

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

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

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie

Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zippis

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

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

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

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

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

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

OPENING BUSINESS

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

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

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

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

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

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

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

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

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

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

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

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

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

Redaction of Social Security Numbers

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

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

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

Joint Subcommittee on Attorney Admission

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Item

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Information Items

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Action Item

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

OTHER COMMITTEE BUSINESS

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

Action Item

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

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

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

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

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

CONCLUDING REMARKS

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