Rules. He noted that the most significant pending legislation was the yearly National Defense Authorization Act, page 140 of the agenda book, which typically passes at or near the end of December. It includes a retroactive reduction in sentences for certain cocaine-related crimes, and it provides that court can reduce these sentences without having the defendant present in person, notwithstanding Rule 43. It also provides that notwithstanding Rule 41 the district court in the District of Columbia may issue a warrant for the seizure of certain assets anywhere in the United States, instead of requiring the warrant to be obtained in the district where the assets are located. Although other bills were noted in the chart, Mr. Pryby observed that it was unlikely that they would be passed soon.

Judge Dever then opened the floor to any comments, additions, or corrections moved to consideration to the Minutes from the April 2022, beginning at page 15 of the agenda book.

Professor Beale noted that Ms. Bruff had brought a few typos to the attention of the reporters, who requested permission to make those corrections. A motion was made and seconded to approve the minutes, including the corrections noted by the reporters.

Judge Dever asked Professor Beale to introduce the next agenda item, a report from the Rule 49.1 Subcommittee chaired by Judge Birotte. She explained that the proposal referred to the Subcommittee came from the Committee's former Standing Committee liaison, Judge Jesse Furman. In the *Avenatti* case[1] Judge Furman had occasion to look closely at Rule 49.1 (Privacy Protections for Filings) and particularly the committee note. As a result of his research, Judge Furman concluded that it would be very desirable to amend the committee note, which cannot be done without a change to the text. His proposal to amend the text and add a new note was referred to Judge Birotte's Rule 49.1 Subcommittee.

Judge Birotte explained that the Subcommittee considered several issues. The first question was whether the note was causing a sufficient problem that an amendment to the text was needed to address that problem. If so, then what would an amendment look like? Judge Furman had proposed the addition of an introductory phrase, "Subject to any applicable right of public access." But if the Committee were to amend the rule adopting that language, it would need to consider an issue of consistency with other rules. To assist the Subcommittee, the prior Committee chair, Judge Kethledge, had reached out to the Committee on Court Administration and Case Management (CACM) to determine its view regarding a possible amendment. CACM was amenable to the Committee's consideration of an amendment, but it was not prepared to take a position without getting input from the stakeholders, particularly the defense bar. Coincidentally, at that time an article by a member of the defense bar was published, raising their concerns about and opposition to the proposed amendment.

The Subcommittee, Judge Birotte said, had extensive discussions about whether there should be an amendment, as well as possible language. It also reviewed the case law, and an analysis of how different judges had interpreted Rule 49.1.

Ultimately, Judge Birotte said, the Subcommittee was not convinced that an amendment was warranted. Members thought it was important that the rule currently does not say that the court "shall" seal the forms. Instead, it says that the court "may" order that a filing be made under seal without redaction. That gives the court discretion and flexibility, and the case law demonstrates that is how different judges have interpreted the rule. The Subcommittee agreed with the old saying "if it ain't broke, don't fix it."

Professor Beale added that the Subcommittee also discussed the difference between procedure (which is within the Committee's jurisdiction) and substance (which is not). The question whether these submissions are judicial documents subject to disclosure under the First Amendment or the common law right of access is a matter of substantive law, and accordingly it does not fall within the Committee's authority. The Subcommittee recognized it was important

[1] *United States v. Avenatti*, 550 F.Supp.3d 36 (S.D.N.Y. 2021).

not to take a position on something that isn't within the Committee's proper ambit. On the other hand, Judge Furman thought that the note does exactly that by putting a thumb on the scale. So the Subcommittee tried to determine whether it would be possible to take that thumb off the scale without somehow signaling the Committee's own views on the substantive issue. It concluded that making any change would be read as taking a position. The Subcommittee concluded it was not necessary to make any change because the note is not having a significant effect. Judges are looking at this issue independently, analyzing the substantive issues, not just following the note.

The Subcommittee also considered the harm that might be done by an amendment. The defense bar has read the proposed amendment as taking a position, either signaling that we think these affidavits are judicial documents and there is a right to disclosure, or at least distancing ourselves from the view in the note. The Subcommittee saw no way around that problem, and no compelling need to weigh in on the issue. The Committee, Professor Beale said, generally tries to avoid doing something controversial that would generate widespread opposition. The recently published article suggested that there would be opposition from the defense bar. So in the absence of a clear need to take action, the Subcommittee concluded that the better position was to leave things where they were. Clearly, the *Avenatti* opinion itself demonstrated that the rule did not prevent Judge Furman from reaching what he thought was the correct result. And now his published opinion is available, and it lays out his analysis for the next judge.

Judge Dever asked if the members of the Subcommittee would like to add their views.

A member who stated she agreed that no change should be made added the observation that the committee note does seem to recommend that the affidavits be confidential, whether that is fortunate or unfortunate.

Another Subcommittee member said that she had been very much influenced by the reporters' memorandum that surveyed all of the court decisions, which showed that the courts were considering all of numerous factors and not resting on the language in the rule or the committee note. So there just was not a pressing need to make any changes.

Another member commented that the defense bar feels the financial privacy of indigent defendants should be protected just as it is for those who retain counsel. The Subcommittee recognized that the rules don't ordinarily include an admonition to follow the Constitution or to follow common law, but we were considering an amendment that would say "Subject to any right of public access." That would have been a departure from how the rules ordinarily are written, omitting any reminders to follow the common law or the Constitution. That was a key reason the Subcommittee felt it wasn't a needed amendment.

Professor Beale noted that Professor Coquillette has often reminded the Committee that if we put this in one rule, then every other rule would have to start with "and consistent with the Constitution." Otherwise writing it into one rule could create a negative inference regarding other rules. Professor Coquillette agreed.

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Judge Dever then opened the floor for comments or observations from other members of the Committee or others with observations. A member commented that for him the problem of a negative implication was a particularly persuasive point.

Judge Bates said it seemed like a very thoughtful resolution, but he posed a hypothetical question: if Judge Furman were to convince CACM to change the guidance quoted in the committee note to delete the reference to the financial affidavits for assigned counsel, would the Subcommittee feel that would require action by the Committee?

Professor Beale responded that there is no way to eliminate a bad committee note. So the note quoting the prior CACM guidance would remain even if the Committee amended the rule and accompanied it with a new note. On the other hand, if CACM does change its guidance, the new guidance would be promulgated and presumably have its own effect. So the Subcommittee did not think that an amendment—which could not eliminate the old note—would be that important in that scenario.

Professor Coquillette and Professor King said it is possible for West Publishing and LexisNexis to add a footnote stating there had been a change in the rules. That might be an option in the hypothetical situation Judge Bates raised.

The Standing Committee's liaison expressed agreement with what had been said so far. He wished there were an eraser to allow the deletion of the note's reference to financial affidavits. But without such an eraser, he thought any cure would be worse than the disease.

Ms. Morales noted for the record that Department of Justice agreed with the Subcommittee's recommendation.

A motion to adopt the recommendation of the Subcommittee not to move forward with Judge Furman's proposal passed unanimously, and Judge Dever thanked all the members of the Subcommittee, especially the Chair, for their hard work. He stated he would communicate the Committee's decision to Judge Furman.

Judge Dever then directed the Committee's attention to Tab 3, beginning at page 162, which deals with the topic of pro se access to electronic filing. He said Professor King would introduce the topic and then turn it over to Judge Burgess, who chaired the Subcommittee. The other members of the Subcommittee were Judge McGiverin, Ms. Hay, Ms. Robinson, and the clerk representative, Ms. Noble. Finally, Judge Dever noted that the Committee was privileged to have Professor Cathie Struve, who is chairing the working group, available to provide additional information.

Professor King said the item on pro se filing was on the agenda to get the Committee's feedback on topics that had been identified for discussion by all the advisory committees affected by this proposal. Currently Criminal Rule 49 (reprinted at the top of page 169) states that a party not represented by an attorney must file nonelectronically unless allowed to file electronically by the court, by court order, or by local rule. The presumption is that unrepresented parties in

criminal cases must use paper filing. The other advisory committees' rules also deal with filing by unrepresented parties.

In 2021, the Rules Office received a proposal to expand access to electronic filing for unrepresented parties in all proceedings. To facilitate consideration by all of the relevant advisory committees, the Standing Committee established a working group, chaired by Professor Cathie Struve, who was participating in the meetings of each of the relevant committees. Professor King noted that Professor Struve's memo in the agenda book identified several issues, based on the Federal Judicial Center's comprehensive study. Professor King encouraged members to focus on pages 200 to 231, which described what the various district courts had reported was happening in those districts with criminal cases and prisoners. That would be the focus of the Committee's attention.

Professor King then identified three issues for discussion. First, does the current rule, which presumes that unrepresented parties in criminal cases must use paper filing, state the correct default rule, or should the default rule be changed? She noted that the Federal Judicial Center study found that several districts have already allowed unrepresented criminal defendants to use some sort of electronic filing. A few of them had approved the use of CM/ECF by unrepresented criminal defendants. There were not many, she noted, but the existing rule gave them the flexibility to do so. It states that unrepresented parties may file using the court's electronic-filing system "only if allowed by court order or local rule." And that has been permitted in a few districts.

The second issue, Professor King stated, is allowing alternative electronic access in a format such as e-mail or fax. This expanded quite a bit during COVID when there was less access in person to the court and many more districts in the study allowed some sort of electronic filing by prisoners in particular. That was facilitated by scanners provided by the federal court to mostly state institutions. One of the issues that the working group will be discussing is whether we should be encouraging expansion of that type of alternative electronic access outside the CM/ECF system.

Professor King described the final issue, which had surfaced in several different committees, as the requirement that unrepresented parties serve others who are already on CM/ECF in person or by paper non-electronically. If parties are on CM/ECF, they get an electronic notice when the clerk scans in whatever filing is delivered by the unrepresented party to the Clerk's Office. But the duty to serve remains, and is regarded by some as burdensome and duplicative.

Professor King noted that the Subcommittee had discussed these issues, and the memo in the agenda book described its reactions. Now the Subcommittee wanted to get input from the Committee and to hear about members' issues and experiences.

Judge Burgess thanked Professor King for a great summary, noting the variety of practices in different districts. Turning to the first issue, the possibility of changing the default position that requires unrepresented defendants to file in paper, he said the Subcommittee

discussed the burden that would place on the clerk's office if unrepresented parties were allowed to file in CM/ECF or by other electronic means (like email). Some districts have tried this and found it wasn't as hard as they thought it was going to be. But one of the Subcommittee's concerns had been the burden on clerks' offices. He also noted that in his experience, as a practical matter in most criminal cases with pro se defendants, they have standby counsel that can handle the electronic filing. So the number of unrepresented defendants without access to electronic filing is very small. But that did not mean the Subcommittee should not consider whether the default should be changed. However, as drafted the rule does allow the courts to permit pro se defendants who are capable of doing so to file electronically. He summed up the Subcommittee's general consensus: the opportunity is there now without requiring a change in the rule.

As to the third issue, regarding service of process, he acknowledged it is a problem in the sense that the rule requires an unrepresented party to make paper service. But there was some concern that a change would place a burden on the clerk's office and it would raise questions about when something was filed. He hoped to hear more from Professor Struve about the discussions in the other advisory committees as they considered these issues, including the possibility of changing their own default rules.

Overall, the Subcommittee recognized the need going forward to take advantage of electronic filing, but that is already available in most districts if an unrepresented defendant can establish the ability to do it.

Judge Burgess noted that another problem the Subcommittee discussed was the difficulties faced by pro se litigants in custody in facilities that don't have the ability to allow them to file electronically. We have prisoners in state and local facilities that do not have the wherewithal for them to file electronically. The Subcommittee recognized the value of increasing electronic filing, but the general consensus was that we just are not there yet. Judge Burgess and Judge Dever then invited other Subcommittee members to make any additional comments.

A Subcommittee member stated that her initial reaction had been that all litigants should have equal access to electronic filing and we should move towards allowing pro se individuals to utilize the electronic-filing system. But it would not be logistically feasible to move from the current rule that pro se parties cannot file electronically without a judge's permission to requiring them to file electronically. That would be unworkable because persons who are incarcerated don't have access to computers. She noted some of the disadvantages of not being able to file electronically. For example, in many jurisdictions an electronic filing can be submitted until midnight, but pro se filers who must file hard copies must be at the courthouse earlier, by 4:00 o'clock or whenever it closes. And it's easier not having to deal with things like making copies. So she felt that we definitely should work toward increasing access to electronic filing.

The member raised the possibility of seeking a middle ground between the current position of the rule (no access unless approved by the court) and the requirement that all litigants must file electronically (i.e., a rule that it's permissible: unrepresented parties may file electronically if they can demonstrate the ability to do so, without requiring the permission of the

court). She thought that a pro se litigant could establish this capacity in the same manner that attorneys do so now: they must sign up for and take training, and then demonstrate that they know how to use the system and the governing rules. Some jurisdictions, she noted, have local rules requiring attorneys to take a test online to show that they are competent to receive ECF credentials. A member responded wryly that his court sometimes had trouble with attorneys being able to use the electronic filing system correctly.

Another Subcommittee member commented that she had not been able to join the most recent Subcommittee call, but she commented that in her jurisdiction, Oregon, they put scanners in two of the biggest state prisons so that prisoners could scan their materials and electronically file that way. That has worked fairly well. The prisoners don't need an Internet connection, and they don't need CM/ECF filing, but they have a way to create a document that the clerk's office receives. The problem is that it's very expensive. They had been able to include only two prisons in a pilot project, though there are 14 or 15 other prisons. Extending this would require access to the libraries within each prison and access to the scanner for each prisoner. That would be logistically complex, and Oregon had not come up with a method that she could recommend would work for the rules.

The member stated the hope that even if there is no amendment to Rule 49 now, it would be possible to preserve the benefit of the work and analysis done by the Subcommittee and the Federal Judicial Center (FJC). It seems fair for prisoners to have access electronically rather than by the ordinary paper mail method. Since the Subcommittee surveyed the various problems that come up, we apparently still need to have the laboratory of experimentation in all of the district courts. She hoped we could encourage that experimentation.

Judge Burgess responded that the member had largely summed up the Subcommittee's views.

Noting that the Committee's clerk representative had been a critical member of the Subcommittee given her experience as the clerk in the Southern District of Florida, Judge Dever asked her to share her thoughts. She responded that the discussion so far had analyzed the issues very well. She said we want to expand electronic filing, and we all understand the importance of equal justice and having everyone have access. But logistically it is very complicated, particularly in larger districts. Her district has five locations and six different jails, some state and some federal. So logistically, it's expensive and difficult to organize. Changing the default would make it impossible for many courts to comply with the rule. The issue is really logistics, because we all have the same goal. It's just a matter of how do we get there, and how do we do it evenly across the country?

Judge Dever then asked Professor Struve to explain the larger project. She began by thanking the Subcommittee, its chair, and the reporters for their valuable insights. Noting that the working group was convened at Judge Bates's suggestion to consider some proposals with respect to pro se access to CM/ECF, she wanted to clarify where those discussions have been with respect to access to CM/ECF, and foreground the questions with respect to service mentioned earlier. With regard to access to electronic filing, she emphasized that no one was

suggesting that the rules should *require* CM/ECF filing by self-represented litigants. The various proposals would either increase access by making it a presumptive option for self-represented litigants, or in the absence of such a change would address the practice of a minority of districts around the country that flatly forbid the use of CM/ECF by any self-represented litigant. She noted that about 15% of the districts, by the FJC's count, provide that no self-represented litigants can ever access CM/ECF in their own cases. But that is a minority position, as is the position of those other courts that presumptively permit CM/ECF access for pro se litigants. Those positions are the outliers on each side, with the larger middle ground being to allow litigants to seek permission. She also emphasized that in our discussions there had been no momentum in favor of extending CM/ECF access even on a permissive basis to incarcerated self-represented litigants.

She thought that the Subcommittee had made an excellent point: the universe of litigants to whom any such proposal might apply in the criminal rule context is very small. According to one study, perhaps 0.3% of felony defendants in the federal system are self-represented, and among those, not all are incarcerated (though some are). So we have a very small N to think about. And even if you say, under the § 2255 rules, which do permit the application of either the criminal or the civil rules to the § 2255 motion, among those litigants, Professor Struve thought the vast bulk would be incarcerated, though she recognized that custody can extend beyond incarceration for § 2255 purposes. But the relevant point is the N is very, very small as far as the criminal rules are concerned.

So Professor Struve agreed with the Subcommittee that both the benefits and the downsides of the access to e-filing proposal are much less pronounced with respect to the criminal rules. It is more of an issue for the other sets of rules—Civil, Bankruptcy, and Appellate—and she offered to provide an overview of those committees' discussions, with the caveat that the service provision is far different in this respect. The service provision would build on the insight that any paper filings by a self-represented litigant are ultimately scanned and uploaded by the clerk's office into CM/ECF. Because all participants in CM/ECF are going to receive notice of those filings and access to them through CM/ECF in the notice of electronic filing, the question arises whether it's necessary to additionally require that paper copies be served on those parties who are registered in CM/ECF. She emphasized this proposal would not ask that the clerk's office do anything different than what we understand it already does. At present, the clerk's office takes paper filings, scans them, and puts them in CM/ECF. The proposal builds on that, saying once they file in CM/ECF, why do CM/ECF participants in the case need to receive a paper filing as well?

Because this issue concerns service, not filing, the self-represented litigants who might possibly be affected by a rules change would include both incarcerated and non-incarcerated litigants. Assuming that the § 2255 rules are currently deemed to incorporate Criminal Rule 49's approaches, she thought the affected population would include incarcerated people moving under § 2255. And especially as to that population, she asked, why should they use the limited funds in their prison account on stamps to send paper copies to the U.S. Attorney's Office, which will have to check them for anthrax and which already has an electronic copy via CM/ECF? She

suggested that the service question would be the place where the Committee might most profitably direct its attention. That was where she thought a rule change in the Criminal Rules might actually have real world effects.

Next, Professor Struve asked for more information about some points raised on page 165 in the agenda book memorandum. The memorandum mentions that the service proposal could interact with the prison mailbox rule. She expressed confusion about that because the prison mailbox rule, as she understood it, concerns how to tell whether an incarcerated litigant's filing is timely. The proposal to eliminate a requirement of separate paper service—which is what was on the table—did not really relate in any way to the timeliness of the *filing*. It would simply absolve the litigant from separately *serving* the papers they are filing. She asked how the prison mailbox rule related to this service provision. Another question referred to in the memo is determining the date of filing: when delivered to the clerk's office, or when scanned in? She wondered again whether the concern here really is about the date of *filing*, because that would not be affected by the removal of the separate service requirement. The date of filing would still be whatever it would have been without the rule change: when it's delivered to the clerk's office if it's someone not incarcerated, or when delivered to prison officials in compliance with any of any applicable prison mailbox rule. But Professor Struve said flagging the issue of timing had been helpful because it had spurred her to think about how the change would interact with the three-day rule in Rule 45(c). The time period is counted from the date of service, and if there were a change in the service requirement we should think more about how to draft the rule to take account of any possible delays between receipt by the clerk's office of a hard copy and subsequent uploading into CM/ECF. But if there are other ways in which this would interact with the date of filing, she would like to know about them.

Finally, the memo mentioned the potential for increased burdens on the clerk's office. Professor Struve said she was having trouble figuring out what those burdens would be. She found it hard to imagine a Criminal Rules situation in which there could even be a potential problem. Presumably the other litigant in a § 2255 proceeding is the U.S. government, which presumably is always on CM/ECF. Accordingly, the government would receive any filing that the litigant makes in hard copy once it's put into CM/ECF. She recognized that in civil cases there may be other parties who are not CM/ECF participants. The districts that have adopted the proposed approach to service (which included the district in which the Committee was meeting, as well as the Southern District of New York and at least one other district) do not seem to have experienced problems operationalizing it. But in order to be able to ask them whether they have encountered particular problems, it would be very valuable to know exactly what burdens would fall on the clerk's office as a result of a provision that would merely absolve the litigant from serving participants who are on CM/ECF. The proposal, she noted, would still require separate paper service on any litigants who do not participate in CM/ECF.

Professor King thanked Professor Struve and replied quickly to one part of her question on service, pointing out that there are often codefendants in criminal cases who do not receive service through CM/ECF. In thinking about the rules governing service, it is important to keep in

mind that it's not just the government. She agreed with Judge Bates that only unrepresented codefendants would not be on CM/ECF, so the number would not be large.

Judge Dever invited comments from other Subcommittee members and asked the Committee's clerk representative for her perspective. He recalled that in the Subcommittee discussion she had spoken about the logistics of monitoring emails and all the different ways communications come to the clerk's office, and the resource constraints and logistical reality of dealing with them.

The Committee's clerk representative responded that the Subcommittee's discussion of the service issue included not only CM/ECF but also alternative means, such as filings by email. Her district experienced issues during COVID receiving documents via email, not just by pro se filers, but also by the attorneys who sent emails to the box and assumed because they were sent to the email box that they didn't have to serve anyone else. And one of the issues specifically was with sealed documents. When they sent sealed documents, they didn't serve the parties and folks didn't show up for hearings and things of that nature. But that was with regard to email filings, not specifically with regard to CM/ECF. As to service, she agreed that if you file something in CM/ECF you should only have to serve individuals who are not registered for CM/ECF, not all of the people that are already receiving electronic filings. She favored changing that rule if possible. With regard to filing, her concerns focused on registration and getting pro se filers registered for CM/ECF. Professor Struve said she would follow up via email with the clerk representative.

Another member observed that at the outset of a case a litigant might not accurately identify the opposing party, which then puts a burden on the clerk's office to determine who should be served. That had been addressed with regard to civil pleadings in Oregon, which has a standing order that the Attorney General's Office has agreed to accept electronic service from the clerk's office whenever a § 2254 is filed. With that agreement, the clerk's office does serve the Attorney General's office. That might be a model to consider. But their U.S. Attorney's Office has not agreed to accept service of § 2241 petitions. When a § 2241 petition is filed by somebody who says they're being held unconstitutionally by the federal government, the clerk's office can't serve that because the U.S. Attorney's Office is not yet a party. They are not on CM/ECF for that pleading. Usually the party that's the opponent would be the custodian. The warden, usually of the federal prison, would be the opposing party. She thought that was probably one of the burdens on the clerk's office, having to determine how to serve that warden. That was one of the problems with service.

The clerk liaison added a concern about burden shifting where the burden is on the party to file the document and to serve it, not on the clerk's office. She was concerned that there would be claims that the clerk didn't serve the document on the correct party, though ultimately it is really the filer's responsibility to perfect service.

Judge Burgess commented that the Committee might want the Subcommittee to take a harder look at this service issue. He asked for an update on whether the other Committees are contemplating reversing the presumption concerning pro se access to electronic filing. If so, he

wondered whether it would it be a problem to have a different procedure under the Criminal Rules.

Professor Struve said the other three committees had already met, and most of their discussion concerned e-filing rather than service. However, when the service proposal came up, it was always to approbation. Members had made comments such as "that seems like an easy lift" and "that sounds like a good idea." So service seems to be kind of ticking along in the other committees as something to work on as a potential rule amendment.

On the question of access to e-filing, she noted that Mr. Reagan and his colleagues at the FJC have been phenomenal in studying this question. Their study found that for presumptive access to electronic filing for self-represented litigants the level of court makes a huge difference.

In the courts of appeals there is almost an even split between circuits that presumptively permit CM/ECF access for non-incarcerated, self-represented litigants and those that do not. She emphasized this referred only to non-incarcerated litigants. No circuit is presumptively permitting access for incarcerated litigants, though the Ninth Circuit had experiments in some particular facilities. With regard to non-incarcerated pro se litigants, six of the courts of appeals presumptively permit them to file electronically, and six will allow them only with permission in the case. The final court, the Sixth Circuit, has not permitted self-represented parties to file electronically. Professor Struve expressed her personal hope that circuit would reconsider its position. Leaving the Sixth Circuit aside, it is a six-to-six split between presumptive access and access with permission.

In the district courts, in contrast, the majority of districts allow unrepresented parties to file electronically with permission. But in slightly less than 10% of districts, if pro se litigants are not incarcerated, they don't need special permission, though they may need training. And 15% of courts appear to say that pro se litigants can never file electronically.

The bankruptcy courts are furthest along the spectrum because they basically do not allow self-represented litigants to access CM/ECF. But in the Bankruptcy Rules Committee, a majority of the participants were strongly in favor of increasing access. They viewed it as an access to court issue and were not perceiving particular problems. They thought that the arguments advanced against access to CM/ECF were not particularly persuasive, and the clerk of court representative strongly supported the idea that it would alleviate burdens on his office.

Professor Struve said none of the Committees had reached any concrete decisions. She described the Appellate Rules Committee as intrigued, given the fact that the appellate courts are by and large further along in potentially adopting this greater access position. In that Committee, the question might be whether they are going to try to shift the default to presumptive permission, from which a court could opt out in a case. Or would the Committee say the courts of appeal are already moving in that direction, so there's no need for a rule change? In the Civil Rules Committee meeting the views of skeptics on increasing access were quite well represented, although in some instances voiced by participants who are not members of the committee. But

there were also questions raised about whether this is in fact a rules issue. One Civil Rules Committee member suggested CACM should take the lead on email access to e-filing.

In summary, Professor Struve said the discussions spanned a range of degrees of enthusiasm for shifting the default with respect to e-filing. Bankruptcy has been the most enthusiastic, Civil much more doubtful and rather skeptical about whether this is for the Rules Committees at this point, and Appellate considering whether to go their own way or just allow things to evolve.

Mr. Byron, who also attended the other committee meetings, added an additional issue. One of the comments he thought might be worth further inquiry and discussion is whether there's a benefit to providing notice to pro se litigants by electronic means, especially for court orders. This might be less significant for Criminal Rules than for Civil and Bankruptcy. But in Bankruptcy, in particular, he had been struck by the observation that many of the unrepresented litigants in the bankruptcy courts and in civil cases too have no regular fixed addresses. Because they change their address from time to time, mail service is often ineffective at providing notice when the court orders a party to file or appear. Electronic notice could be really beneficial to those parties, and he thought that was an issue to add to the list.

After thanking Professor Struve for her efforts, Judge Bates commented that he agreed that the service issue is one that is right for continued coordinated action. It is more difficult to decide exactly what the next steps should be with respect to the access to CM/ECF issue more generally, but he and Professor Struve would continue talking about that.

Professor King asked for other comments in response to the question about concerns regarding a change in the service requirement. A member asked how a pro se litigant would know who is and is not on CM/ECF if we eliminate paper service for those on CM/ECF. How does that work in practice?

Professor Struve responded that question could be pursued with the districts that have implemented this procedure. These districts have a large docket of self-represented litigants, and there must be an answer. And she emphasized we are only considering service with respect to filings after the initiation of the case, and not service of case-initiating documents like complaints or petitions.

Judge Bates commented that it is a very small group where there is a self-represented criminal defendant and there are other parties in the case that will not see CM/ECF. He had never seen such a case, where there is more than one pro se defendant in the case without standby counsel.

There was agreement that the Committee should learn more about the experience in the districts, including the Southern District of New York and the District of Arizona, where they have already eliminated paper service on parties who are on CM/ECF. Professor Struve commented that the idea of eliminating paper service in this context had been prompted by an early conversation with a person who had been instrumental in bringing this change to the Southern District of New York.

With regard to the general issue of increasing CM/ECF access for self-represented parties, Ms. Morales stated that the Department of Justice supports any measures taken to increase and provide equal access to all our tools. But in looking to expand access to defendants the Committee should also consider the safety concerns that that may raise. She reminded the Committee of the report from the Task Force on protecting cooperators and the risk that any access from prison to these files could potentially cause some harm to the defendant. She put this on the record as the Department's only concern about expanding access.

Judge Nguyen thanked the Subcommittee members for their work, and she endorsed the view that we should be cognizant of the risks and technological challenges but move in the direction of equal access to CM/ECF. But in the meantime, she said, the Subcommittee had discussed some districts that are providing alternative means of electronic access, such as providing portals and allowing filing by email. Though each would carry its own challenges as discussed, she thought from a technological standpoint it would be fairly easy to provide portals where documents can be uploaded. One of the lessons her court had learned during the pandemic was the need to move aggressively to take advantage of technology. During the height of the pandemic, they had to rotate staff coming in just to scan the tremendous volume of filings through the drop boxes. They were thinking about how they could move this to some electronic format that would be safer. She asked whether there would be a means of providing encouragement of these alternative means of electronic submissions.

Mr. Reagan responded that one of the frustrations the FJC researchers had encountered was the ambiguity of the phrase "electronic filing." It can mean filing using CM/ECF, but it can also mean emailing something to the court for filing or using some kind of web portal upload. He also commented that "rules are not always rules." The FJC researchers found that many courts were not enforcing the paper service rule, and there was no incentive to enforce it. The other side wasn't enforcing it because they were already getting service. So there was nobody enforcing the rule. That, he said, was another part of that dynamic: the rule is not being followed because nobody thinks in their particular circumstance that the rule is particularly useful.

Judges Burgess and Dever asked whether there was anything else the Committee wanted the Subcommittee to look at in addition to the service issue. Judge Dever stated that the reporters would follow up with Professor Struve and monitor developments with respect to the other Rules Committees. The Committee will also continue to gather information about what is actually happening on the ground in the districts that are technologically ahead to learn what they are doing, and whether the rule is serving as an impediment, suggesting the need for an amendment.

Professor Beale noted there were references in the FJC report to the additional difficulties that NextGen seems to be posing for pro se parties. She was uncertain where that NextGen process is and how it is being coordinated with what the Committee has been considering. As Judge Nguyen and others said, one of the Committee's overriding goals is access and if there are technical issues concerning software that would scan for malware and so forth. She asked whether NextGen is coming, or is it here? And is there a formal way of bringing these projects together?

Judge Bates responded that CM/ECF is always evolving through NextGen, and it is both here and coming. He characterized it as a process rather than a single thing. He did not think it would be beneficial to wait for something to happen with NextGen, though we should be aware of it, and may be able in some instances to work in coordination with it. Professor Beale expressed the hope that the information that the FJC was collecting in this massive study is somehow being fed back to the people who are working continually on CM/ECF NextGen.

Mr. Reagan said NextGen is mostly here. For the past few years, courts have been transitioning to NextGen first a few at a time and then a very large number, many of them fairly recently. So NextGen is not something in the future, but very much in the present.

Mr. Byron noted, as a matter of terminology, that NextGen CM/ECF is the process that was just completed of transitioning all of the courts to that system. There is, however, an additional conversation, without a specific timeline, to replace CM/ECF with an entirely different platform. He thought that was at least several years away from full adoption and implementation. He thought that in the process of replacing CM/ECF with a different platform, there may be opportunities for the Rules Committees to work with the people at the AO who are working on that process to help ensure that that new products take account of the concerns that we're identifying. But we should not wait for that to be fully developed. There are still things we can do in the rules process in the meantime to address what is possible under what we now live with, which is NextGen CM/ECF (itself subject to constant evolution and tweaking).

The Standing Committee liaison encouraged the Subcommittee also to reach out to the clerk's office in the Northern District of Illinois, particularly as it pertains to CM/ECF electronic filing by pro se litigants, the procedures that clerk's office put in place to prevent malware from being introduced into the CM/ECF system, and how it handles service on CM/ECF users by pro se filers. He thought they had worked things out pretty well and might have some good lessons to impart.

Judge Dever thanked him for that suggestion. Noting this had been a very helpful discussion, he said that the reporters would continue to communicate with Professor Struve, and the Subcommittee would focus on the service issue as Judge Bates had requested, not wait for potential CM/ECF or NextGen solutions, and provide a report at our next Committee meeting.

After a short break, Judge Dever opened the discussion of Rule 17. He introduced himself, noting he is a district judge in the Eastern District of North Carolina and chair of the Committee. After introducing reporters Professors Nancy King and Sara Beale, he asked the other Committee members and participants in the Rule 17 discussion to introduce themselves. Judge Dever noted that Judge McGiverin, a United States Magistrate Judge from the District of Puerto Rico, was experiencing travel issues but would join the Committee as soon as possible.

The Committee members and staff introduced themselves, and the following participants, who attended at the invitation of the Committee, introduced themselves:

Michael Carter, Executive Director, Federal Community Defender's Office, Eastern District of Michigan

Robert (Rob) Cary, Williams & Connolly, Washington, D.C.

Mary Ellen Coleman, Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina, Asheville Division

Donna Elm, Criminal Justice Act panel attorney for appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the Ninth and Eleventh Circuits

James E. (Jim) Felman, Kynes, Markman & Felman, P.A., Tampa

Mike Gill, Criminal Chief, Eastern District of Virginia and chair, Criminal Chiefs Working Group

Angie Halim, criminal-defense trial attorney representing indigent federal criminal defendants, Philadelphia

Ellen Leonida, BraunHagey & Borden, San Francisco

Lisa Miller, Deputy Assistant Attorney General, U.S. Department of Justice's Criminal Division

Dimitra Sampson, Assistant United States Attorney, District of Arizona

Stephen (Steve) Wallin, Criminal Justice Act panel attorney, Phoenix

Judge Dever turned the meeting over to Judge Nguyen, the Rule 17 Subcommittee chair, who expressed appreciation for allocating the Committee's time at the meeting to study the Rule 17 issue. She explained that, in its preliminary review of the proposal to amend Rule 17, the Subcommittee concluded that it did not have a sufficient understanding of how the process worked on the ground and how it varied among districts. So the day's purpose was to gain a greater understanding of the rule's functioning. She thanked the participants for attending to share their experiences and explained how the Committee would proceed. She noted that the Subcommittee had planned several panels and set time frames and issues for each. She asked each participant to speak for six minutes, after which she would invite Subcommittee members to ask a single question before she opened the floor to questions and comments from the whole Committee.

The first panelist, Robert Cary, said he practices in Washington, D.C., but handles cases in other districts as well. Mr. Cary said that in his experience courts enforce the *Nixon* three-part test of relevancy, specificity, and admissibility, and he had identified only a handful of reported decisions in federal district courts in New York and the Northern District of California that seemed to depart from the standard. He had found the *Nixon* standard is very hard to meet, so much so that in his last two criminal federal criminal trials, he sought no subpoenas because he did not think in good faith he could meet that standard. For example, in a case in the District of Columbia, he sought to subpoena a company for records concerning its cooperation with the government. This was an important line of inquiry for the defense because the company was

subject to debarment, the government had not debarred it, and the government's chief witness had been able to sell the company for hundreds of millions of dollars. So the defense issued a subpoena. The company moved to quash, and Judge Emmet Sullivan (who has been known to be relatively generous in providing discovery) quashed the subpoena, finding it did not meet the *Nixon* test. Mr. Cary said the defense was unable to identify with specificity precisely what documents it was looking for, much less demonstrate that those documents were admissible. But in the same case, the government issued a trial subpoena for emails from one of the defense witnesses to the witness's employer. The employer, for whatever reason, decided not to move to quash, and the government got all those emails. Mr. Cary characterized this as unfair.

Mr. Cary said it was difficult to provide examples of things that he should have been able to obtain by a subpoena that would have made a difference, because you don't know about what you don't get. But he provided one example from a pro bono drug distribution case he had in the Maryland state courts. A subpoena for phone records provided evidence that defendant was in fact innocent, and the charges were dropped on the first day of trial. But if there had been a motion to quash under *Nixon*, Mr. Cary thought they would have been unable to satisfy the *Nixon* test. His takeaway was that the *Nixon* test is very hard to meet in practice. In most districts, as he reads the law, you have to describe with specificity and demonstrate that that the material sought will be admissible. It's a very hard standard to meet, and clients are aghast and cannot understand why they do not have the same ability as the government has to issue subpoenas. Mr. Cary endorsed the proposal of the New York City Bar Association ("New York Bar"), commenting that that he thought it would go a long way towards not only increasing fairness, but also the perception of fairness.

James Felman, the next speaker, said this is a big issue in white collar cases. In the big fraud cases, we are in a data-driven era. In his current case, for example, the discovery provided by the government was the equivalent of 30% of the Library of Congress, or 3,000 copies of the new Encyclopedia Britannica. This is an enormous amount of information, a "document dump." He called the design of federal criminal litigation trial by one-sided ambush. The government does not necessarily want to obtain the same information that the defense wants. So the defense gets a lot of information, but it is what the government wanted and obtained using a grand jury. But the defense may need different information, and Rule 17(c) is the only way the defense can get what it needs in time to review and use it.

Mr. Felman said his experience was a little different than Mr. Cary's. In many cases the prosecutors did not oppose the sorts of subpoenas that he has asked to be issued, which obviously sought important information. And many times the government concedes the subpoena can issue, though the recipient of the subpoena might move to quash it. That means there are now two rounds of litigation. In round one, the defense has to satisfy the government. And then if they can get through that, in round two, the defense is opposed by the recipient of the subpoena.

Mr. Felman noted that if the government has not agreed to his subpoena, he was probably not going to be successful. He agreed with Mr. Cary that he has to show that he already knows

what he is looking for, and even though he already knows what he is looking for, somehow he cannot prepare for trial without getting it. It's almost an impossible standard to meet. The reality is the defense does not really know with that specificity. It only knows that there is likely to be highly relevant information in the hands of this third party, and they need to get it. So it is almost impossible ever to meet the *Nixon* standard. But most of the time he has not been required to meet the standard, because it would be embarrassing and an obvious due process violation to take the position that the defense cannot get those documents—though sometimes that happens.

And so basically, he said, we are practicing law despite the rule and despite the *Nixon* standard. He described some of the workarounds. Sometimes the clerk's office gives him a blank subpoena, and with the prosecutors' consent, he just fills in the date. We issue the subpoena and it does not even go through the court. When he first started practicing, they would get a trial subpoena, serve it, and sometimes the party would just give us the documents early. But many of the people he is serving are sophisticated, and they will not voluntarily give the defense something early. And he needs pretrial production. He acknowledged that there can be budgetary issues because filing and litigating these motions is expensive. He also expressed concern that in some circumstances, there may be disclosure to the government of a defense theory. Unless he can move ex parte, the government will be able to see what the defense is seeking and then get a copy of the documents when they come in—even if he would not have been required to disclose them to the government under Rule 16. So he urged the Committee to look at this issue, which he characterized as critically important to the modern practice of white collar criminal defense law, saying that practitioners are hobbling along by working around the rule, and it would be much worse if the prosecutors that he worked with were not so professional.

The next speaker was Mr. Wallin, who said that he frequently uses Rule 17 subpoenas before trial in the District of Arizona, he always does so ex parte, and he requests authorization from the judge in advance. He always makes that motion ex parte, and he had never gotten any pushback in various kinds of cases. Mr. Wallin commented on the high quality of the bench in the district, as well as the federal prosecutors.

Mr. Wallin agreed with the previous speakers that the defense needs to obtain material to prepare for trial. He noted that the cases talk about a distinction between discovery and production, which he characterized as semantic, noting that in his motions he always states he is seeking production not discovery. He also reminds the judge that he could also issue a subpoena duces tecum for trial, but that would delay the trial. He surmised that makes a difference to some of the judges.

Mr. Wallin thought that it would have been a real problem if he had the judges that other speakers had described and had to meet those difficult standards. He briefly described a number of cases in which he had been able to subpoena materials. There were many entities in a white collar case, and none were in his client's name—there were nominee family members and so forth. The government had not gotten the bank records from any of these entities, and he needed them for his forensic accountant. In a rape case arising on a reservation, his expert needed the photos of the victim's vaginal and anal areas to determine whether there had been an anal rape.

With the photos he was able to secure a much more favorable plea bargain that did not include sexual assault.

Mr. Wallin urged that Rule 17 be revised to make it clear that, under the judge's supervision, the defense can obtain a subpoena duces tecum as pretrial discovery. Although he thought he was very lucky that the judges in Phoenix seemed to understand that, he emphasized that a revision is really needed.

Judge Nguyen invited questions, first from members of the Subcommittee.

A member asked if subpoenas from retained attorneys and those appointed to represent indigents are treated the same way. She said the public defender in her district said that under 17(a)(1)—which is just about witnesses—retained attorneys can go to the clerk's office and get subpoenas willy nilly. He told her that 17(b) is then primarily for indigents. She did not think that was clear in the rule.

Mr. Cary responded that he believed he could get a trial subpoena simply by going to the clerk's office in any district court in the country without court intervention. But the *Nixon* test is still going to apply if it's a subpoena for documents. But if it's for witnesses, no, but if it's for documents in any way, you have to go through the *Nixon* standard. That was his understanding of law and what his research indicated.

Mr. Felman emphasized the distinction between pretrial and trial subpoenas. He said that, in the case of a subpoena for documents for use at trial, he could go to any clerk's office and get that subpoena with no difficulty. The issue we have been focusing on, in contrast, is a subpoena that would require the third party to provide the documents in advance of trial so that the defense can study them and use them to prepare for trial. He said most courthouses will not issue the defense a subpoena with a blank date. They will only issue a subpoena with the trial date. He can get a pretrial subpoena with an earlier return date only if he has prevailed in litigation and obtained a court order. Now, that's how his courthouse works.

A member asked if 17(a) is solely for witnesses and 17(b) is for both indigent and retained defense counsel, and if both have to satisfy the *Nixon* standards. Mr. Felman responded that Rule 17(a) governs trial subpoenas for everyone. But 17(c) is what you use to get something that's returnable in advance of trial. He thought that was the part of the rule under consideration. But, the member asked, do both (a) and (b) require court intervention?

Another member clarified that 17(a) and (b) are both about trial subpoenas, but they treat indigent defendants differently, because indigent defendants have to name the people they're going to be subpoenaing, whereas those who have retained an attorney can get blank subpoenas at the courthouse. Rule 17(b) in theory requires the defense to name their witnesses and get the court to approve the subpoena, whereas the Committee just heard that if you have a retained counsel under 17(a), you don't have to do that. That seems like a good issue for the Committee to address as well. The member also noted that some defense attorneys get documents by using a witness subpoena under 17(a), and they subpoena the witness to bring the documents. And then the witness might bring the documents earlier.

A member stated that she had always read 17(c) as the only part of the rule that applied to documents, but she thought it was confusing. Some speakers indicated they used 17(a) to get documents. They shouldn't be doing so, but they are. She thought 17(c) was for obtaining documents under court supervision.

Mr. Wallin said that was how he had always read it, and that was the reason he always filed a motion for a Rule 17(c) subpoena in advance to get the authority under Rule 17(c). The first sentence of Rule 17(c)(1) does not refer to court intervention. The second sentence says "The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence." So if you want the items before trial, you have to go to the court, and he had always done that.

Judge Nguyen commented that this was part of the Committee's investigative process, and what the Committee was hearing is that the practices really do vary, including how district judges are interpreting the various provisions. She noted that the next panel would focus on judicial oversight.

Ms. Morales commented that Mr. Wallin's experience was very different from those of Mr. Felman and Mr. Cary. She wanted to understand the source of the difference. Was it a difference between the approaches in different districts, or a difference in the types of cases handled by the speakers, or a combination?

Two speakers responded. Mr. Wallin said he had not done any federal court practice outside the District of Arizona, so he could not say. He assumed it was a matter of the culture. Mr. Cary thought it was a matter of who objects, whether it's the subpoena recipient, who undoubtedly has standing, or sometimes the government. He noted he has not experienced objections, but when you get objections you must meet the *Nixon* standard, which is very tough. A member commented that either way there is court supervision for document subpoenas. Mr. Wallin responded that he dealt with this on the front end, including a judge's order when he issues subpoenas. He thought the court order short circuited any objections, though he thought he had once received a call from the recipient of a subpoena.

Mr. Cary said that until hearing the day's discussion he had thought he did not need judicial authority to get a subpoena and serve it returnable for the first day of trial—though when he got an objection, then the *Nixon* standard would apply. He thought he would need to be more careful going forward.

Another Subcommittee member asked Mr. Cary to provide more detail on the state case in which he had successfully subpoenaed documents that resulted in the case being dropped. Mr. Cary said it was a drug-distribution case where the drugs were dropped off by an undercover Federal Express delivery to a specific address. By subpoenaing telephone records of somebody they suspected might have been involved, the defense was able to establish the drugs were intended for that other suspect. He emphasized that if the telephone company had objected he could not have met the *Nixon* standard for a broad subpoena seeking many phone records.

Another member asked if Mr. Cary or other speakers had a suggestion on what you think would be a better standard. His point was that the *Nixon* standard was too high because it would have required him to know in advance what is in the documents are that you haven't seen yet. In Mr. Cary's case, he thought the phone records would be useful, but he would not have been able to show the court that the records would specifically show that the other suspect was present at the delivery site. So what should the standard for subpoenaing documents from third parties be? The member asked the speakers what standard would allow them to get the documents they needed but still have room for people to object that it's too burdensome.

Mr. Cary responded that the material and relevant standard is a good start, but the burden was another issue he thought was not addressed sufficiently in the New York Bar proposal. He noted that Rule 16 uses the word "material," and he thought it was appropriate for Rule 17 as well.

Mr. Felman stated that he thought there should be no limit on the issuance of pretrial subpoenas. The defense should be able to issue such a subpoena without court involvement. If a recipient thinks it is unduly burdensome, then the recipient would move to quash, and that is where he thought the standard would come in. He noted that he did not seek to subpoena material he did not need and that the process should not be any different than in a civil case. He did not think many civil litigants issue abusive subpoenas, and he saw no reason to believe that criminal litigants would abuse this. So Mr. Felman agreed with the New York Bar proposal, which would eliminate prior judicial approval for the issuance of subpoenas, and, if the recipient thinks it is unduly burdensome and oppressive, they could move to quash.

Judge Nguyen had a follow-up question for Mr. Felman and Mr. Wallin. Although they had described working cooperatively with the U.S. Attorney's Office on the front end, she wanted to know what standards the courts apply when there is an objection from the US Attorney's office or a motion to quash. Is it *Nixon* or something closer to material and relevant?

Mr. Felman responded that if there is an objection, the courts apply the *Nixon* standard, and he is almost certainly going to lose. Mr. Wallin emphasized that he always makes his motions ex parte, and he had never had a judge question that, and never had an objection from the prosecution because they don't know about it. And the judges said fine with that. And he'd never had a motion to quash. That supported Mr. Felman's point that the defense has no interest in abusing the subpoena authority. Mr. Wallin acknowledged that litigants in some civil cases pursue a scorched earth policy, but that just doesn't work for criminal defense lawyers. He thought that some of the concerns and fears that motivated the current design of Rule 17 are just not very persuasive.

Mr. Felman added another point. Sometimes in round one the government doesn't object and the subpoena issues. But he has to file the motion, which articulates the *Nixon* standard, which is then granted. But at the second stage, if the recipient of the subpoena objects that the subpoena is overbroad, burdensome, and does not meet the *Nixon* standard, he will respond that he has already met the standard. But there's some ambiguity at that point because the recipient was not a party to the litigation where he met *Nixon*.

Judge Nguyen then invited questions from members of the Committee who were not on the Subcommittee.

A member asked about the concern that meeting the standard for a subpoena would reveal the theory of the defense. She noted that it requires a great deal of work to obtain judicial approval of a pretrial subpoena, and when you do receive documents they are immediately disclosed to the government. But these may be documents that you don't want to use in your case in chief. You thought they would be relevant and that actually ended up hurting you. So those are decisions that you make early on. She asked the panelists to describe their experiences. Did it reveal the theories of your case? How does it hinder you in order to get documents produced prior to trial to determine whether they are beneficial and helpful? Does it hurt preparation of the defense because subpoenaed documents will be disclosed at the same time to the prosecution?

Mr. Cary began by saying it was his general practice to be "sort of an open book when it comes to discovery." He thought he would not get good discovery from the government unless he disclosed quite a bit of his own defense theories. That is his premise, though he was aware many other defense lawyers did not agree. He noted the contrast with Mr. Wallin, who had described his general practice of using ex parte motions.

Mr. Wallin noted that he generally took the same approach on discovery, but he does file his motions ex parte. And in his motion and proposed order, he includes a statement that the defense must comply with Rule 16 with respect to whatever material is produced in response to the subpoena. He described a case in which his client was in custody and made multiple calls from jail to a defense expert who had evaluated him. Mr. Wallin wanted the jail to provide the calls, so he subpoenaed them, but he did not want to alert prosecutor to the calls. He said that almost by definition, if he is at the point where he thought he needed something to help prepare his case, then he would be revealing defense theory by asking for it and explaining to the judge why it meets the *Nixon* standard. But he noted that typically he did end up disclosing what he got from the subpoena to the government. And, as he said, it might help him get a better plea agreement.

Mr. Felman added that it was very difficult to have a one-size-fits-all answer because it depends on the type of situation at issue. There are times where he wants to get information in the hands of a third party that he thinks might be helpful, but does not think the government knows about and does not want to alert them to. It might or might not be helpful, and he would move for the subpoena ex parte. But most of the time, he was in Mr. Cary's school of thought, and usually talking with the prosecutor. He views a trial as sort of a failure to communicate. He wants the government to see the documents almost as much as he wants to see them himself if he thinks they are helpful to the defense. So usually revealing the defense strategy is not an issue. But it can be. Under the rule, the documents are to be produced at the courthouse, and that means that both parties get a copy. But as a practical matter, it isn't done that way. Usually, arrangements are made that the court will give the defense the response, but the defense has to give it to the government. That's what the rule requires. He noted the asymmetry there. The government gets to investigate and only give us what it wants to, although they do have the

Brady obligation. Ordinarily the defense would only have to hand over what it intends to use in its case in chief. But instead it is gathering new information by subpoena and giving it to the government. On balance, however, he thought it better to get the information even if the government gets it, than be unable to obtain it.

A defense member noted that some people would disagree with Mr. Felman's reading of Rule 17. The requirement that the subpoenaed items be returned at the courthouse doesn't necessarily mean that they also go to the government. The member noted that her own survey of defender offices revealed that in many places, including Oregon, they file everything ex parte, and they would not expect the government to object to the subpoena request because they're not a party to it. Rather, they expect the person who received the subpoena request to do the objecting, and the rule doesn't say that the return should go to the government. The rule says it goes to the court. That gives the court the chance to review it and address any concerns. The court might know, for example, that somebody is objecting and just hasn't gotten their motion onto the docket quickly enough. The member asked if Mr. Felman agreed that just because the subpoenaed material goes to the court that did not necessarily mean it goes to the government.

Mr. Felman said that was absolutely right. This had become routine in his own practice, based on the kinds of subpoenas he was issuing, which the courts were granting with the understanding that both parties are going to get the documents. But he agreed it doesn't have to be that way. And particularly in the ex parte scenario, you would not want it to be that way.

The member then suggested that the Committee look more into the inclusion of the words ex parte in Rule 17(b), which says that the defendant can file an ex parte application to bring their witnesses to court. She suggested that the same reasoning would apply to the defense getting their documents ex parte: the concern about revealing your trial strategy. She noted the speakers had highlighted again different practices around the country. Different courts treat ex parte motions in different ways.

Another member asked if the problem is that the *Nixon* standard is too difficult to meet, why the solution would be to change Rule 17. If the objection is to the way the courts are applying *Nixon*, shouldn't the solution come through litigation involving the standard?

Mr. Cary said the *Nixon* standard comes from the government's subpoena for the Watergate tapes, not a defense subpoena for information from a third party. But as he read the cases and encountered the issue on the ground, many trial judges and circuit judges feel bound by the *Nixon* case even though it's not perfectly analogous to third-party subpoenas. He did not know how you can correct the situation unless you can get a case to the Supreme Court. The chances of getting cert granted are only 4%, and it could take decades to get an issue like this before the Court.

Judge Nguyen asked Mr. Cary about Judge Sullivan's decision, and whether he was objecting to Judge Sullivan's decision, or were the courts applying this standard across the board? Mr. Cary responded that in his experience the *Nixon* standard was generally being applied

in the District of Columbia. In addition to Judge Sullivan's ruling in his case, another leading case was Judge Walton's decision in the *Libby* case, which also applied the *Nixon* standard.

Judge Bates commented that most of the district court's docket is not cases that give rise to Rule 17 subpoenas, and Mr. Cary said he had been dissuaded from filing subpoenas in many circumstances because he thought he would be unable to meet the *Nixon* standard. That too reduces the opportunities district judges have to grapple with the issues. He asked exactly what it is about the standard the speakers thought was so difficult to meet. The first part of the *Nixon* standard is the evidentiary and relevant—as opposed to the material and relevant standard articulated a few minutes ago. Is that where the problem lies? Or is it in the other parts of the *Nixon* standard? What causes defense counsel like Mr. Cary to be dissuaded from even seeking the Rule 17 subpoenas, or makes judges decline the Rule 17 subpoena because it doesn't meet the *Nixon* standard?

Mr. Cary said it is the requirement of specificity which Judge Walton ruled, quoting another opinion, doesn't require explicit specificity but does nevertheless require specificity. Judge Bates commented that specificity is not in the *Nixon* opinion, but is a word that the courts have put into the test. Mr. Cary agreed, saying that he views the *Nixon* test as reduced to three things: relevancy (which is not a hard standard to meet), admissibility, and specificity. Specificity, he said, is the hardest gate keeper. The defense may know what type of document it wants, but many people read the *Nixon* standard to require you to describe the documents with super precision. He can rarely do that.

Mr. Felman focused on each element of the four-part test. The documents have to be evidentiary and relevant. Some courts define evidentiary as admissible. He said it was a mystery to him how he could know something was admissible when he had not yet seen it. You must show you cannot otherwise get them without due diligence, and he accepted that he should probably have to ask for them first. And he must show he cannot prepare for trial without them. How, he asked, can he show that without seeing the documents? And he must show it's not a fishing expedition, whatever that means. He said you could describe many of his subpoenas as fishing expeditions because he did not know yet what he didn't know. So the problem is a combination of all of those factors.

Mr. Felman described the case that brought him to the Committee's attention. He was representing a man under indictment for conduct that had been worked on by a number of major law firms. The government was aware of that work but did not issue grand jury subpoenas to those law firms. Accordingly, the discovery from the government to the defense did not include any of the law firms' work. Mr. Felman said he was currently litigating with law firms over their files, relying on Rule 17(c). He described the difficulty of meeting the *Nixon* standard in that context, concluding that each of the elements posed a challenge in that context.

Judge Bates asked whether the courts are rejecting these subpoenas based on all of those things, or was Mr. Felman concerned that they might be rejected? Mr. Felman said he never withheld efforts to seek subpoenas, and he found generally reasonable prosecutors won't stand up in court and tell the judge the defense should not have those files—though that can happen.

But Mr. Felman said he did not think he should be at the mercy of the prosecutor's good graces, but instead should have a rule that entitles him to what he needs. He concluded that when *Nixon* is the reality of how this rule is being applied, he doesn't have much.

Mr. Cary added that a leading case from the Fourth Circuit, *Rand,* was an accounting fraud case, in which the defendant sought accounting records. Mr. Cary thought it was a reasonable request for accounting records that would be admissible as business records, but he noted that the Fourth Circuit rejected that argument under the *Nixon* standard.

Mr. Wallin commented that the meta problem with the *Nixon* standard is that judges are told that Rule 17 subpoenas are not for discovery. That creates the potential for serious problems because realistically to do their job defense attorneys need to do some discovery, whether it's called a Rule 17(c) subpoena or something else. They can say it's production rather than discovery, but the meta problem is that we do not have a rule that says you can use subpoenas duces tecum for discovery.

A member suggested that it might be preferable to place this in Rule 16, and Mr. Wallin agreed. He thought Rule 16 would be a better site to state a specific standard for discovery. The main thing is we have to look at it as a discovery technique and to write the rule so that judges know they are applying a discovery rule. Otherwise there's just too much potential to take away the defense right to prepare for trial.

Mr. Cary provided some context for the language often cited from the Supreme Court's opinion in *Bowman.* He said the defendant was trying to use a subpoena to the government to do an end run around Rule 16 to get material from the government that was not available under Rule 16. In that situation, the Court said Rule 17(c) is not a substitute for discovery. Courts don't recognize that was a case where there was an effort to use Rule 17 to get discovery that was not available under Rule 16.

A member asked about the difference between Mr. Cary's description of his practice and that of the member who had said she always files ex parte. Mr. Cary said that he thought he could make his motions ex parte, though it was not his practice to do so. He generally thought he was more successful "in sunshine."

A member was asked to elaborate on her statement that the rule did not require material subpoenaed by the defense to be provided to the government. The member said that her office interpreted the rules as requiring them to disclose subpoenaed material to the government only when required to do so by Rule 16. For example, the defense might subpoena the guest register at a hotel. If your theory is that your client was there for only one night, and the register shows the client was there for five nights, the defense may not want to use that evidence at trial and also does not want to it over to the government, which can do its own investigation. But if you subpoena the hotel register and find that someone else who is an alternative suspect was there and your client wasn't there, that might not be evidentiary, i.e., not something the defense can introduce into evidence in court, but it might lead to a witness that you bring to court. So she agreed with earlier comments that the evidentiary standard is hard. But on that that question

about disclosing to the government, she thought it was important to not interfere with the defense investigative work and not to give the government everything that the defense looks into. The defense tries to look at all the facts and get a broader context than what the government might have looked at. And if you end up having to do the government's work for them essentially, that would really put a terrible burden on the defense. She characterized this as a pretty important issue, and she urged that the rule be revised to state clearly that the defense is permitted to file ex parte and that the subpoenaed material does not have to be given to the opposing party. Of course, Mr. Cary would still have the option to disclose the material. But she stressed the importance of making it clear that there should be no interference with defense strategy, noting case law supporting that point. The inclusion of ex parte in Rule 17(b) indicates the Committee noted this concern previously, though it was not added to 17(c).

A member asked Mr. Cary and Mr. Felman to respond to questions that arise in internal investigations. The first articulation by a witness of a false statement or the beginning of the inconsistent statements is often made to the outside counsel conducting an internal investigation, a lot of which gets ironed out by the time the witness hits the grand jury. She asked whether either had been successful in subpoenaing the law firm that has done the internal investigation for these interviews or for other material from their internal investigation. She noted counsel's declination pitch or its negotiations with the government may identify someone other than the client who might have been responsible.

Mr. Felman commented that he had generally sought to get documents and information from the time period of the offense and felt he was on thinner ice seeking to essentially get the work product of a law firm that has done such an investigation. But he thought there might be circumstances in which he would try to do that, though he had not done so. He had subpoenaed law firms for their communications with the prosecution but not their internal witness interviews. He noted there is a circuit split over whether or not the firms can maintain a work-product privilege over documents if they have given them to the prosecution. It has been very case-specific litigation. He wanted the Committee to understand that he did not think the explicit authority he was advocating would create a Wild West scenario in which everyone was subpoenaing each other's work product. What he seeks is almost exclusively historical information.

Mr. Cary noted he had experienced a little success subpoenaing an internal investigation but only because there was parallel civil litigation at the same time and the evidence in question was being produced in the civil litigation.

Mr. Wallin said he had not had white collar cases at this level, though he had some experience with work product and attorney client issues.

In the hypothetical about internal investigations, a member asked why this information would not be available in discovery from the government. Wouldn't the government have possession of that information and have to turn it over to the defense if someone came in on a pitch and said somebody else might have done this or has possession of the prior witness statements from internal investigation? The member who provided the hypothetical said that

often the government refrains from asking for those witness interviews so that they don't have to confront this problem. At one level, she said, it is work product. But it's also a witness making a statement, and often their response the first time they're asked about alleged criminal behavior is not completely truthful. So it gets memorialized in some fashion, but it also has substantive value.

Judge Dever said that, in more typical drug and gun cases the defense often argues that it does not have the burden of proof, and if a doorbell camera would have shown something, the government should have gotten that evidence. He asked all the members of the panel whether outside the white collar cases, they had examples of situations in which they were aggressively investigating and trying to use 17(c) subpoenas to do that. And can you give us some examples of that?

Mr. Wallin recalled a case in which he sought the repair records on his client's girlfriend's vehicle. Because his client was not the car's owner, the repair shop refused to produce the records without a subpoena. So he filed a motion for a subpoena that explained what he thought was in the repair records and how they would help his client. The judge issued the subpoena and he got the materials. Mr. Wallin noted that he generally tries to do some investigation his own, and when he runs into a wall he goes to the judge, explains what he found, and why he can't go any further without the subpoena. So far he had not gotten any pushback. He thought was because of the judges in his district.

Judge Dever observed there was also a distinction between someone issuing a subpoena for all the text messages of all the codefendants from the phone company for the last three years versus asking for these specific records. Mr. Wallin asked why he would ask for a lot of material he did not need. He acknowledged wryly that he was paid by the hour on the Criminal Justice Act (CJA) panel but it was not that much. So it was all about what he needed for the defense.

Judge Bates asked if Mr. Wallin had any concern with the examples that he had in mind that if forced to, he would not be able to meet the *Nixon* standard. He thought in his example Mr. Wallin would probably have been able to meet specificity, which has been raised as the greatest concern, and probably admissibility as well. Mr. Wallin responded that sometimes he would, but other times he would not. His problem, as said earlier, was because he had never gotten any pushback he really did not know what would happen if the judge set his motion for a contested hearing. He thought it was important to have done some work that up front so you can explain to the judge why you need this. But he asked again: how is this not serving as a discovery tool? When he gives this information to the judge, he is really making a discovery kind of argument—though under *Nixon* dressing up as production, not discovery. But what he has established shows that it is a discovery request.

Judge Nguyen thanked Mr. Cary, Mr. Felman, and Mr. Wallin for their very informative comments, and then she said it was time to move on to the next panel.

Ms. Coleman opened the next panel, noting that she was an assistant federal public defender in Judge Conrad's district, the Western District of North Carolina. Noting that her

remarks would overlap to some extent with what had already been said, she offered to also provide real world examples. She also thought it was important to set the base level starting point of the ethical obligations of defense attorneys. It is her ethical obligation as a defense attorney to investigate the charges against her client, wholly independent of the government, and to investigate mitigating evidence. She noted her belief that Rule 17 applies to sentencing as well as the guilt innocence phase, and that is wholly independent of a presentence investigation report. These are obligations under licensing boards, from the ABA, from the NLDA, and from precedents regarding what constitutes ineffective assistance of counsel. Moreover, her clients have a constitutional right to compulsory process, and Rule 17 is the mechanism by which they are able to effectuate that Sixth Amendment right. Often her investigation leads to documents and objects that are not in the custody and control of the government. Accordingly she will not get them through Rule 16, and the government may have no *Brady* obligation to provide them. So this is the problem: someone else has this information and Rule 17 is the only way for the defense to get it.

Noting the panel's topic is judicial oversight of these subpoenas, she observed that whether or not the judicial oversight is good or bad is not straightforward. In her district, the problem is inconsistency in whether the judges are going to give you a subpoena. There is an older standing order specific to the federal public defenders, and it is ambiguous as to whether we even need to file a motion requesting these subpoenas. And she has found that it's used quite differently in the Asheville and the Charlotte Divisions. She got the same response from a survey of the local CJA panel attorneys. The requirement of a written motion is unclear and inconsistent. Some judges require it; some judges have gone back and forth multiple times. Because of the inconsistency, she errs on the side of caution and always requests her subpoenas by a motion. But the standards applied in reviewing her motions vary from judge to judge. Some judges take a very broad approach, and like Mr. Wallin she had been very fortunate in the granting of her motions. Some judges take a very strict approach and deny motions, which has in fact produced a chilling effect. Some attorneys whose cases are before particular judges have said they won't bother asking for that subpoena because they know they will not be successful. This removes a very important tool for defense attorneys and places the defendants in those particular courts at a severe disadvantage.

She described the denials. Some simply stated Rule 17 is not for discovery but provided no explanation for why the justification for the subpoena was insufficient. Subpoenas have also been denied because they were seeking documents for sentencing purposes and not for trial. Her office has also had subpoenas denied seeking documents for use in pretrial negotiations. Everyone knows the percentage of cases that actually go to trial in federal court is very small, so plea negotiations are critical as well as sentencing. She emphasized that the majority of clients in federal court will end up in sentencing at some point. Ms. Coleman noted that her office was able to get a renewed motion granted in some of these cases seeking information for sentencing and pretrial negotiations after briefing on the defense role and why it's important for us to get this information. The denials stating simply subpoenas are not for discovery are particularly

problematic, leaving no avenue for recourse. Interlocutory appeal on these issues is not available, and counsel is stuck trying to navigate the case without this piece of information.

Ms. Coleman's other major concern regarding judicial oversight was the need to be able to make motions both ex parte and under seal. If that cannot be done, a particular subpoena request can be very problematic and damaging. For example, in a sexual assault the defense investigation uncovered from its own witness interviews that the alleged victim, instead of immediately reporting the assault or immediately going to a hospital and Medical Center, instead went to a casino and spent considerable time there. Ms. Coleman knew that casino had and retained excellent surveillance video. The videos would show that what happened was inconsistent with the victim's statement. The government had not turned over this information, which wasn't in its control. This evidence, which was critical to their theory of defense, was in the hands of a third party. Disclosing the request for this information would have tipped the hand of what their defense theory was and identified the witnesses they were talking to. So her office very much wanted to file this request for information from the casino ex parte and under seal. The trial ended in an acquittal, and the information obtained by subpoena was very important.

Ms. Coleman noted that there are also situations when she needs to review documentary evidence that contains both inculpatory and exculpatory information about her client. One of the best examples is cell phone records. In many drug cases the government now turns over cell phone records that can have not only the call and text data, but also cell site location information showing where a particular individual lives. She had a serious fentanyl death results case where the government provided cell site location information from the victim's cell phone, but not for the defendant's cell phone. She wanted to obtain her client's own cell phone records, which you cannot typically obtain with only a release from your client. Usually the cell phone companies require a subpoena. Ms. Coleman was concerned that the cell phone records would not show the exculpatory information of where she was at the time of this drug deal, but might also include a host of other inculpatory information regarding previous drug transactions that the government could use for a variety of purposes, including 404(b) at trial. So the defense needed to be able to get this information ex parte and under seal, so as not to tip off the government, which could have done their own investigation and gotten a search warrant. The defense needed to weigh how important the information was to their case, and whether they would need to inculpate their client on other crimes to defend the more serious charge. She offered this as an example for the need to have discretion. She acknowledged that there is case law allowing this, and she has been filing her motions ex parte and under seal. But the rule itself is ambiguous and doesn't provide for this explicitly. She advocated revising and improving it.

As an aside, Ms. Coleman noted that cell phone records can be voluminous, and there are charts and tables. An expert is needed to extrapolate the cell site information. It is not practical to have this information brought to court at the time of trial and reviewed at that time, and it is critical to obtain this information ahead of time.

Finally, Ms. Coleman argued that Rule 17 applies to sentencing. Sentencing is a critical stage of the case, and defense counsel has an obligation to investigate information for it. She

provided two examples of Rule 17 subpoenas that bore on sentencing. In one drug case, $8,000 in cash had been seized from her client at the time of arrest. The Presentence Report converted that to drug weight and increased the sentencing guideline based on the extrapolated drug weight. But her client told Ms. Coleman that he had been at the casino less than 30 minutes before his car was stopped and that he had won the money. A casino video showed him playing Black Jack and winning one $5000 and three $1000 chips. In that case she did not seek the subpoena ex parte. Although the government didn't care about the information, they were not going to seek it. It was up to the defense to establish that this wasn't the proceeds of drug trafficking, but instead money won legally at the casino. The judge granted the subpoena, and the video showed her client at the Black Jack table, turning in the chips, and the money being counted out to him. This resulted in a lower sentence, and there was no other way to obtain the video. Ms. Coleman noted that it took time to go through the casino's videos, and it would not have been feasible to use Rule 17(a) and have someone bring the video to the courthouse at the beginning of the trial.

Ms. Coleman turned next to the use of subpoenas seeking sentencing material going to mitigation based on the defendant's background and personal history, which she noted is relevant to the court's responsibility to make an individualized assessment of each defendant. But it can be very difficult for defense counsel to get information about their clients, who are often in custody and unable to ask the Department of Children's Services or social services for the records of abuse and neglect they suffered. She had used Rule 17 to seek that information and asked the court for a sealed and ex parte subpoena because the records are so private and confidential. Records of a juvenile's psychological assessments may be critical to sentencing arguments about their abuse as a child, but the same information could also be detrimental as far as future dangerousness. So it is important for counsel to make the assessment to determine what is going to be beneficial for their client.

Ms. Coleman closed by stating she agreed that the concerns regarding the misuse of the subpoenas are misplaced. Defense counsel come to this from an ethical place, and there are protections built into this practice against the abuse. The subpoenaed person or entity may move to quash a subpoena, especially if it is overly burdensome, there are constitutional protections against the government seeking to use the rule to gain information about the defendant, and there are reciprocal discovery rules. If the defense intends to use this information, the government will not be sandbagged. If the information would be in her case in chief, she would turn it over to the government. If she intends to use it in sentencing, it will be in a sentencing memorandum. So the government will get that information. Ms. Coleman also noted that Rule 17 already has specific protections built in regarding personal and confidential information. She was interested in the New York Bar's suggestion, which would expand that protection beyond victims and require some type of judicial approval whenever you are seeking information that is personal and confidential. She thought that was where the line should be drawn, because judicial oversight has often been cumbersome. The courts treat her with suspicion, and she often has to explain her role. She characterized the *Nixon* standard as completely ambiguous, and she advocated more clarity in Rule 17.

Mr. Gill said he had surveyed the criminal chiefs working group to get a feel for how Rule 17 is being applied across the country. In the opinion of the criminal chiefs, judicial oversight and approval are critical, and the case law bears that out. It is very important to have judicial oversight with respect to how these subpoenas are issued. It works very well in connection with the discovery rules. The key is that judges have oversight over what's going on in particular cases. They know what's at stake and what has already been produced in a case. Often when a case is going to trial there has also been briefing. So the judges know what's going on, and they are able to dig down and find out what makes sense for the case. He noted that Rule 17 already gives the judges the authority and flexibility to do the things that they think make sense. For example, do the records need to be produced before trial? Do the parties need to inspect the material beforehand to make sure that they are prepared and neither side is ambushed? With regard to ex parte practice, he said there were several examples in which it had been used effectively to make sure that the defense is able to get the records that they need. He also noted that Rule 17 has another very important function in connection with the Crime Victims' Rights Act (CVRA). If subpoenas are levied with respect to victims, seeking personal and confidential information, a judge needs to be involved to make sure the subpoena is appropriate and that victim has notice unless there are exceptional circumstances.

On the whole, Mr. Gill said, the bottom line is that the system works: judges are engaged and doing what they need to do based on what they know about the case. Prosecutors agree with what the defense lawyers had been saying. If the defense needs to obtain records, counsel needs to be able to go to a court and get them. And in his experience, the judges in the Northern District of Texas and Eastern District of Virginia, and the experience relayed by the criminal chiefs across the country, judges are granting those subpoenas. And the key is parties are able to come forward, based on what they know about the case, that they need certain records. In the case, for example, of the phone records example, he honestly could not think of either a federal judge or prosecutor who would oppose a defense subpoena. Similarly, he couldn't imagine any prosecutor would not want to get to the bottom of that, or would want to stand in front of a judge and say the defense should not be able to obtain those records. He thought it was perfectly fine if the defense wants to use the ex parte process, because the courts are able to get the details they need for the production.

Mr. Gill provided several real world examples. The 2020 Jason Penn case in the District of Colorado was a very complex, ten-defendant bid rigging and price rigging scheme, an excellent example of how judges can drill down. All ten defendants filed requests for subpoenas in specific areas. Judge Brimmer carefully sifted through in that case and parsed those out. He agreed they needed communications related to the bid rigging scheme and talking about the negotiations at issue in this case. But Judge Brimmer denied requests that were overly broad, seeking any and all documents. He was in the best position to make those determinations.

In another white collar case from April 2022, in the Middle District of Florida, in front of Judge Marsha Howard, the defendants moved for subpoenas, and they filed very detailed ex parte submissions. It was litigated before a magistrate judge who very carefully went through, denied some, made some tweaks, and ordered some subpoenas issued. Then the third parties

moved to quash, and the case went back to the magistrate judge. There was more tweaking involved, but ultimately the magistrate judge ordered production on these areas, not production in other areas because they were not specific enough. The parties appealed to Judge Howard, who carefully reviewed the magistrate judge and upheld the magistrate judge's order in a published opinion.

Mr. Gill called another case from the Northern District of Ohio a perfect example of how the process works without the government being involved. In this case, before Judge Sara Lioi, the charges were sex trafficking of children, drug trafficking, and witness tampering. The defense filed four ex parte motions for subpoenas, and the government had no knowledge of the motions. The process worked, and the only reason the government found out is that Judge Lioi entered a very detailed order afterwards in which she stated she carefully reviewed this and was not granting the subpoena. In a footnote, however, she stated she was not going to reveal the reasons for her decision because she didn't want to tip the government off to the defense strategy.

Mr. Gill noted another case from the Eastern District of Virginia, his district, from earlier in 2022, in which the defense filed numerous pretrial requests for subpoenas. Judge Brinkema carefully went through granting some and denying others. Because the case involved an assault on a plane, she granted subpoenas for information about the specific flight attendants and complaints about them. She also said the defense was entitled to information about the rules that apply to the flight attendants, and the responsibilities on this route. But she denied subpoenas seeking information about how the airline tries to solicit customer complaints in general. The case ended in an acquittal, and he thought the defense attorneys would say they had gotten what they needed for that case.

Summing up, Mr. Gill said it is very important to have judicial oversight, and with that oversight the system works well. The judge is kind of like a referee. The judge knows, based on the case, how to handle it, and the rule allows the defense the flexibility they need to reveal information to the court to make determinations about whether subpoenas should issue.

Noting the variety of interesting experiences in other districts, Ms. Halim said that her district—the Eastern District of Pennsylvania, in Philadelphia—absolutely adheres to the *Nixon* standard. There is no mechanism to obtain an enforceable subpoena for documents pretrial absent judicial authority. The defense does have to go to the court to get the approval to even issue a subpoena that would be enforceable and available pretrial. She echoed everything that prior speakers Mr. Cary, Mr. Felman, and Ms. Coleman had said, but she tried not to repeat points already made. Although she had a bit of white collar criminal defense experience, the bulk of her work as a solo practitioner was privately retained or court appointed pursuant to the Criminal Justice Act.

Ms. Halim began by noting workload concerns. A solo practitioner or an assistant federal defender, with a caseload of 35 to 40 federal criminal cases, barely has time to issue a subpoena and follow it up, much less review whatever she obtained from it. The extra step of applying to the court for a court order—and perhaps having to litigate whether or not you're even entitled to

a subpoena—takes critical time that could be put towards other issues in that particular defendant's cases or work on other defendants' cases. She also agreed with Ms. Coleman and other prior speakers that frequently the defense is looking for investigative materials, and most of the time it cannot satisfy the *Nixon* standard. She is unable to satisfy *Nixon* when she is doing follow-up investigations that the government didn't do, and she has to get the materials to know what they say.

And in her district (unlike Mr. Wallin's), Ms. Halim said there was not an across-the-board acceptance of ex parte filings, and it could be a risk to file something ex parte. She stressed how important it is to protect defense work product. She noted that when she might have a shot at satisfying the *Nixon* standard, it's because she had either done her own investigation that has provided useful information or it's part of her defense theory. To get the court order, she would have to spell that out, compromising the defense theory and work product.

As to real world examples, Ms. Halim observed that there is relatively little litigation regarding Rule 17(c) subpoenas in her district because the Third Circuit adheres so closely and strictly to the *Nixon* standard. This definitely produces a chilling effect, and it is discouraging for defendants to gear up for a fight that you're likely to lose. It is not always an option to file ex parte.

Ms. Halim described various forms of evidence the defense may wish to subpoena in non-white-collar cases. Phone records are a big source of information, and often the defense is still investigating when it seeks them and cannot be certain that they will yield evidence that it will admit it trial. But a subpoena might produce evidence the defense will want to introduce, and it's unlikely to get those records without a court order. Another major source of investigative information in her district arises in federal prosecutions that have been adopted from the City of Philadelphia. Often the state prosecution continues against other defendants, and the federal prosecutors obtain limited information very specific to her client. But there may be material that is relevant and potentially exculpatory in the hands of various state agencies, such as the local DA's office, local jails, other local law enforcement agencies, and the Department of Human Services.

In federal prosecutions, Ms. Halim concluded, the defense has to litigate and request permission from the court to investigate its own case. Under the best case scenario, it can be litigated ex parte. But that still takes valuable time, which is a critical factor. Often the defense lacks the time to do that, and is discouraged from filing a motion for a Rule 17(c) subpoena.

Ms. Sampson, an AUSA in the District of Arizona, was the last speaker on this panel. Her work has primarily been prosecuting violent crimes in Indian country, but she also sought information from her colleagues in the district. She had not been aware of how frequently Rule 17 was being used in the district. She thought that showed the system was working because so few of the ex parte applications had come to their attention, and noted her experience was limited to the Rule 17(c) that had been brought to the government's attention. In her district, like many others, the government has an open file policy, and the discovery framework is constantly expanding. From her perspective, Rule 17 subpoenas are just a small part of the discovery

process. She said prosecutors recognize the need to obtain records that are not in its control, and the Rule 17(c) subpoena process is absolutely an appropriate avenue for getting them. In her district and her own experience working violent crimes there had been examples where the prosecutor and defense have worked together very well with requests for records. Perhaps the government was able to assist in obtaining them, so there was no need for a subpoena.

She had also seen examples where the parties agree a subpoena is appropriate even for a confidential and private records—perhaps with a protective order to protect those records in violent crime cases. Often the subpoenas do request information and materials that implicate privacy, but that does not mean they are not discoverable. Often the government is producing those records, in their case in chief or in the discovery process. But when the defense requests records that implicate those concerns, Ms. Sampson said she had also seen their district judges grant them in part and deny them in part after giving the government and the victims a right to object or speak on the issue, which is a requirement of not only the rule but also the CVRA. She thought this is how the rule is intended to work, and that is how she had seen it play out in her district. The only ex parte motions that had been brought to the government's attention sought private and confidential information, which requires the victims to get notice. The government has to be involved and receive notice so that there is an opportunity to be heard. But that did not mean that those subpoenas were denied outright. Most examples Ms. Sampson had seen of subpoenas denied outright or quashed by the district court in Arizona involved defense requests for unrelated, confidential and privileged records where the defense is unable to articulate why they are relevant to the case.

Ms. Sampson said that the government operates on the assumption that defense counsel have good motives and intentions. It recognizes—as earlier speakers had emphasized—that the defense may want information that the government doesn't want and may not understand why the defense wants it. But she thought the rule in its current form, with judicial oversight and gatekeeping, provides safeguards without impeding the defense from getting the records that it needs. She had seen a subpoena narrowed or denied on the basis of the undue burden only once or twice in federal court. She noted that in Indian country, tribal agencies are often subpoenaed in their cases for massive amounts of records, and they either don't know where to get them or they don't have the resources to compile and duplicate those records as part of the discovery process. She had seen courts narrow and perhaps be a little more stringent in applying the standard to avoid putting an undue burden on those agencies. But she had never seen that as the sole basis for denying a defense subpoena for actually relevant and material records.

With regard to the *Nixon* standard, in Ms. Sampson's experience in their district judges have been very thoughtful in their approach to Rule 17(c) subpoenas. She had not seen them deny outright any subpoena strictly citing *Nixon* without additional concerns for privacy and confidentiality or concerns that the subpoena goes beyond some of those standards. Typically, the courts are operating their gatekeeping function by making sure that Rule 17(c) subpoenas aren't being used strictly for what we call fishing expeditions. She recognized there are questions about what that means, again operating under the presumption that most defense attorneys are looking for relevant and useful information and have no ill intent.

With regard to the records being turned over to the court, Ms. Sampson noted that the rule now gives the court discretion to order the records to be disclosed to the parties, and the documents can be returned to the court directly. She had one example from her district where a subpoena was denied because the defense attorney asked for private and confidential information to be turned directly over to him or her. It was not litigated any further, but had it been, she thought some of the subpoena would have been denied anyway because of the nature of the request. So in practice, while the rule is not always strictly followed in some of these regards, at least the court is exercising its gatekeeping function and determining whether the records can appropriately be sought under Rule 17(c). That is why she felt so strongly that judicial oversight is a key and crucial function of the rule—to make sure that subpoenas are being properly requested and utilized, and that the process is not being abused.

Ms. Sampson also provided an example showing the problems that can arise in cases involving pro se defendants. One of her colleagues had provided an example involving a pro se defendant in a human trafficking case who requested all kinds of records to vindicate a certain "mission" on his or her part, rather than actually seeking records that were relevant to the criminal case. The court quashed that subpoena. But without that judicial oversight, she noted, a pro se criminal defendant would have the same access to these subpoenas without the advice of counsel. But a pro se defendant cannot be expected to understand the parameters of the rule that govern when a subpoena is appropriate or not, when to provide notice to the other party, and when to provide notice to victims when they're seeking confidential and privileged information. She noted that was a particular concern for her, given her work on violent crimes in Indian country. She noted that, as Mr. Wallin had explained, the District of Arizona does allow defense counsel to apply ex parte applications for subpoenas. That process seems to be working, and the only time the government hears about it is when there is a request under the rule that requires the government or victims to be notified. The biggest value of that judicial oversight in her cases is protection of victims, protection of witnesses, and potentially protection of law enforcement.

Ms. Sampson noted that amending the rule would implicate the CVRA. Recognizing the dignity and privacy rights of victims, Rule 17(c)(3) was created to make sure that victims would be notified when somebody is requesting private and confidential information about them. The CVRA gives the government the right to assert those rights on behalf of victims. So the rule with that judicial oversight then ensures that the CVRA is also being followed. Many types of records are implicated beyond just health and mental health records. There are all kinds of other private and confidential records, including the social service records that are used regularly in the types of cases she handles. And because of the wide variety of confidential and private records, she thought it was not practical to carve out the requirement of judicial oversight. In her experience working with the tribes, court oversight ensures that the third party recipients of subpoenas have an ability to vindicate their own rights. Recipients are not always savvy corporations that have counsel that can file motions to quash. They may not know how to file a motion to quash and may not know that they do not have to comply under sanctions because the subpoena has a stamp of the United States District Court. So without judicial oversight, the court or opposing counsel would never know that an overreaching subpoena has been filed on a third party because that

third party might not have the wherewithal or the ability, knowledge, or resources to make a motion to quash. And that deprives the court of the ability to supervise the subpoena process and ensure that there's a fair discovery and trial process, which is part of the court's responsibility.

In summary, based on her own experience and the poll she took of her colleagues at the U.S. Attorney's Office, Rule 17 seems to be working in the District of Arizona. The judges seemed to be providing proper and effective oversight over the rule, and she had not personally observed a detriment to either party, though she recognized that colleagues on the defense side might disagree.

Judge Nguyen invited Subcommittee members to question the panel, and Ms. Morales directed a question to Ms. Coleman and Ms. Halim. She noted that Ms. Coleman had described the problem of getting insufficient responses from their judges, whereas Ms. Halim focused on the fact that it's a very time consuming process. She asked each to say more about what they thought was the right role for judicial oversight in this context. What would you want it to look like? Would you want less of it, or would you want it to be more expansive and perhaps have clearer standards or something like that?

Ms. Coleman said she definitely wanted less judicial oversight and clearer standards, characterizing the current situation as very unfair. In some districts judicial oversight is working quite well. But we are a large country with many districts, and she thought that one could find as many examples where Rule 17 is not working as you could where it is. The lack of clarity in the standard is not fair to defendants, who should not be adversely affected by where their charges are brought. She liked the New York Bar's recommendations. She understood and reluctantly agreed that it is important (and already in the rule) that we need to protect personal and confidential information, and that could go through the court. It had been her long standing practice to do that through something like a *Pennsylvania v. Richie* motion where you're asking the court to review the confidential information of the victim. But in a mine-run case, she thought the procedure was too burdensome, and the standards are applied inconsistently. It is time consuming to file motions for reconsideration with 15-page explanations of your role as a defense attorney, trying to articulate the application better, especially when you don't know the particular rationale for denying your subpoena. She liked the suggestion that in the mine-run case judicial oversight is not necessary. She liked very much the New York Bar's proposal for Rule 17(i) allowing the court itself to require the parties in a specific case to get court approval for subpoenas. Because there was no requirement for court approval in the mine-run case, the proposed rule would no longer put defense attorneys at a disadvantage because they don't have the same investigative tools as the government. But it would allow specific requirements in cases where there is a potential issue, and force the parties to address why judicial oversight is needed in a particular case.

Ms. Halim said that at a minimum the rule needs to make clear that an ex parte application is not only appropriate, but also necessary to protect defense theory and defense work product. She endorsed Mr. Felman's suggestion that you get to issue your subpoena for documents without the requirement of meeting a standard, and the standard comes in if the

recipient of the subpoena moves to quash, to restrict, or to narrow the subpoena. It should be clear the standard allows the use of subpoenas for seeking discovery and investigative materials, not just evidentiary material as the *Nixon* standard requires.

A member, who noted that she would prefer to practice in Arizona than in her own district, asked the Assistant United States Attorneys who did not experience such a liberal granting of 17(c) subpoenas what their reaction would be to ex parte or under seal as a default. Did they experience litigation over 17(c) subpoenas filed ex parte or under seal?

Mr. Gill responded that in the Eastern District of Virginia and Northern District of Texas, where he practiced he saw it go both ways. He knew several attorneys follow Mr. Cary's approach of transparency where the parties are discussing it, which he thought worked very well. That was the way he handled it. He believed that giving the defense attorney the choice is the way to go. If they want to go ex parte, he was completely in favor of that. He understood that if you are trying to get records, you need to lay it out for the court so the judge can make a good decision. You should not be inhibited and worried the government will see your strategy. That is an excellent idea. He thought it was happening in practice, but it could be important to clarify the rule to make sure some people aren't missing the strategic point. In response to a member's question, Mr. Gill said he thought there should always be court oversight.

A member asked Ms. Sampson, who had mentioned a concern about pro se defendants, whether she thought that the rule should distinguish between pro se and those represented by counsel, rather than the way Rule 17(b) now distinguishes between defendants unable to pay and other defendants. The member noted that many indigent defendants are represented by public defenders who are following the same ethical rules Ms. Coleman spoke about. Did she agree that that would be the right distinction?

Ms. Sampson was not sure she had thought enough about that issue to comment. When she used the example of pro se defendants, it was an example of the potential to run afoul of those rules because of somebody's lack of legal knowledge without judicial oversight. She was really focusing on judicial oversight. Also, pro se defendants are just an example of a small sliver of the population where the process could be abused. It's also entirely possible that well-intentioned defense attorneys ask for records and they don't understand what private and confidential information could be included within those records. That sometimes happens with some of the tribal agency records. Some are more obviously private or confidential in nature, and that is where judicial oversight is so crucial because it does not rely on bad intentions.

Judge Nguyen wanted to clarify whether there had been no instance of a judge who disallowed a defense attorney from utilizing the ex parte and the sealed processes. Mr. Gill said he was not comfortable answering that question. Things could happen with judges in particular cases, and there could be a judge out there who would not allow it. In his communication with the criminal chiefs working group, nothing like that that came up. When courts receive ex parte applications, a lot of times they split them up. The judge looked at issues that he or she believed should be considered independently without the government, and the ones that could be found in

the open court, with the government weighing in, they did that. That was done in the Florida case he described. The judge divided it up and did it both ways.

Ms. Coleman said that she thought the first time she filed a subpoena with a new magistrate, it was denied. She had to refile and explain it better, essentially briefing it. That was part of the problem she and other witnesses had been describing, the time consuming process. And at that point she thought the court had permitted her to proceed ex parte. But she could definitely see the situation where the ex parte and under seal process would not be allowed and was judge dependent.

A member asked for clarification: did the judge disallow it without an analysis? Or did the court announce they denied it, and then you made a motion to reconsider, explaining and trying to shed more light for the judge? Ms. Coleman thought that in that particular situation he denied it under seal and without prejudice, giving her the ability to refile.

Ms. Halim said she had contemplated filing a motion for a 17(c) subpoena and then decided not to because it was too much of a risk that it wouldn't be kept under seal or ex parte. So she has made the decision to forego it completely because the risk exists.

Judge Dever noted that *Rand* is the leading Fourth Circuit case, and it applies *Nixon* and *Bowman Dairy*. He asked Ms. Coleman whether, in all the examples that she gave, she got the information she wanted. She responded that sometimes she had to try more than once, but at the end of the day she got the information. But she had colleagues who were not successful. Judge Dever asked if she thought the problem had been with the specificity standard. She responded it was hard to tell because our denials had often been just a simple statement that Rule 17 is not for discovery. She thought that had really chilled the use of Rule 17, and that she had been invited to participate because she has been more aggressive about using it. But she thought in practice it had really chilled the use because people anticipate being denied.

Judge Dever asked all the panelists to respond to the issue Ms. Sampson raised about pro se defendants with no judicial oversight. Google has an army of lawyers that respond to subpoenas all day, every day. But many people who receive a court order would think they have to bring everything requested to whoever sent it to them.

Mr. Wallin said the subpoena form includes instructions stating the recipient can move to quash if it's too burdensome, and so forth. Ms. Coleman said that the third page of the subpoena tells you how to do that. And in her experience, most agencies that hold personal confidential information like tribal services and DSS have attorneys, and they have had motions to quash from those types of agencies. But it's a different situation when you're dealing more with the mom and pop business.

Judge Dever commented that in his experience it was very common to get ex parte motions under seal from each side. For example, as in the *Pennsylvania v. Richie* case the government might say we don't think this is *Giglio* material, but you might disagree with us. Here's our argument. And the judge deals with it. He asked to hear from the judges about their experience with getting motions in criminal cases with respect to subpoenas or discovery issues,

ex parte under seal. He was interested to hear what the judges' experiences are across the districts in thinking about these issues.

A judge from the Northern District of Illinois said the practice there was for the prosecutors and defense counsel to submit an agreed motion, which they call a motion for early return of trial subpoenas. He had never really looked into it, because the motions are always agreed and are always granted. The agreement is that both sides can serve subpoenas for the production of documents, and then they share whatever they get. He had never had an issue. But now looking at Rule 17, it seemed like either a bastardized version of 17(a) or some sort of version of 17(c). But the criminal bar in Chicago is just very cooperative and it's never an issue.

A member commented that the rule did not provide for ex parte applications for documents. Judge Dever responded that was why the discussion was so helpful. The Committee has the text that says what it says, and it is trying to understand what is actually happening in the real world in some subset of the 94 federal judicial districts. So that's a very helpful thing to know.

Judge Bates commented that he did see ex parte motions, and they are routinely granted, including for documents. They are part of the defense investigation and development of their theory of the case. He could not recall a case in which he had required that it not be ex parte. But if he were to deny it, he did not think he would have to disclose that to the government.

Another judge member commented that this was an interesting discussion because it raises broader issues than the text of the rule. The rule is really not saying this is discovery or not discovery. But these are much more philosophical questions than what the text of the rule gives. It is helpful in thinking about what Rule 17 does, and if it doesn't do enough, is something else needed.

Another member added a historical comment connecting the Chicago practice to an earlier practice in the District of Oregon. She said that in the past the Administrative Office had a single form for subpoenas for both trial witnesses and documents. You could use one form for both, so in many districts the practice was to use that trial subpoena and just subpoena documents to an earlier date. In Oregon for many years they essentially used Rule 17(a) and subpoenaed people to come to court with the documents, but gave them the option of not coming in person but just providing the documents. They did that ex parte without the government's involvement. They asked the court to set a court date for these subpoenas to be returned. On that date the person could choose to come and contest the subpoena if they wished to do so with a motion to quash. But if they didn't want to quash, they would just turn over the documents. Then the Administrative Office issued two different forms, one for subpoenaing a witness for trial, and another for documents. She did not remember when that change occurred, but the practice in her district changed, and they now file 17(c) subpoenas for documents.

Although they do not use the trial form anymore in the District of Oregon, the member said they still get the subpoena pretty easily. It's the same process: asking the judge ex parte to subpoena this video or these records. They had been able to obtain telephone records as long as

they had a basis for explaining why they were relevant to the defense case. They only got a motion to quash when seeking confidential information or when they tried to subpoena the police video system at the police station. There was a hearing, but the police, not the government, was their opponent.

The member concluded that she thought there are districts around the country that are exactly like what was being described in Chicago, where the parties use 17(a) trial subpoenas as a way to get documents, and the practice was based on the old forms. Based on what she had heard from different districts, that is not an unusual practice. But most districts didn't really want to talk about it because it is not really clear whether it is permissible. It works really well, and it is a way to get things really quickly without a problem. But it is not clear that it's allowed under the rules anymore.

Judge Dever had a follow-up question for all the defense lawyers as the Committee thought about how Rule 17 is written and then how it is really applied. He noted that he never had a request that included a declaration from the defendant. Rather, it was a representation by counsel, an officer of the court, stating counsel needs this information. The member noted that had been sufficient for him. But he wondered if any of the other defense lawyers had encountered any hindrance or hesitancy to make this representation, if for example judges in their district were saying that what a lawyer says is not evidence, and you need a declaration from your investigator. Or was that not an issue? He invited comments from the panelists as well as the defense members of the Subcommittee.

A member responded that in her district the CJA panel members do not often make a request for production of documents prior to trial. At least one judge's practice in the district is similar to a probable cause type motion. In a case before that judge she had to say she believed that there was evidence that would be relevant and important to her case, explaining her defense theories and how she would use the documents. She had had a form rejected and been told she needed to use the form being used by the Public Defender's Office. In the case she referenced, the court ordered the subpoena, but provided that the documents must be immediately produced to the government. This was ex parte. She was subpoenaing the Department of Motor Vehicles, and she felt the weight of what she was requesting was being evaluated. Like Ms. Coleman, the member's client told her that he had a certain defense, and she had a good faith basis to ask for the subpoenaed material. She did not believe it would be sufficient for an acquittal, but it was actually a document that she had used in the Fourth Circuit on appeal regarding a search warrant issue. So while she did not think it would ultimately prevail, she did think it was a good faith argument. She characterized it as an argument that could change the direction of her client's case, but she also felt that the court was prejudging the value of that evidence before issuing the subpoena. Although ultimately she got the evidence, which was important, there was a burden of having to go through those hoops. She had been in the United States Attorney's Office for many years, and there she could issue a subpoena and get whatever she wanted from whomever she wanted to establish her case. Now, coming to the other side she essentially has to do a search warrant affidavit to get a piece of evidence, even from a state agency such as the DMV. That's very onerous and burdensome on the front end.

Mr. Wallin commented that there might be a sequencing issue. As a CJA attorney, he had had cases in which he knew fairly quickly that he would run over the statutory fee limit and would have to file a budget request. By the time he sought a subpoena, the judge had already seen and approved the request in which he had explained why he would need additional funds, including things he would need to get, review, and have an expert review. Because the judge had already seen and approved his request, he thought it kind of primed the pump.

Mr. Cary said he had never submitted a declaration. But he could not imagine any defense lawyer would have his or her client submit a declaration. Judge Dever agreed there were some self-evident reasons why no defense lawyer would ever want to do that, but said he had concerns if some judges somewhere were actually requiring that. He noted nothing in the rule that suggests that.

Mr. Gill brought up an experience years ago in Texas. He stated his opinion that it is very important for the defense to be able to make these requests ex parte without fear of revealing their strategy. But it is equally important to the government when the defense comes across evidence that they are going to use in the trial that they reveal it to the government. It is in the interest of justice, and ferreting issues out also leads to right decisions when prosecutors know things. Holding things back just creates problems. The case he noted involved the second in charge of Dallas Police Department, who was involved in an arrest. Mr. Gill wondered why the case was going to trial. It was clean and this was an excellent witness. And on cross examination, the defense attorney cross examined the witness about something he had gotten from internal affairs about his involvement and supposedly mishandling evidence. He was shocked. But his witness explained that he had challenged the accusation, and they found that somebody had improperly levied that against him from within the department. It was unfortunate that it came out in front of the jury. It was a very fast verdict for the government. It didn't work, and if it had been revealed beforehand he would have worked it through with the defense attorney. He wanted to get to the bottom of it. He thought that if you are going to use something as evidence, it should be revealed. So it's back to them by both sides. But if it's something that hurts the defense, the defense should not have to reveal it to the government because that would chill their ability to look for evidence. In response to a query about the Texas case, Mr. Gill said this was used for impeachment. He thought that the judge in that case was determined not to let that happen again. It should have come out earlier, and it was crazy when it happened in front of the jury.

Judge Dever announced there would be a 45 minute lunch break.

Following lunch, Judge Nguyen introduced the next set of speakers.

Mr. Carter's comments focused on the contrast between state and federal subpoena practice, the difficulty of meeting the *Nixon* standard for admissibility and specificity, the inability to predict whether the judge would share the request or documents produced with the government, the harm that could cause, and the varied interpretations of the rule by different judges. He said that more experienced judges recognize some of the hurdles that Rule 17 presents to the defense, and they don't follow the rule as rigorously as some of the younger judges. Ex parte requests are rarely denied, and many of the judges will allow the defenders to

subpoena documents to their office without giving the government a chance to review them. Some of the newer judges, however, follow the rule more closely, and that creates what some of the panelists had called a chilling effect that really affects how they investigate their cases.

Mr. Carter stated that when he moved from state practice to the federal defender's office, he had been surprised how difficult it was to get a subpoena. In the Michigan state courts, he said, when investigating a case the defense can subpoena whatever it wishes. For example, if there has been a shooting outside a liquor store where there is a security camera, the defense can issue a subpoena to the liquor store. If the store's owners believe it is overly burdensome, they can file a motion to quash. Similarly, the defense can subpoena documents needed in a child sex or carjacking case.

Mr. Carter explained that Rule 17's relatively strict requirements can hinder investigation. When he has to meet the *Nixon* standard, he said, he prays that the judge will allow him to file ex parte because he will have to disclose some of his trial strategy. The investigation may be seeking information that is not admissible but may lead to something else. But he cannot pass the *Nixon* standard unless he knows "exactly what this camera is going to show or exactly what the phone records will say."

It was a struggle, Mr. Carter said, to investigate a case without having to file an ex parte motion and running the risk of a judge not granting the motion ex parte or unsealing his document and putting it on the public docket. This risk, he said, "discourages creative investigation" and seeking investigative leads that may not fall into Rule 16 but may help build the defense.

Mr. Carter gave an example of judicial oversight that could hurt defendants. His office took one of the *McGirt* cases in Oklahoma. The client had significant mental health issues that could have led to a verdict of not guilty by reason of insanity. The defense needed the client's records from the Child Protective Service Department, which requires a court order and a release. To get those records, they filed a Rule 17(c) motion. The motion was granted, but the court issued an order requiring the defense to turn over to the U.S. Attorney's Office the documents they had not yet reviewed, Although the defense lawyers had no idea what was in that sensitive information, the judge "wouldn't budge." So they called the U.S. Attorney, explained why they asked for the documents ex parte, that they had not yet reviewed them, could not turn them over now, but would provide them if they were going to be used for trial. His office literally begged the U.S. Attorney's Office not to press the matter and require them to provide the documents, and fortunately the prosecutors agreed.

Mr. Carter said it was "somewhat terrifying … that a rule exists that can result in us actually not following or adhering to our ethical duties as defense attorneys. It should not depend on how liberal the judge is in terms of his or her reading of the statute." Although Rule 17 seems pretty straightforward on its face, the way it is interpreted from circuit courts and the district courts is "all over the place." This creates obstacles that prevent defense attorneys from really digging in and investigating cases.

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The next speaker, Ms. Elm, argued that Rule 17 adds little benefit while imposing high costs. She explained why there is so little benefit. She said that the rule is made for a very small number of attorneys who are truly abusing subpoenas. She estimated that 15% of lawyers get in trouble at some time, and of those two thirds can get some treatment or help and need not be disbarred. But 5% are bad actors who abuse the system. She estimated that fewer than 1% are defense attorneys who are likely to abuse subpoenas duces tecum. But this rule, she said, was made to control that small group. Other attorneys subpoena only things that are relevant. They do not have time to seek other material. As a CJA lawyer, she is subject to funding caps and has to be watchful to be sure she will be compensated for her work. Moreover, the rule is not likely to stop abuse. Bad actors can just issue trial subpoenas and fake them. She had once had an attorney in her office whom she discovered "was truly abusing this system" and not following Rule 17. After learning the attorney had issued 51 subpoenas duces tecum in a single case, Ms. Elm fired her, went to the chief judge, and got her removed from the CJA panel.

Ms. Elm concluded that if people are not following the current rule they could still escape detection. But there are ways to identify abuses. If an attorney is serving 51 subpoenas for one case, the recipients or the U.S. Attorney could complain. The judge might also notice if the returns for 51 subpoenas are coming in for an immigration case and ask what is going on. Or the judge might notice the subpoenas include no court date.

As to the cost of the rule, Ms. Elm emphasized that "the chilling effect is real." She had been told that other lawyers do not seek Rule 17 subpoenas because it is too difficult and costly. In her experience, an attorney's first Rule 17(c) motion takes 20 hours, which is close to $3,000 of taxpayer money. Subsequent ones now take her three hours, which is $500.00 of taxpayer money. Additionally, there will be a hearing, which adds to the cost. All of this cost is imposed on many people who are not bad actors. She explained that even putting in three hours plus court time and then potentially fighting with the recipient means she will hit her funding cap really early as a CJA lawyer, requiring her to apply to exceed the cap. It requires her to explain things more and raises a worry about voucher cutting. If she did a lot of investigative work, but the subpoenas don't pan out, she worries that the judge may not want to approve funds to compensate her for her work.

Ms. Elm noted another cost is exposing defense work product to the government and to the judge who will be sentencing the client. Getting the judge's approval before issuing the subpoena means the judge learns things about the case that she may later regret revealing, and that too hinders robust defense investigations. That concern was another reason, she said, that she used subpoenas more in state than federal court. She concluded that there are very real worries when she has to obtain her client's records, doesn't admit them at trial, and the judge who will be sentencing the defendant is aware of the situation.

Ms. Elm advocated amending the rule to specify what is required to get a subpoena duces tecum. She favored changing the "tough" *Nixon* standard, and allowing subpoenas for material that "might" or "has some potential of producing relevant admissible evidence." Alternatively, the rule could adopt the phrase in Civil Rule 26: "could lead to discovery of other admissible evidence." She recommended mentioning fishing expeditions in the note, but interpreting them

narrowly. She commented that almost any time she seeks a subpoena duces tecum, it might be called a fishing expedition because she is unable to say exactly what is in a document. But if she already knew what was in the document, she would not need to obtain it.

The second change Ms. Elm recommended was spelling out sanctions, as Rule 16(d) now does. She thought that could be powerful for attorneys. Although it would probably not affect pro se defendants, it would make her think about those standards when issuing a subpoena.

Like other defense practitioners, Ms. Elm pointed out that her experience with subpoenas in federal court was "very uneven." She had practiced in Arizona and the Middle District of Florida. In both districts judges had turned down some subpoenas while granting others that she thought were much closer to fishing.

Regarding judicial oversight, Ms. Elm drew attention to limitations on the defense versus the government's ability to issue subpoenas without judicial oversight. She suggested that the Committee ask the DOJ how many grand jury subpoenas and administrative subpoenas had been issued during a specified time period. She said that in a report to Congress on administrative subpoenas about twenty years ago, the DOJ had reported there were 2,000-3,000 administrative subpoenas on health fraud and about 1,300 on child exploitation. That was just two areas, and nearly 100 agencies have that power. She concluded that "if you look at what they need for investigation, and then how many Rule 17(c) motions you've seen, you will see a vast disparity, and the disparity has to do with everything a person has to go through to try to get it for the defense."

Ms. Leonida said she had been a public defender in California state court, a federal public defender in the Northern District of California, and was now in private practice at BraunHagey & Borden. She began by noting that the rules in California state court are very similar to the proposed amendment the Committee is considering, and she had considerable experience with both. She focused her remarks on three concerns raised by judicial oversight under current Rule 17, particularly in cases with more than one defendant. She also noted that given the recipient's ability to file a motion to quash, her experience with more generous subpoena power in state court did not support claims that reforming Rule 17 would result in "an unfettered fishing expedition."

In cases in which there are two defendants whose interests are obviously at odds with each other, Ms. Leonida expressed concern about the risk that one defendant's ex parte application under Rule 17(c) could provide the judge with prejudicial information about the other defendant, whose counsel would be unaware of it. She related a case where her client's defense was based on a codefendant's coercion and intimidation. She had obtained multiple ex parte subpoenas for information as permitted in the Northern District of California. That necessarily brought in front of the judge information about what a bad actor the codefendant was. In that case, she got reliable information that benefited her client. But if she had been the codefendant's lawyer she would have been justifiably angry that the judge was receiving this ex parte information that would cast her client in a very negative light.

A different concern, Ms. Leonida said, was the possibility that disclosure of a defendant's ex parte application to a codefendant could place the defendant in danger. She described a murder case she had when she was with the Federal Defender in the Northern District of California. She submitted more than ten affidavits ex parte in support of Rule 17 subpoenas, and her client cooperated with the government and testified against his codefendant. The codefendant was convicted of murder and sentenced to effectively spend the rest of his life in prison. His new lawyer on appeal sought the affidavits Ms. Leonida had submitted ex parte, and the records produced that had exculpated her client and helped him to be in a position to testify against the codefendant. The Ninth Circuit denied the codefendant access to the affidavits, holding that he had not established that there was anything exculpatory in them. But that situation had raised a number of concerns for her and her whole office. One concern was the chilling effect that people have been talking about—not just the potential that the court might expose your ex parte application to the prosecution or the public, but also the possibility that the court might expose it to a codefendant. That could potentially be very dangerous to a client's safety.

Ms. Leonida's third concern was the possibility that a codefendant's application for a subpoena or the documents produced by a subpoena might contain information that exculpated someone else. There might be exculpatory information about a codefendant in an affidavit that was in the court's possession. As a defense attorney, she has no *Brady* obligation to help a codefendant. But if the court in the course of reviewing ex parte applications under Rule 17 sees something that is exculpatory for a codefendant, there will be a real tension between preserving the strategy and the work product of the defendant applying for the subpoena, but withholding documents that could be exculpatory to another defendant who has no idea that that they exist.

Ms. Leonida concluded by stating that in her years of practicing in California she had not seen unfettered fishing expeditions, and that was the experience of attorneys who practiced in other states as well. If defense attorneys are not forced to apply to the court for subpoenas, the recipients can still move to quash. Notice to victims or the complaining witnesses can prevent abuses on that front, and she thought the proposed amendments were "very workable."

The next speaker, Ms. Miller, said she based her remarks on her experience as a Deputy Assistant Attorney General in the Criminal Division, where she supervised the Fraud and Appellate Sections, her supervisory and line experience in the Fraud Section, her prior experience as an AUSA in Miami, and her discussions with economic crimes chiefs and major crimes chiefs across the country. She focused on the limited purpose of Rule 17—expediting proceedings, not granting discovery—and gave multiple examples to illustrate her position that the risk of delay, harassment, and abuse in the use of Rule 17(c) subpoenas require judicial oversight.

The purpose of the rule was not to provide a means of discovery for criminal cases, Ms. Miller stated, but to expedite the trial by providing a time and place before trial for inspection of subpoenaed materials. In practice, Rule 17 is used not only for trial preparation but to prepare for any hearing—a sentencing, a restitution hearing, even an evidentiary hearing. Because the rule is

for evidentiary and relevant materials, it has to be tethered to some hearing before the court. She emphasized that "Rule 17 is not intended as a general discovery device."

Ms. Miller defended this limited purpose, reflected in the current language of Rule 17, the limits on the rule articulated in *Nixon*, *Bowman Dairy*, and other relevant precedent, as appropriately reflecting the differences in criminal and civil discovery as well as the fact that prosecutors have heavy ethical burdens (not just *Brady*, *Giglio*, and the *Jenks* Act), and must also abide by grand jury secrecy and prove their cases beyond a reasonable doubt. Prosecutors, she said, protect public safety, and they have to protect the integrity of ongoing covert investigations so that targets don't flee or obstruct justice. She said it was important to remember those considerations when evaluating the purpose of Rule 17 as opposed to Rule 16.

Ms. Miller argued that it was not intended that Rule 16 would provide a limited right of discovery and then that Rule 17 would provide broader discovery. Instead, she said, "circuit after circuit has held that *Nixon* does apply to defense subpoenas for third parties because the rule itself doesn't distinguish between the parties, other than 17(b), which is directed at payment of costs for indigent defendants who want to seek process."

She warned that without judicial oversight "a high volume of subpoenas" might be "issued without any standards," with numerous adverse consequences for criminal cases, including delay. Delay could harm not only the government's case, as witness memories become stale, but also the interest of the defendant and the public in a speedy trial. Other harms include the "potential for harassment of corporate and individual victims and witnesses," and the use of discovery by defendants and conspirators "to advance agendas other than defending the criminal case." Ms. Miller related several examples that she said demonstrate these potential dangers, illustrate why judicial oversight is important, and why the standard matters. Some of the examples illustrated potential harms to victims. Ms. Miller also noted that the proposal to change Rule 17 would require litigation and development in practice to define "private and confidential." A system where the onus is on the recipient of the subpoena to litigate will sometimes be hard for victims. For example, a dead victim's family may not have money to litigate, and may not know that they can litigate to quash a subpoena for very sensitive records. So a regime where the onus is on the recipient of the subpoena has to be policed carefully in cases where private, confidential information is being sought.

In other cases, Ms. Miller said, the defense sought information that was not relevant or evidentiary, or information that was protected by privilege or work product. In still other examples, the subpoena was overly burdensome in some respect, threatened an active investigation, or involved an attempt to use criminal subpoenas for discovery in civil cases. She also suggested that the percentage of cases where there are instances of improper materials being sought through Rule 17 subpoenas exceeds 1%. She summarized ten case examples.

(1) *United States v. Ford*. A defendant charged with being a felon in possession of a firearm subpoenaed the Los Angeles Police Department for 40 categories of documents and demanded production of the entire file for an ongoing murder investigation. The defendant seeking the information had previously been a suspect in the murder. The LAPD moved to quash

on grounds that the subpoena violated state law, would be burdensome, and would inhibit the ability of the state to effectively conclude the homicide investigation. Because the defendant in the felon in possession case was affiliated with the suspects in the murder case, granting the subpoena would have disrupted an ongoing homicide investigation. Those materials may very well have been useful to the defense, she said. But the defense was unable to establish that because it was a § 922 possession case, and the firearm in the murder wasn't the firearm in the § 922 case. Ms. Miller said this demonstrated that even when something could be relevant for investigatory purposes for the defense, there are other interests, such as public safety, to consider.

(2) *United States v. Stone*. A retired FBI agent was charged with trying to get money and other benefits from a woman after falsely stating that she was on probation. The defense sent a Rule 17 subpoena directly to the victim without permission and sought personal information such as cell phone records. The victim told the prosecutor about this and then told defense counsel that he intended to file a motion to quash. It was the threat of judicial intervention that caused the defendant to withdraw the subpoena. And if that threat had not been present, the victim would have been affected. That subpoena was also improper because no hearing date in the case had yet been set.

(3) *United States v. Gallo*. This case involved a securities and commodities fraud scheme. A parallel civil case against the defendant, involving a receiver who had been tasked by the SEC with preventing dissipation of assets and recovering fraud proceeds, was stayed pending the criminal case. In the criminal case, the defendant sought to subpoena the receiver and notes of the receiver's interviews with the cooperating witnesses in the criminal case. The court held that information was protected as attorney work product of the receiver and the receiver's team. Ms. Miller characterized this as an attempt by the defendant to use the criminal process to get information relevant to defending the civil case which had been stayed.

(4) *United States v. Javat*. The defendant's scheme was falsely representing to ten victim companies that he intended to purchase certain goods for export. He did this because these companies offered massively discounted rates to buyers who were going to export the goods to, for example, Afghanistan. He could generate a steep profit if he sold the goods domestically. Defense counsel sent Rule 17 subpoenas to the victim companies before trial and before the sentencing and restitution hearings. All were quashed, in part because they were directed at things other than what was at issue in these proceedings, i.e., the defendant's intent. The subpoena sought information from the victim companies about their pricing strategy, all of their buyers, and any prior criminal investigations. The court found the subpoenas were overbroad and improper. Even if the victim companies were not diligent in looking at what was going on in this case, as a matter of law in the Eleventh Circuit the contributory negligence of a defendant could not be a proper defense. So the information sought couldn't have possibly yielded evidence that was "evidentiary."

(5) Defense counsel used Rule 17 to subpoena not only a cooperating witness, but their counsel for "information that would be Rule 16 or Jencks, if it were in the possession of the

government." Counsel argued that it put him in an ethical bind to supply impeachment information about his own client to his adversary, and moreover, the information being sought was privileged (the defense counsel's own notes). After an in camera review, the subpoena was quashed.

(6) In *United States v. Sing* (E.D.N.Y.), another subpoena seeking information from counsel for a cooperating witness was quashed. There the defense counsel even acknowledged in part they were seeking privileged information and withdrew the subpoena.

(7) *United States v. Holmes* (N.D. Cal.) was a recent instance of a Rule 17 subpoena's being used in connection with a hearing on a motion for a new trial based upon what occurred after trial. One of the witnesses at the trial of Elizabeth Holmes was Dr. Rosendorff. After the trial he went to the defendant's home. The hearing was limited in scope to discussing what happened at that visit after the trial. Yet the defense sent a Rule 17 subpoena to Dr. Rosendorff seeking all his communications with the prosecution team, and all of his communications regarding the witness's trial testimony for the prior year, and correspondence with friends and family after the trial about a variety of things. The court quashed the subpoena because it was unrelated to the limited scope of the hearing, which was that one visit to the defendant's house, not an entire year of communications. And since this occurred after trial, impeachment of the witness would not be a proper basis for seeking a new trial.

(8) In *United States v. Coleman* (D. Mass), a kidnapping resulting in death case, the defense sought to subpoena the mental health records of the deceased victim. This was litigated under seal. Over the government's objection, the defense was allowed to obtain these records, and hundreds of pages of private information went directly to the defense. The prosecutors would have preferred that this information go first to the court. Ultimately at trial only a limited portion of those documents were admitted in heavily redacted form, and the prosecutors were able to notify the deceased defendant's family at the time of trial. This case showed other interests at stake: privacy interests in victims' mental health records.

(9) In an example from the Northern District of Illinois, a prosecution for spoofing and wire fraud, the defense subpoenaed the spoofing victims. There were subpoenas to proprietary trading firms and hedge funds seeking what they viewed as very sensitive information, such as their algorithmic trading formulas. Obviously these firms didn't want to provide that information, and they received subpoenas for voluminous records covering a decade. In one of the cases, the defense lawyers worked out a stipulation with the proprietary trading firms and hedge funds, so they were able to submit an affidavit in lieu of complying with the subpoena, which would have been overly burdensome.

(10) In another case, Ms. Miller said, the judge quashed a subpoena that was directed not to the victims, but to the Commodities Futures Trading Commission because it was "seeking deliberative process privileged materials."

To conclude, Ms. Miller quoted the opinion in *United States v. Layfield*, (C.D. Cal. March 2021) on the topic whether the returns from these subpoenas should be shared:

> [T]he defendant's main argument against sharing is simply mistaken. Defendant argues the government got to use the grand jury to acquire numerous documents. It only needs to provide those intended for use at trial or which constitute *Brady* or *Giglio*. Therefore, defendant now should be able to conduct his own investigation and produce those documents that are helpful and ignore those that are perhaps inculpatory.
>
> This entire line of reasoning is unpersuasive. The grand jury is a unique institution with its own powers and its own rules. Once an indictment is returned, the parties are on a more equal playing field. The government cannot now use the grand jury to conduct discovery or plug holes in the investigation.
>
> Furthermore, sharing the documents is a salutary check on the in camera process. Yes, this court either has or will, as the case may be, declined to rubber stamp any requested subpoenas. But inevitably the court either has been or will be sympathetic to requests from the defendant that appear meritorious. But if the defendant knows the documents will be shared, you'll be less likely to make requests that are essentially discovery requests camouflaged as requests for exculpatory trial exhibits.

She said that the judge in *Layfield* noted that early production and document sharing allowed for effective trial preparation. That's the key, she said, especially where voluminous or sensitive records are being sought. It serves the interest of judicial economy and the interest of all the parties to address some of these issues pretrial through sharing information not only under reciprocal discovery and Rule 16, but having protocols perhaps like the practice in the Northern District of Illinois, where the parties agree that there will be some pretrial sharing. This promotes the efficient administration of justice that serves everyone's interest.

Judge Nguyen invited questions from the members of the Rule 17 Subcommittee.

One member objected to the statement that the grand jury cannot be used once indictments are returned, noting that the government uses the grand jury after an indictment is returned if it is investigating other potential charges or bringing a superseding indictment. She asked Ms. Miller if she had any information about how often the government uses Rule 17(c) subpoenas to get information after an indictment has been returned. Also how often does the government use Rule 17(c) subpoenas?

Ms. Miller responded that in reading the *Layfield* opinion she did not mean to suggest that the government never uses the grand jury after indictment. What the judge might have meant is that there is a more equal footing after indictment because the proper purpose of using a grand jury subpoena after indictment is to investigate new conduct or new targets, and it would be an abuse of the grand jury to investigate the pending charges. Presumably there would be new indictments returned based on those grand jury subpoenas post trial or new charges. She noted that an unreported decision from the Northern District of California, *United States v. Pacific Gas and Electric Company*, involved a government request for Rule 17 subpoenas, and the court

modified the magistrate judge's order allowing in part some of the subpoenas, because some of the information sought was for impeachment, which would not be allowed. She said she did not have statistics on how often the government uses Rule 17 subpoenas after indictment, but she acknowledged that it does sometimes, particularly in reactive cases, or cases where the arrest occurs earlier than anticipated. For example, that might occur when prosecutors learn a defendant is about to flee the country and is at the airport. An arrest can be made on information that is not in admissible form. So they might may need the records custodian to certify that these are business records and use a Rule 17 subpoena to get the admissible form of the same evidence for trial.

A member asked Ms. Leonida if she had come across published opinions that addressed something similar to the codefendant issues she described. Ms. Leonida replied she had not. The first situation was just something that bothered her personally because the codefendant's attorney had no idea that that she was filing these applications. As for the case in the Ninth Circuit, she hadn't found much authority. She said one of the things that concerned her was that much of this happens behind the scenes and the codefendant's attorney never knows there is an issue.

Ms. Morales remarked that the defense comments had been pretty unanimous about reducing judicial oversight, and the prosecutors have raised some issues about the different safeguards that need to be in place to ensure that these subpoenas don't ask for records that violate privacy and other concerns. She asked the defense attorney participants what safeguards they proposed or envisioned as possible. Or did they think that there should be nothing and the Committee should just trust the 99%? How did they see it playing out, considering that not every recipient of a subpoena has the resources, knowledge, time, or inclination to move to quash a subpoena that may be improper?

Mr. Wallin responded that in a situation where the victim had been notified under Rule 17, the first thing that victims want to do is call the U.S. Attorney. As a practical matter, that is the first thing that they do. To some extent, that ameliorates problems. He said, however, that he was not per se opposed to judicial oversight. He added that he had not heard much support for maintaining the distinction between discovery versus production, and how judges should have to remember that this is not a discovery tool. He thought the provisions in question should be moved to Rule 16, so it is clear to the judges that third-party subpoenas are a legitimate discovery tool and they should analyze the factors through that lens. He thought Ms. Miller's examples would have ended up the same if there were a Rule 16 discovery type of subpoena, because they all sounded pretty egregious.

Ms. Miller responded that the victim did contact the AUSA in the Texas example. But in other cases, especially in Miami, the victims do not speak English as the first language, or they're otherwise scared because it was a violent crime and they were victimized, or they're just focused on doing their job every day, or they don't quite understand the AO form. So sometimes it is difficult for subpoena recipients to call the AUSA or to go to the court. In one case a victim in a tax fraud case denied at trial that he had met with the government, though he had met with the prosecutors and been told repeatedly that they were government. The prosecutors had to

intervene and remind the witness that they represented the government. She emphasized the importance of making the process accessible for lay people who do not understand the system when they are involved and impacted by crime.

Ms. Elm said she favored judicial oversight at the back end, rather than the front end. She appreciated that not everyone will object to subpoenas, but the Committee cannot address 100% of the problems. In her view, if the rule spelled out the expectations and the possibility of real sanctions, and judicial oversight was available when there were objections or complaints, that would address many of the problems. And, she noted, the Victims' Rights Act requires oversight at the beginning for anything dealing with the victim.

A member asked Ms. Miller two questions: whether she was in favor of judicial oversight across the board under 17(c), and whether she believed that oversight for document subpoenas should always be ex parte. Ms. Miller replied she did favor judicial oversight across the board for documentary evidence. Judicial oversight of documentary evidence, and perhaps even deadlines for exchange of information, serve the same goals as the parties' exchange of exhibit lists. On the second question, she replied that oversight needn't always be ex parte. Recognizing that the government's interests are distinct from those of the victims, some courts allow government standing to challenge Rule 17 subpoenas. Victims may not know, for example, what the charges are and thus what conceivably might be relevant in the case. She gave the hypothetical of a rule that removed any time limitation, allowing a defense attorney, one day after the indictment's returned, to submit a subpoena to return documents five days later. In that system, she thought it would be too hard to go ex parte because the court had just received the case off the wheel, and it might be important to hear from the government, for example, what the case is about.

Ms. Miller acknowledged that, in practice, many lawyers do submit ex parte subpoena requests under Rule 17(c). But the words of the rule say only:

> A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

She noted that the text doesn't say anything about ex parte, and it doesn't say you must go to the court. But Rule 17(a), which speaks to content, says a subpoena must state the court's name and the title of the proceeding. And she thought that a little bit of judicial oversight was implicit in the fact that it's coming from the AO.

The member followed up, asking whether Ms. Miller liked the rule as it is now, and preferred that it not be "automatically ex parte." Ms. Miller responded that the sound discretion of the district court should govern whether an ex parte application is granted in the context of Rule 17 and other contexts. Committing to the sound discretion of the district court whether any given item should be filed ex parte, she said, allows flexibility based on the facts and the issues.

In response to another question seeking clarification, Ms. Miller said she always preferred judicial oversight.

Judge Nguyen asked for questions from Committee members who were not on the Subcommittee.

A member raised a question triggered by Ms. Elm's description of her experience of trying to get Rule 17 subpoenas as a practicing CJA panel attorney representing indigent defendants. The proposal from the New York Bar included a hypothetical with a much different situation, where an apparently very well-heeled defendant and defense counsel with huge resources wanted sophisticated financial information to give to their financial forensic expert and consultant. The member asked whether defendants and attorneys with significantly fewer resources have different experiences and challenges getting these subpoenas. And, if so, is there something baked into Rule 17 as we have it now that exacerbates that situation? Is there something in the proposal that would help alleviate that situation?

Ms. Elm replied that well-heeled defendants represented by major law firms tended to do better than she has done representing small drug dealers. That may have been because of resources, or political ties, or more respect. But when she had gone in on 17(c) and explained it well, she said she had almost always been well treated by judges. As a CJA attorney, she tries to winnow down her requests because it will cost her a lot of time to get five subpoenas duces tecum on five different things that she might really need for her defense. Now doing habeas work, looking at ineffective assistance of counsel issues, she asks what subpoenas did they not issue that now, in habeas, they might be able to find out could have helped? And why did they not issue or try and get those subpoenas? She acknowledged that if you have the resources, you can do more. You can hire investigators to do all kinds of things. She is much more limited with a small drug client, and she did not think that Rule 17 speaks to that issue.

Mr. Carter added that he'd worked in both white collar and indigent defense, and often the relationship with a white collar client is completely different than the relationship a public defender or CJA lawyer has with their client. Usually the white collar client has selected the attorney, and they inherently trust the attorney, who comes with a great reputation. But public defenders are not quote unquote "paid" lawyers, as his clients always remind him. What that means is his client does not trust him and may not be as forthright as the white collar client. So when he asks his client if he should get the video surveillance camera outside of the liquor store where there was a shooting, he does not know whether to trust the client's response knowing that the client does not trust him. That puts him in a very difficult position. Perhaps he can file under Rule 17, but he cannot definitively state why he needs the video because he does not know if his client is telling the truth. That's baked into the indigent defense relationship.

Second, Mr. Carter agreed with other speakers about the importance of the time component. A lawyer who works at a silk stocking law firm and represents Exxon, which is his major client, can devote a lot of time to a case. For a big white collar indictment the lawyer would have the help of 100 partners and associates. But as a public defender, he has a big RICO case, a street gang, and 35 of these cases. It is difficult for him to sit down, draft motion after

motion, and think about trying to meet the *Nixon* standard each time. It stalls the process, but judges resist adjournments. A simple gun case may not be that simple in terms of the investigation. But a district court judge might think this is just a felon in possession case, so why are you asking for all these subpoenas. Judicial oversight sometimes creates this tension, and defense attorneys feel time pressure from the judges. They feel the judge will be angry if they file another Rule 17(c), when they should really do so. All of this, he said, is baked in when you're talking about indigent defense.

A member commented that the distinction between discovery and production kept coming back as an inflection point. The member appreciated the way that Ms. Leonida and Mr. Carter grounded their views on the ethical obligations of defense attorneys to conduct investigations. The duty to investigate was at the heart of *Strickland*, the case that erected the framework for ineffective assistance of counsel. The member commented that there seemed to be some common ground, perhaps around safeguards, protection of victims, and ensuring some ex parte procedure.

Judge Bates asked Ms. Leonida about the examples of situations with codefendants. Was she suggesting that some rule change was needed to address that? For at least one of those examples, he said, it seemed she might be arguing for less judicial oversight, so that the judge would not be aware of certain things. Did she think there is a rule change that would be needed to address those types of codefendant problems?

Ms. Leonida replied reduced judicial oversight would solve the problems that she had encountered in codefendant cases without resulting in fishing expeditions or jeopardizing victims or the pursuit of justice in any way. In both situations, she said, the issue was the judge getting secret information about a defendant through the Rule 17 application process. Codefendants frequently have secrets from each other. It is not a problem if one defense attorney knows something that another defense attorney wished they knew. But it does become a problem when the court has that information, putting the court in a bind in terms of which defendant's interests get priority. It is one defendant's right to exculpatory information versus another defendant's right to pursue their defense. And it is even more dangerous where a judge of necessity has a lot of information that's negative about a defendant when they are presiding over that defendant's trial, and perhaps even more significantly sentencing that defendant—and defendant's lawyer doesn't even know there is information that they need to contest or address in any way. She commented that it is not possible to unring a bell, once something is in front of anyone, even a judge.

Ms. Leonida thought that all of Ms. Miller's examples had included the word "quash." So they seemed to be situations where a subpoena was issued under the current regime, presumably approved by a judicial officer. She noted even without judicial oversight at the front end, the courts are involved. The proposed amendment requires notice to victims, and there is always built-in judicial oversight.

Judge Bates posed a second question for the prosecutors, Ms. Miller and Ms. Sampson. He said that they had raised many examples of why judicial oversight is good and necessary, and

some indication that it is desirable to have judicial discretion whether to make it ex parte. He asked whether they thought the rule as written creates any problem that needs to be fixed. Or does it allow the kind of judicial oversight and discretion they thought advisable?

Ms. Miller responded first to the question that had been directed to Ms. Leonida. She admitted she had focused on examples where there had been motions to quash, but one of them was a threatened motion to quash. She said that she thought that if the proposal were adopted, it would reduce the ability to quash improper subpoenas before records have been provided. There are some instances where parties don't know they can quash or they just start providing records because it's close to the due date. She thought that would be an issue if the Committee changed the system.

On Judge Bates's question, Ms. Miller thought the language of the rule could be sharpened. It could expressly require that there be a scheduled hearing before the court, including sentencing, restitution, trial, and so forth. But she did not think there was a problem that needed to be fixed, because the courts are currently providing appropriate case-by-case oversight. Although there are examples where sometimes a court's paying more attention or less attention, and there is district by district variation, that happens across all of the rules of criminal procedure. The variation in Rule 17 practice is similar to the variation that occurs in practice across criminal issues. She thought the variation in the Rule 17 subpoena context is not so different or much greater than the variation in, for example, the use of Rule 35s versus 5K motions in some districts. The key, she said, is the involvement of judges who know the facts and the law and can appropriately weigh in.

Another member asked Ms. Miller about her comment that in some instances early on in case judges can't know enough about the case to make decisions, which is why the Justice Department should be involved. Ms. Miller responded that her comments on this point had referred to the situation if the rule were amended. If the rule were amended to sever the link between subpoenas and scheduled hearings, and people want extremely early returns, which she thought the defense might under the new proposal, then it would be difficult given the court's limited information.

But what if a defense lawyer needs a subpoena before they even get the Rule 16 discovery? Is that reasonable? Ms. Miller said this might pose an issue in terms of managing the court's docket, but that the judges would be more knowledgeable about that. She thought as a practical matter it could be difficult to weigh these things extremely early in the case.

Judge Dever asked whether tying the Rule 17(c) request to a hearing was somewhat artificial. A defense lawyer could always say there is an upcoming initial appearance, a detention hearing, or an arraignment, and counsel needs to advise whether to plead guilty or not guilty, and that is why counsel needs this information. Mr. Wallin noted that in his district they set a trial at the arraignment, and he just sets the date of return at the first trial date. If the date later gets pushes back, that's not his problem.

Judge Dever said he would like to hear from both prosecutors and defense attorneys to get a better sense of the practice. He said that under 16(b) if a defense investigator finds inculpatory information the defendant has no obligation to turn that over. The text of the rule covers that. And yet some speakers mentioned the subpoena return is being made to the court. He noted Ms. Coleman's example where defense counsel is not sure what they will get. It might be a mix of inculpatory and exculpatory. He also asked for more information on the practice experience of those in districts where these orders are being issued. Were judges telling the defense they will only get a subpoena if the U.S. Attorney gets the information too, even when the judges realize the defense doesn't know what will be in there? Some of it might be evidence that will be introduced in the government's case in chief.

Mr. Felman responded that he had not yet had a case where he was trying to get something from a third party that he felt he needed to hide from the government. But other speakers at the meeting had given examples where that was definitely the case. So there is no one-size-fits-all scenario. There must be opportunities to go ex parte. He had come away from the day's discussion thinking that many thorny technical questions could come up. But the big one is the philosophical question: "do you want me to find out what happened or not? Or is this about limiting discovery?" That, he said, is the question the Committee has to answer. We are having a debate about whether discovery should be limited, whether defendants should basically get what the government gives them, and nothing more unless it can make a pretty compelling case on targeted matters.

Mr. Felman said he also practices criminal law in state court where he can subpoena anybody anytime. When he has gathered all the documents, he takes a deposition of each of the state's witnesses. And when he has seen the evidence the government will use at trial, he explains to his client why they need to plead guilty. He had never had a problem getting depositions in criminal cases for 30 years, and we have several places in this country where people issue subpoenas freely. Some of them are indigent, some pro se. He was sure some subpoenas get quashed. He invited the Committee to envision the reaction of civil practitioners hearing a proposal to remove their subpoena authority because some subpoenas had been quashed. He thought they would say that of course some would be quashed. He thought there was no basis to believe that if you let the defense issue subpoenas it would abuse them.

Mr. Felman returned to the foundational question. Do you want the defense to be able to learn what happened in this digital age where the evidence is not necessarily stagnant, it's not small, it's not who shot who at the 7-11? These are mountains of papers and files and digital records and emails that are not necessarily the ones the government wants the defense to get. The government is not going to seek them out. So if he cannot get them under Rule 17(c), he never will. What the Committee is really challenged by, he said, is the philosophical question of whether discovery should be limited to what the government wants to give the defense, or whether the defense should be allowed to go out and discover what happened. He urged the Committee to bend toward justice, to bend toward letting the defense find out, and let the truth shine.

A member noted that on Judge Dever's question, Mr. Carter, for example, had given the example of subpoenaing his client's health records in the *McGirt* case, and the judge ordering the records to be turned over to the prosecution. We heard some other examples as well where the defense wants to file ex parte, believing that would be possible, but then that was not the case. She thought the common ground the Committee had heard was that the rule isn't clear, and how your subpoena will be treated really depends on the judge. She thought that is a pretty significant problem, and that the Committee should fix the rule. She noted Mr. Gill said he thought a defense attorney should be able to file ex parte whenever they want to do so. But the lack of clarity described by many speakers does have a chilling effect, and it is something the Committee should try to clarify. The Northern District of California has a standing order where their court has said they are ex parte. So perhaps some courts have taken the extra step to actually write something into a rule. But Rule 17 doesn't say anything, and the member thought the Committee should at least correct that uncertainty.

The member also commented that Judge Dever had raised a good question about whether it makes sense to retain the words "hearing" or "trial" in the rule. This rule predated Rule 16, and it was not intended for discovery. We could update Rule 17 to show that you can use it for some discovery, taking out the idea that it's for a hearing and modifying the language to show it allows the defense to get discovery. But the Committee needs to agree on the standard, whether there is judicial oversight, and when judicial oversight would take place. She had been unaware that so many states don't seem to have judicial oversight at the front end, and she suggested the Committee look into that. She said it is a problem if defendants are being treated differently depending on where they live or what judge has the case. Everyone would benefit from making it clear, to show the ex parte nature of that defense investigation, and that the defense doesn't have to turn it over.

Ms. Elm added she'd had a few instances where the judge granted her motion but added she must give it to the government. In those instances, where it goes wrong, she has an ethical obligation to move to withdraw because she just harmed her client. That adds another issue.

A member asked Ms. Miller in the situations where subpoenas were withdrawn under threat of being quashed, had there been judicial approval before they were issued and served? Ms. Miller replied she would have to review the cases and supply that information to the Committee.

Ms. Miller also responded to Judge Dever's questions, noting that in a case before Judge Matsumoto in the Eastern District of New York the defense filed 35 ex parte subpoenas with the court and sought four years of records. The subpoenas originally were made out for the return to the defense. But the court ultimately ordered that the materials be turned over. She said she would follow up with the details. She noted that in *Layfield*, the case she had quoted from earlier, the court discussed why sharing the returns is beneficial for the system. So there have been instances where courts order sharing. She thought the best arguments for sharing are those given by Mr. Gill. i.e., not to invade defense strategy, but to ensure that the truth comes to light and the parties efficiently share large volumes of information, especially in white collar cases. If, for

example, the defense seeks voluminous records before arraignment to assess how to plead in a white collar case involving ten years of conduct, that could postpone the arraignment for a year and a half. So there are practical reasons why there have to be some limits. It gets to question posed by others: what should discovery be for criminal defendants? She thought it should be a different than the civil system because of the different purposes of the criminal justice system.

A member asked Ms. Miller whether she could review the cases she had described to answer some questions. Had the judges been aware of the subpoenas and had they approved them under the *Nixon* standard before the motions to quash were filed? And for those situations where judicial approval was not obtained before issuance, did the judge at the quashing stage ask why this was not brought to the court beforehand? Ms. Miller said she would review the cases, and she added that in the example from the Northern District of Texas where the former FBI agent was committing fraud there had been no advance court approval of that improper subpoena. Professor Beale asked Ms. Miller to send any additional material to Shelly Cox and copy the reporters.

Judge Nguyen invited the morning's panelists to make short additional comments in the time remaining.

Mr. Cary said he seldom used ex parte applications but had found six reported cases where ex parte applications were held to be improper. He would provide those to the Committee. He also agreed this is a philosophical question. The big question arises from the *Nixon* case, which he noted was decided in a completely different context. But now he must tell his clients he cannot satisfy the *Nixon* test even though he believes in good faith that there's information out there that would be helpful to the client, who in theory has a right to compulsory process.

Mr. Cary also responded to the question whether we should let the courts decide this thorough litigation rather than amending Rule 17. He said it would be necessary to get the Supreme Court to take a case presenting this issue if this Committee is unable to deal with what he called the basic issue: "Is the defense going to get what we defense lawyers think we need." He added that to the extent there is a concern about abuse, he agreed with Ms. Elm about sanctions and would not object to including a sanction mechanism for abuse. For personal and confidential information, he noted that the New York Bar proposal expands the protection of the Crime Victims' Rights Act, requiring advance court approval for subpoenas for personal confidential information from both victims and people other than victims. He thought that was a good balance.

Mr. Cary's final comment concerned cost and funding. He observed that we are in a data-driven world, and evidence is in data. It could often cost money to get it. In most of his white collar cases his client will gladly pay if he has to go to some company and search their computers. But Mr. Wallin's clients may not be able to pay. Our system needs to come to grips with the question how we are going to pay for it. He thought cost shifting, which was not addressed by the New York Bar, would be appropriate. He understood there may be an issue with getting funding. But if defense counsel has a good faith belief, on a good basis, that

evidence exists that would be helpful or reveal the truth, we need to find the money to allow the defense to get it.

Ms. Coleman said there is a problem with the rule. The rule regarding judicial oversight needs to be fixed, and we have to address the standard. She brought the focus back to her client: a person, a defendant with constitutional rights, including rights to compulsory process. Like a doctor, she wanted first to do no harm to her client. That is the importance of the ex parte process. She did not agree that subpoenaed materials must be shared, unless that was required by the rules governing reciprocal discovery. There must be, she argued, some capacity for her to investigate her case—as she is ethically obligated to do—and not harm her client.

Ms. Sampson said she had trouble thinking of a time when she had actually received disclosure from a defense 17(c) subpoena, though we all know that occurs. Unless we're actually going to trial and the records are going to be used in Arizona, they don't have that issue. So, in the District of Arizona, she thought they might be "in the position of what doesn't seem to be broken, doesn't need to be fixed, because it's actually working." She said the government doesn't want to keep the defense from seeking information or seeking the truth, because they are obligated to find the truth. That is absolutely something that that they want to do. But she did not know how you could have a system where the judiciary does not get an opportunity to ensure that the process of trial and discovery are going well. She knew of no other way. She said that judicial oversight is the key. She said we could talk about expanding the standard, but she thought it was not being strictly applied in her district.

Mr. Carter said indigent defense is about human beings, not two corporations fighting it out, or a big corporation being charged for some sort of fraud. These are real human beings facing a lot of time. In many state cases the unrestricted use of subpoenas had really changed the course of the litigation, whether it be getting a client to see the light and accept a good plea, or finding exculpatory evidence leading to the dismissal of the case or a not guilty verdict. The rule as written really does chill litigation. Many things are left in the dark because, as a defense attorney, you don't want to run the risk of disclosing information that can end up harming your client. Mr. Carter strongly encouraged the Committee to adopt the amendments proposed by the New York Bar.

Ms. Elm reiterated that we are really talking about trying to control a very small number of bad actors and having a very significant impact on the defense. She advocated a cost benefit analysis weighing the significant negative impacts: a rule that chills defense advocacy, imposing a difficult and expensive process, but can affect only a small number of bad actors. We should presume, she argued, that most defense attorneys are not acting inappropriately, and not impose these hardships on the good practitioners, many of whom are doing their work pro bono or for $158.00 an hour, serving the court and protecting constitutional rights of thousands of people. But the rule as written creates hardships, including realistic possibilities of denial and exposing inculpatory material. Exposing that material to the judge, even if it's not revealed to the prosecution, can affect sentencing. That is something we should to try to avoid, because it creates "a fundamental procedural due process sort of problem." The procedural burden imposed on the

defense is much more onerous and difficult than that faced by the prosecution. She agreed with the speakers who had said the issue was about allowing the defense to try to get the truth.

Ms. Miller said it was important to consider cost not just with respect to Rule 17, but also with regard to other rules. With a large volume of subpoena returns it is important to consider who will review them. She also expressed concern about federal public defenders lacking the resources to review those materials and keep up with the caseload. Would it really help defendants if it is too burdensome, given the volume of materials? That was something to consider with all of the rules, and she suggested advocating for more funds in Congress.

Judge Nguyen thanked the speakers for the robust and informative discussion. She said the Subcommittee would continue to gather information from various stakeholders, and she requested that the speakers email any additional information they think would be helpful to Shelly Cox and copy the reporters.

Judge Dever thanked everyone and stated the next meeting would be in Washington, D.C., on April 20, 2023.

Draft

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

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA BUEHLER CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 2022

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 28, 2022 at the Sandra Day O'Connor College of Law, Arizona State University, in Phoenix. On the day of the meeting, the Committee convened two panels of experienced judges, lawyers, and law professors to discuss two possible amendments to the Evidence Rules. At the subsequent meeting, the Committee discussed the comments of the panelists, and also reviewed its proposed amendments that are currently out for public comment.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report. In addition, the five proposed amendments that are currently out for public comment, discussed below, are attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Panel Discussions

1. Juror Questions Posed to Witnesses

The first panel provided the Committee with information regarding the practice of allowing jurors to pose questions to witnesses. Last year the Committee prepared a proposed amendment that would impose safeguards if a court decided to allow jurors to ask questions. The proposal did not take a position on whether juror questions should be allowed.

The proposed amendment was considered by the Standing Committee, but it was returned to the Advisory Committee for further research. Some members of the Standing Committee were concerned that the proposal would lead to more courts allowing jurors to pose questions to witnesses. It was suggested that the Committee conduct more research on how the practice actually works when it is employed, and on whether the benefits of the practice outweigh the costs. The panel was put together in response to the Standing Committee's suggestion.

The panel in Phoenix was made up of distinguished state and federal judges, and attorneys experienced in civil and criminal litigation. Each of the panelists had substantial experience in the practice of jurors submitting questions for witnesses. The practice is mandated in Arizona state courts (subject to a good cause limitation) and the two Federal judges on the panel have often allowed jurors to submit questions.

The panelists all reported very favorably on the practice. Their basic conclusions were: 1) when jurors are allowed to ask questions, they are more engaged and less likely to seek information from outside sources; 2) at most trials, the number of juror questions is around 5 to 10, a manageable number; 3) jurors generally do not pose questions in an argumentative form, and do not become advocates; 4) most questions are essentially for clarification purposes, such as when jargon is used by lawyers or witnesses that the juror does not understand; 4) it is always helpful for courts and lawyers to know what jurors are thinking; 5) there was no instance that any panelist could remember of a juror question raising an issue in a way that allowed the party with the burden of proof to correct a deficit in their case; and 6) the enactment of the safeguards proposed by the

Committee would likely lead more courts to allow jurors to submit questions to witnesses.

In the subsequent Committee meeting, the Committee reviewed the very helpful panel discussion and decided to continue its research on the practice of juror questions of witnesses. Some issues that remain to be considered are: 1) how frequently juror questioning is already allowed in Federal courts across the country; and 2) how frequently courts using the practice have been found to be lacking sufficient safeguards.

2. Illustrative Aids

At its spring 2022 meeting, the Advisory Committee unanimously approved, for publication for public comment, a new Rule 611(d), which sets forth a distinction between demonstrative evidence and illustrative aids and imposes requirements on the use of illustrative aids at trial. The Standing Committee unanimously approved the proposal, which was released for public comment in August. A panel was convened in Phoenix to provide comment on the proposed rule. The panel included the professor who drafted a similar rule in Maine. He concluded that proposed Rule 611(d) would be valuable, because courts and litigants have had difficulty in distinguishing demonstrative evidence (from which one derives inferences) from illustrative aids (which are not evidence). The professor concluded that the experience in Maine showed that the rule was a helpful ordering device, and that it had not given rise to any problems of interpretation in the courts.

The judges and lawyers on the panel expressed concern about the rule. Almost all of that concern was focused on the notice requirement in the rule. Panelists pointed out that there would be many situations in which an illustrative aid is used and advance notice could not be provided — such as where an illustration is made by a witness in the moment and without prior preparation. The lawyers also contended that an advance notice requirement would be problematic as to illustrative aids used in opening and closing arguments.

In the meeting, the Committee carefully considered the comments of the panelists. The sense of the Committee was that the notice requirement should be deleted, and the question of notice should be left to the discretion of the court. The Committee further concluded that if the objections about notice are thus addressed, the rule remaining would provide valuable guidance in distinguishing illustrative aids and demonstrative evidence — and it also would be helpful in distinguishing between summaries of voluminous evidence (covered by Rule 1006) and summaries that are offered not as evidence but only to assist the factfinder in understanding evidence or argument. The Committee adhered to its belief that it is important to write a rule on illustrative aids, as they are used in every case and yet there is nothing in the Evidence Rules that specifically addresses their use. A final vote on the proposed rule, with the notice requirement dropped from the rule, will be taken in the spring, hopefully with the benefit of more public comments.

B. Prior Inconsistent Statements ---- Rule 613(b)

A proposed amendment to Rule 613(b) is currently out for public comment. 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 occur even after the 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 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 Committee is awaiting public comment on the proposed amendment and will process any comments at its next meeting.

C. Rule 801(d)(2) --- Hearsay Statements by Predecessors

A proposed amendment to Rule 801(d)(2) is currently out for public comment. 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 the statement should be admissible, because it would be admissible against the declarant had the cause of action or defense been kept by the declarant.

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

D. Rule 804(b)(3) and the Corroborating Circumstances Requirement

A proposed amendment to Rule 804(b)(3) is currently out for public comment. 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. The rationale for that amendment 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 proposed rule out for public comment tracks the 2019 amendment to Rule 807 and states that the court must consider evidence, if any, that corroborates the hearsay statement.

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

E. Rule 1006

A proposed amendment to Evidence Rule 1006 is currently out for public comment. 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 for the underlying voluminous records); 2) requiring all underlying voluminous materials to be in fact admitted into evidence; 3) refusing to allow resort to a Rule 1006 summary if any underlying materials have been admitted into evidence; and 4) allowing Rule 1006 summaries to include argument and inference not contained in the underlying materials.

The proposed amendment addresses and corrects the above problems, and also states

specifically that a summary that simply promotes the factfinder's understanding of the evidence is covered by the rule on illustrative aids, and not by Rule 1006.

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

IV. Minutes of the Fall 2022 Meeting

The draft of the minutes of the Committee's fall 2022 meeting is attached to this report. These minutes have not yet been approved by the Committee.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

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(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:

(A) its utility in assisting comprehension is not [substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and

(B) all parties are given notice and a reasonable opportunity to object to its

[1] New material is underlined in red.

use, unless the court, for good cause, orders otherwise.

(2) ***Use in Jury Deliberations.*** An illustrative aid must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record.*** When practicable, an illustrative aid that is used at trial must be entered into the record.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term is vague and has been subject to differing interpretation in the courts. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and

which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. *Cf*. Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers [substantially] outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. *Cf*. Rule 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to

allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 613. Witness's Prior Statement

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(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after 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~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement. This requirement of a prior

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

foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g.*, *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The original rule imposed no timing preference or sequence, however, and permitted an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain

circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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

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(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

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(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

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(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or

the principal under this rule is also admissible against the party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

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(b) The Exceptions. * * *

(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

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

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness~~, if offered in a criminal case as one that tends to expose the declarant to criminal liability~~ after considering the totality of circumstances under which it was made and evidence, if any, corroborating it.

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it. While most courts have considered corroborating evidence, some courts have refused to do so. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement that tends to expose the declarant to

criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

The amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like *Donnelly v. United States*, 228 U.S. 243 (1912), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a 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.

(b) Procedures. The proponent must make the underlying 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.

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

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly

supported Rule 1006 summary because the underlying writings or recordings – or a portion of them – *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court," the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous, admissible information offered to prove a fact, and summaries of evidence offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

TAB 7B

Advisory Committee on Evidence Rules
Minutes of the Meeting of October 28, 2022
Sandra Day O'Connor College of Law
Phoenix, Arizona

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 28, 2022 at the Sandra Day O'Connor College of Law in Phoenix, Arizona.

The following members of the Committee were present:

Hon. Patrick J. Schiltz, Chair
Hon. Shelly Dick
Hon. Mark S. Massa
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Arun Subramanian, Esq.
James P. Cooney III, 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. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
H. Thomas Byron III, Esq., Rules Committee Chief Counsel
Timothy Lau, Esq., Federal Judicial Center
Professor Jessica Berch, Sandra Day O'Connor College of Law

Present via Zoom:

Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Bridget Healy, Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff

Draft

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting. He noted that Federal Public Defender Renee Valladares and Principal Associate Deputy Attorney General Marshall Miller could not be present due to work obligations. The Chair explained that Betsy Shapiro was present on behalf of the Department of Justice. The Chair introduced two new distinguished members of the Committee: Justice Mark Massa of the Indiana Supreme Court and James Cooney a Partner in Womble, Bond & Dickinson in North Carolina. The Chair also welcomed Judge Hannah Lauck, the new liaison to the Committee from the Civil Rules Committee.

Approval of Minutes

A motion was made to approve the minutes of the May 6, 2022 Advisory Committee meeting. The motion was seconded and approved by the full Committee.

Report of Standing Committee Meeting

The Chair then gave a report on the June 2022 Standing Committee meeting. He informed the Committee that the Standing Committee gave unanimous final approval to the proposed amendments to Rules 106, 615, and 702. He noted that the Judicial Conference subsequently approved the amendments and that all three had been passed on to the United States Supreme Court.

The Chair explained that the Standing Committee also approved the publication of proposed amendments to Rules 611(d), 613(b), 801(d)(2), 804(b)(3), and 1006. He noted that the Committee's proposal to add to Rule 611 procedural safeguards that would apply if a trial judge decided to allow jurors to pose written questions to witnesses was sent back to the Committee for further study.

II. Pending Amendment Proposals

The Chair opened the discussion by commenting on the top-notch quality of the morning symposium exploring rulemaking proposals with respect to illustrative aids and procedural safeguards for jury questions. He thanked Professor Capra for his tremendous work in finding highly qualified panelists and in moderating the discussion. He also thanked Professor Berch for her outstanding support in hosting the symposium. The Chair suggested that the Committee discuss all of the other amendment proposals currently before the Committee prior to turning to a discussion of the symposium and of illustrative aids and jury questions.

Draft

A. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement

The Chair asked Professor Richter to brief the Committee with respect to the proposal to amend Rule 613(b). Professor Richter directed the Committee's attention to the proposal that would require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness's prior inconsistent statement. She explained that the proposed amendment would require that the witness have an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of that statement could be offered in the usual case, but would retain the trial court's discretion to delay or forgo the foundation under appropriate circumstances. She reminded the Committee that the flexible timing in the existing rule has the potential to cause inefficiencies and problems in practice. She noted that many judges require a prior foundation to avoid these difficulties notwithstanding the flexible timing embodied in the rule. She explained that the proposed amendment was designed to bring the rule into alignment with practice in this area.

Professor Richter informed the Committee that no public comments had been received to date with respect to the proposal. She suggested that the Committee change the second use of the word "prior" in the first sentence of the proposed Committee note to "before" to avoid using the word "prior" twice in the same sentence. All Committee members agreed with that minor change and offered no further comment on the proposal.

B. Party-Opponent Statements offered against Successors / Rule 801(d)(2)

The Chair asked the Reporter to brief the Committee on the proposal to amend Rule 801(d)(2). The Reporter reminded the Committee that party-opponent statements admissible against a declarant or the declarant's principal are excluded by some courts when a successor party stands in the shoes of the declarant or the declarant's principal. The proposed amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant's principal. The Reporter informed the Committee that no public comments had been received to date with respect to the proposal.

The Reporter explained that a member of the Standing Committee offered one suggestion with respect to the proposal. He called the Committee's attention to the final paragraph of the proposed committee note, which explains that the declarant's statement is not admissible against the successor in interest if it was made *after* the transfer of the interest to the successor. A member of the Standing Committee suggested that this limitation was sufficiently important to be included in rule text, rather than in the committee note. The Reporter opined that the limitation should not be added to rule text and was best left in the committee note for two reasons. First, he noted that the circumstance in which a transfer of interest precedes the declarant's statement is exceedingly rare; there are no reported cases on the subject. He suggested that such an unusual circumstance need not be treated in rule text. Second, the Reporter explained that capturing this concept would be linguistically complicated and could undermine the clarity of the principal advance of the amendment (making statements admissible against successors that would have been admissible against the declarant). The Chair agreed on both points and suggested that the Committee should

respectfully decline to add the note language to the rule text. Professor Coquillette also agreed, opining that the complex and exceptional concept of post-transfer statements would undermine the amendment if it were added to rule text. No Committee member voiced a contrary position.

Judge Bates pointed out that the rule text provides for admissibility when a party's claim or liability is "directly derived" from a declarant or declarant's principal. He noted that the final sentence of the first paragraph of the Committee note that appeared on page 169 of the agenda materials discusses a party "that derives its interest from a declarant" without using the modifier "directly." He proposed adding the modifier "directly" to the committee note to match rule text. All Committee members agreed and the Reporter promised to make the change.

C. Rule 804(b)(3)

Professor Richter briefed the Committee on the proposed amendment to Rule 804(b)(3)(B), the hearsay exception for statements against interest. She reminded the Committee that the amendment would resolve a conflict in the courts by directing courts to consider "the totality of circumstances" as well as "evidence, if any, corroborating" the statement in determining whether a statement against penal interest offered in a criminal case is supported by corroborating circumstances that clearly indicate its trustworthiness. She noted that no public comments had been received to date.

Professor Richter explained that a member of the Standing Committee had offered one suggested change to the proposed amendment. The suggestion was to add rule text directing the court to consider evidence *contradicting* the proffered statement against penal interest, as well as evidence corroborating it. Professor Richter explained that it may not be advisable to add language about contradictory evidence to the text of the proposed amendment for three reasons. First, the existing text of the amendment that directs courts to consider corroborating evidence, if any, logically means that contradictory evidence cuts against admissibility. She noted that courts currently applying a similar requirement under Rule 807 properly recognize the impact of contradictory evidence even though contradiction is not included in rule text. Second, Professor Richter explained that the amendment to Rule 804(b)(3)(B) was designed to track the 2019 amendment to Rule 807 and that the text of Rule 807 does not expressly direct courts to consider contradictory evidence undercutting admissibility. She explained that Rules 804(b)(3) and 807 would utilize slightly distinct language to address the same issue if the concept of contradiction were added to the Rule 804(b)(3)(B) amendment. An argument could even be made that the two rules should be interpreted differently due to the use of distinct language. Finally, Professor Richter explained that, to the extent that there could be any question whether the amendment to Rule 804(b)(3)(B), as published, includes the consideration of information contradicting the statement against interest, the committee note specifically addresses this issue in two separate places, stating that: courts should "consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it" and that "Courts must also consider evidence that contradicts the declarant's account."

The Chair agreed, while observing that he would favor adding contradiction to the text of the Rule 804(b)(3)(B) amendment if Rule 807 did not already address the concept without that

language. But he added that judges and litigants might wonder why a contradiction consideration was included in Rule 804(b)(3)(B) but left out of Rule 807 if the Committee were to add it to the proposed amendment. The Committee agreed.

One Committee member noted that Rule 804(b)(3)(B) uses the term "corroborating" twice – once in requiring that a statement against penal interest be "supported by corroborating circumstances that clearly indicate its trustworthiness" and again in directing courts to consider "evidence, if any, corroborating" the statement. He queried whether the two uses of the term were redundant. The Reporter explained that both are necessary and that they are not redundant. The first use is a term of art --- "corroborating circumstances" --- that describes the *finding* the trial court must make to admit a statement against penal interest in a criminal case. The second and amended reference to corroborating evidence describes the information that a court should *use* in making the requisite finding. Because the Committee does not want to alter the original term of art used to describe the requisite finding, two uses of the term "corroborating" are necessary. The Chair concurred, noting that using the term twice may not be artful, but it is necessary to clarify that courts should look to the existence of corroborating evidence without disturbing the well-established term of art included in the original rule. Professor Richter closed the discussion by noting that the Committee should consider deleting the term "corroborating" from the second sentence of the committee note on page 175 of the agenda and replacing it with the term "such" to make the note language more efficient. The Committee agreed.

D. Rule 1006 Summaries

Professor Richter then briefed the Committee on the proposed amendment to Rule 1006 that would clarify the foundation necessary for admitting a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter explained that the Committee had received one public comment with respect to Rule 1006. Although the commenter expressed strong support for the proposed amendment, he suggested that the Committee add language to the text of the amended rule clarifying the longstanding part of the foundation for Rule 1006 summaries to be *admissible* even if they need not be *admitted*. Professor Richter explained that this admissibility requirement was not one that courts had misapplied and that it had not been included in the clarifying amendment proposal for that reason. Still, she noted that the issue seemed important to address and that the agenda memo behind tab 7 had raised the same issue prior to receipt of the comment. She explained that the Committee could clarify the admissibility requirement in the committee note to the amendment. But she opined that a modest modification to rule text would be superior to avoid any inference that the admissibility requirement of the foundation had been altered. She offered the Committee two options for modification of the amendment in a supplemental memo dated October 28, 2022. Option 1 would simply add the word "admissible" before the word "voluminous" in the proposed amendment, to state clearly that the underlying materials must be admissible. Option 2 would provide that the "court may admit as evidence a summary, chart, or calculation to prove the

content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court but are otherwise admissible….” All Committee members agreed that the text of the amendment should be modified to include the admissibility requirement. In addition, all members of the Committee preferred Option 1 that would make the change with a single word.

The Committee also determined that it would reorder the words “voluminous, admissible” in the first sentence of the final paragraph of the committee note on page 183 of the agenda materials so that it reads “admissible, voluminous” to track the order used in the language of the rule. Judge Bates opined that the first sentence of the final paragraph of the committee note on page 183 of the agenda materials was grammatically incorrect. All agreed to modify the first sentence of the final paragraph of the Committee note so that it reads: “The amendment draws a distinction between summaries of admissible, voluminous information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence.”

E. Juror Questions to Witnesses

The Chair launched the discussion of juror questions by praising the high quality of the symposium hosted by the Committee on the morning of the meeting that explored issues of juror questions and illustrative aids. Professor Coquillette commented that it was one of the best symposia he had ever observed. The Chair noted that the Standing Committee had sent a proposed amendment providing procedural safeguards to be used when jurors are permitted to ask questions back to the Committee for further study. He queried whether the Committee wished to continue pursuing such a rule after listening to the panel presentation and, if so, whether the Committee wished to make any changes to the existing proposal.

One Committee member inquired whether there was data regarding the particular regions of the country allowing jurors to pose questions. The Reporter offered that the data was imperfect but that the practice appeared to be uncommon on the east coast, prevalent in the Seventh Circuit, common in California and “spotty” in the mid-west. Judge Bates noted that the practice is not followed on a court-by-court basis and that it is adopted by individual judges. He explained that not all California judges allow jurors to submit questions to witnesses.

Another Committee member stated that the chief objection to the proposed amendment is the fear that it would implicitly endorse the practice of allowing jurors to pose questions --- even though the provision disavows such an intent. He asked whether Committee members think that an amendment providing safeguards when juror questions are allowed would be perceived as an endorsement and whether it would have the effect of increasing the practice. The Reporter suggested that the proposed rule could not fairly be read as an endorsement because it specifically says that the safeguards apply only “*if*” the trial judge decides to allow the practice and states in the note that the amendment takes no position on whether juror questions should be allowed. He noted that the amendment likely would make trial judges more comfortable with the necessary safeguards should they decide to allow questions --- and that way it might lead to more use of the practice. The Committee member responded that he remained concerned about a perceived endorsement that could unintentionally increase the practice.

Another Committee member queried whether there are academics or judges who do not like the practice. He noted that the panel consisted of those who had used juror questions and who supported the practice. The Reporter noted that studies indicate that those who are opposed to the practice are generally those who have never tried it. Another Committee member offered that there was merit in trying to impose order on the practice where it exists but opined that allowing jurors to pose questions fundamentally changes the nature of a trial. The Reporter noted that the problem the Committee was attempting to resolve concerned judges who already allow jurors to pose questions but have inadequate procedural regulation. Judge Bates inquired whether there are federal judges in Arizona who do not allow jurors to pose questions notwithstanding the prevalence of the practice in Arizona. The Reporter responded that he had not inquired of all Arizona federal judges but that Judge Campbell, for example, does permit juror questions, as does Judge Zipps, a member of the Standing Committee.

Another Committee member queried whether the procedural safeguards would fit better in Rule 614 governing questions by the judge. The Reporter noted that such a provision does appear in Indiana's counterpart to Rule 614 but opined that the provision was best included as a new subsection to Rule 611, because Rule 614 covers calling and questioning a witness, and jurors cannot call a witness --- so it is not a good fit. The Committee member asked whether the safeguards that are provided in circuit caselaw are already sufficient to regulate jury questions and whether the Committee was simply transplanting those existing safeguards into a rule, making an amendment less necessary. The Reporter replied that the safeguards were not uniform in the circuits and that the safeguards are characterized as "suggestions" rather than mandates in some cases. Another Committee member asked whether centralizing the procedural safeguards in an evidence rule would deprive the independent laboratories of the state and federal court systems of the opportunity to develop appropriate safeguards for this still emerging practice. The Reporter responded that an evidence rule would not stifle experiment and development if it sets minimum standards applicable to the practice, leaving room for additional safeguards above and beyond those specified in the rule.

Another Committee member queried whether such safeguards were best left in a best practices manual or jury instruction book. The Reporter noted that best practices manuals had not historically succeeded in improving practice. Judge Bates noted that the federal bench book had been very successful. He opined that safeguards would not fit in a jury instruction book because they are measures for the judge to take rather than instructions to the jury.

Judge Bates also cautioned the Committee to take a close look at the effect of juror questions in criminal trials. The Reporter explained that there are many trial judges already allowing juror questions in criminal cases and that the amendment would be designed to add safeguards when the court employs the practice. Judge Bates suggested that perhaps the safeguards should not be added to the evidence rules at all. They could go into the Federal Rules of Civil Procedure and regulate juror questioning, if any, in the civil context. Another Committee member voiced concerns about juror questions in the criminal context, explaining that a criminal trial is an adversarial proceeding in which the prosecution bears the burden of proving its case beyond a reasonable doubt. He opined that he would be wary of allowing juror questions to alert the prosecution to defects in its case and explained that the result should simply be an acquittal if the government leaves unanswered questions. The Reporter noted that he had done substantial

research on juror questioning and interviewed many judges and lawyers with experience with juror questioning in criminal cases --- and he had yet to find or hear of an example of a juror question that helped the prosecution prove its case by evidence it would not otherwise have presented.

The Reporter commented that the Committee needs to determine whether safeguards in the evidence rules would encourage juror questions and, if so, whether it is superior to leave safeguards to a hodgepodge of caselaw in the courts where juror questions are already being used. Judge Bates queried whether there are federal appellate cases finding error due to a lack of proper procedural safeguards when juror questions were allowed. The Reporter responded that there are plenty of cases finding errors, though they often find the errors to be harmless. Judge Bates then asked whether the appellate cases found that it was error to allow jury questions at all or whether they found error in the procedures used in permitting juror questions. The Reporter responded that the majority of cases involve errors in the methodology used for permitting juror questions. For example, a court erred in allowing juror questions without allowing the lawyers an opportunity to object to the questions. Another erred in browbeating jurors to ask more questions. And in another, the judge allowed the jurors to pipe up in the middle of lawyers' examinations to ask questions without allowing controls for vetting the questions.

Another Committee member asked whether the Committee could do a judicial survey to ascertain how many federal judges are currently allowing jury questions. He suggested that a rule providing procedural safeguards might well be needed if the number is significant. Professor Struve noted that a 2007 study found that juror questions were allowed in 11.4% of criminal cases and in 10.9% of civil cases. The Reporter suggested that the numbers have increased since 2007. Another Committee member noted that the NYU civil jury project found that 25% of judges in state and federal court permit juror questions. A Committee member commented that these numbers reflected not insignificant use of juror questions, necessitating safeguards. He queried whether the safeguards in the existing caselaw were adequate to deal with the existing use of juror questions. Allowing the safeguards to remain in caselaw would avoid enacting a rule that *could be perceived* as an endorsement of jury questions (even if the rule disavows such an endorsement). The Reporter noted that the safeguards in the existing caselaw may not be adequate to provide the requisite protection because some of them are characterized as "suggestions" rather than as mandates.

A Committee member noted that the discretionary practice of allowing juror questions came to California as part of a larger project to improve the role of the jury in the trial process. The practice was not designed primarily to allow jurors to obtain the information sought by their questions, but rather to improve their engagement and understanding and to ensure that jurors felt they had the tools to get to the right answer. Thus, juror questions were part of a broader project to develop best practices for jury cases. Other related advances were pre *voir dire* mini-opening statements to orient prospective jurors, instructions that preceded the introduction of evidence, plain language instructions, juror binders, juror notetaking – all designed to provide jurors better tools to decide cases. Another Committee member noted that Indiana had engaged in the same process in the 1990's and that Indiana Rule 614 gives trial judges the discretion to allow juror questions in both civil and criminal cases. Another Committee member noted that the Seventh Circuit participated in a pilot project allowing juror questions and then instituted the practice after a favorable response.

A Committee member commented that judges and lawyers should constantly strive to improve the trial process, but that not all improvements belong in an evidence rule. The Reporter explained that the judges who do allow juror questions do so under the umbrella of Rule 611(a) and that the idea for an evidence rule offering safeguards for juror questions was part of a project designed to take some of the practices judges engage in under the vague auspices of Rule 611(a) and to make them more defined in rule text. He noted that the proposal to add a subsection to Rule 611 governing the proper use of illustrative aids was born out of this same initiative.

A Committee member pointed out that all judges allow jurors to pose questions after deliberations begin. He suggested that he leans toward proposing a rule to add procedural safeguards given that the practice is already permitted in a not insignificant number of courts. He argued that the issue is one of evidence because juror questions that are allowed will produce evidence in a case. Finally, he noted that there is no time in the heat of a trial to look through caselaw to locate appropriate safeguards and that judges need such things in one readily accessible location. The Reporter commented that the committee note to the existing proposal points out that the rule is not an endorsement of the practice but suggested that the note could make that point even more forcefully to avoid any inference of an endorsement. A Committee member also noted that the current text of the proposal imposes safeguards "if" the trial judge permits questions. He suggested that the rule text could further negate any inference of endorsement by adding another "if" to the heading for subsection (e)(2) of the proposed provision so that it reads: "Procedure If Court Allows Juror Questions." The Reporter summarized the plan to make the rule text even more provisional (or iffy) and to further negate any endorsement of the practice in the Committee note. He cautioned that the Committee would not want to say anything negative about the practice in the note, however, because that would put a thumb on the scale in the other direction.

The Chair asked the Reporter to return to the Committee with an alternate draft of the proposal to add procedural safeguards to be used when juror questions are allowed. The new version will aim to further ameliorate any concern about endorsing or encouraging the practice of allowing juror questions. He noted that it would be helpful to review findings made by the Ninth Circuit that led it to reject juror questions in criminal cases that were referenced during the morning symposium. One Committee member suggested that the alternative draft add a provision requiring that all jury questions be made part of the record – whether they are ultimately asked or not. Another Committee member suggested deleting subsection (e)(1)(F) of the proposed provision. All Committee members agreed that subsection (F) (requiring an instruction that jurors are not to act like advocates) added little and should be removed. The Reporter agreed to redraft the provision with all comments in mind. Another Committee member asked whether it is inconsistent to tell jurors not to discuss a case until deliberations begin but then to allow them to ask questions that may reveal their thinking to other jurors. The Reporter replied that the panelists at the morning symposium who regularly allow juror questions reported that most are clarifying only. For example, a juror might ask what an acronym thrown around at trial stands for. He also suggested that requiring anonymity of jurors asking questions as a safeguard may be unworkable in light of courtroom realities and promised to cut anonymity from the proposed rule.

F. Illustrative Aids

The Chair opened the discussion of proposed Rule 611(d), that would regulate the use of illustrative aids at trial. The proposal is currently out for public comment. He explained that he emerged from the morning symposium thinking that it would be very helpful to have a rule that provides a framework for judges and lawyers working with illustrative aids, despite the fact that several panelists expressed concerns about the issue of notice. He opined that it would still be very helpful to tell litigants that illustrative aids do not go to the jury room in the typical case and that it would still be very helpful to provide that all illustrative aids should be preserved for the record. He observed that the issue of notice of illustrative aids was the only portion of the proposal causing concern for panelists and that a notice requirement could be removed from the proposed amendment. He explained that an accompanying committee note could explain that the issue of notice was to be resolved according to the trial judge's discretion on a case-by-case basis.

Judge Bates remarked that many panelists expressed concerns about including illustrative aids used during openings and closings in an amendment. The Chair replied that the concerns about openings and closings related exclusively to the notice issue and that those concerns would be eliminated if the notice requirement were eliminated from the rule. Another committee member asked whether something used by a lawyer during closing arguments even qualifies as an illustrative aid. He suggested that openings and closings should be excluded from the coverage of the rule. The Reporter reiterated that concerns about openings and closings are eliminated if there is no advanced notice required by the amendment. The Committee member responded that including openings and closings in the rule would create a potential objection available when a lawyer does something such as creating a timeline during a closing and could cause mischief. Another Committee member asked whether the amendment could be written to cover illustrative aids summarizing only "evidence" as opposed to "argument." The Chair stated that it would not be advisable to exempt openings and closings from coverage as that could be seen as eliminating regulation of materials used during arguments. He noted that parties could object to an aid used during argument, such as a timeline, as misleading under current law. Thus, an amendment would not be creating the possibility of an objection where there is none currently. Another Committee member noted that the current proposal treats only aids that help the fact finder understand "admitted evidence" and explained that the Committee should add the word "argument" to rule text if it is intended to cover openings and closings.

The Chair asked whether the balancing test included in subsection (d)(1) could create any potential concerns. The Reporter argued that it would not because it reflects the balancing test courts currently apply in deciding whether to allow an illustrative aid. The Chair remarked that the balancing test would give judges and lawyers some common vocabulary to utilize in discussing the use of illustrative aids.

Judge Bates inquired whether subsection (d)(1)(B) of the current draft rule containing the notice provision should be eliminated altogether or whether it should retain the requirement that parties be afforded a "reasonable opportunity to object" to an illustrative aid. The Chair commented that Professor Richter had suggested eliminating the notice requirement from that subsection while retaining the requirement that lawyers receive a reasonable opportunity to object, leaving it to individual judges to determine what opportunity is reasonable for a given illustrative aid. The Chair thought that eliminating subsection (d)(1)(B) altogether made more sense because the subsection would achieve little once stripped of the notice requirement. There will always be

an opportunity to object, whether or not there is language in the rule; again, the problem is notice. Another Committee member asked whether the rule would be eliminating any obligation to provide notice of an illustrative aid before revealing it to the jury if it removes the notice provision. The Chair responded that trial judges clearly possess the authority to order notice as appropriate, even without a provision in the rule, and that the committee note could so state. Judge Bates cautioned the Committee against placing a substantive rule in the committee note. The Chair suggested that the note could explain that there are an infinite variety of illustrative aids and that notice may vary markedly depending on the circumstance. He suggested that the note might provide examples of illustrative aids on different ends of the spectrum and suggest the type of notice that could be appropriate for each. The Reporter explained that the note should not include examples of notice if the rule contains no notice requirement.

Judge Bates also inquired whether the committee note would explain when a power point is or is not an illustrative aid. The Chair said it would not and that it would be better to leave broad language that allows a trial judge to determine what qualifies in any given case.

A Committee member offered her thoughts that the proposed rule is a good one that would help distinguish between demonstrative evidence and illustrative aids and that would provide some common vocabulary around an issue that confuses judges and lawyers. She suggested that the proposed rule ought to preserve a judge's discretion to send an illustrative aid to the jury room in appropriate circumstances. Judge Bates suggested that the rule provide that "illustrative aids are not evidence and are not to go to the jury room absent consent" unless the judge for good cause orders otherwise.

The Reporter noted that the Committee had not discussed whether to leave the term "substantially" in the balancing test currently in Rule 611(d)(1)(A). He commented that the proposed rule had been published with the term "substantially" in brackets to invite public comment on that point and that the Committee would get feedback on the issue for the spring meeting. The Chair explained that the Reporter would return to the Committee in the spring with a new draft of proposed Rule 611(d) that reflected the Committee's discussion. He remarked that the symposium had worked beautifully because it had provided the Committee with helpful feedback that improved the proposal.

III. Closing Matters

The Chair thanked the Committee and all participants for their contributions. He announced that the spring meeting would take place on April 28, 2023 in Washington D.C. He explained that public hearings on the published amendments had been set for January 20 and 27 2023, but that no requests to present had yet been received.

Respectfully Submitted,

Liesa L. Richter

TAB 8

TAB 8A

JUDICIARY STRATEGIC PLANNING (ACTION)

The Committee will consider providing recommendations to the Executive Committee regarding the strategies and goals from the *Strategic Plan for the Federal Judiciary (Plan)* that should receive priority attention over the next two years.

PRIORITY SETTING

The *Plan,* updated by the Judicial Conference in September 2020 (JCUS-SEP 2020, pp. 13-14), identifies strategies and goals to enable the federal judiciary to continue as a model in providing fair and impartial justice. The approach to strategic planning, approved by the Conference when the *Plan* was first adopted, provides for the identification, every two years, of strategies and goals from the *Plan* that should receive priority attention (JCUS-SEP 2010, pp. 5-6). Upon consideration of recommendations from Conference committees, the Executive Committee identifies these priorities (JCUS-SEP 2010, p. 6).

At its February 2021 meeting, after reviewing the input from Judicial Conference committees, the Executive Committee added seven new strategies (1.3, 2.1, 2.4, 4.1, 4.3, 6.3 and 7.1, asterisked below) and affirmed four strategies and one goal previously identified (2018, 2016, 2013, 2011) to establish the following twelve priorities:

Strategy 1.1	Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.
Strategy 1.2	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Strategy 1.3*	Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.
Strategy 2.1*	Assure high standards of conduct and integrity for judges and employees.
Strategy 2.4*	Encourage involvement in civics education activities by judges and judiciary employees.

Strategy 3.1	Allocate and manage resources more efficiently and effectively.
Strategy 4.1*	Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements.
Strategy 4.3*	Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.
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.
Goal 5.1d	Continuously improve security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.
Strategy 6.3*	Promote effective administration of the criminal defense function in the federal courts.
Strategy 7.1*	Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

At its February 2023 meeting, the Executive Committee will consider which strategies and goals should receive priority attention over the next two years, 2023-2024. Committee input is critical to the Executive Committee's deliberations.

Judicial Conference committees are encouraged to pay particular attention to priority strategies and goals in committee planning and policy development activities, in setting the agendas of future meetings, and when making resource allocation decisions and assessing cost-containment proposals. Committees are also asked to consider priority strategies and goals in the identification of committee-requested studies and analyses, and in the development of strategic initiatives to help implement the *Plan.* During their summer 2023 meetings, committees will be asked to report on the status of their strategic initiatives. At those meetings, committees may review current efforts relating to priority strategies and goals, and consider whether any additional projects or activities might be reported to the Executive Committee in the future as strategic initiatives supporting the implementation of the *Plan*.

Action Requested: On or before January 9, 2023, [or for those committees meeting in January, one week after your committee's meeting], the Committee is asked to provide recommendations to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge L. Scott Coogler, regarding the prioritization of the *Strategic Plan for the Federal Judiciary*'s strategies and goals over the next two years.