

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 28, 2020 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Phoenix, Arizona, on January 28, 2020. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.

Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipp

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –

Judge Michael A. Chagares, Chair (by telephone)
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –

Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Bankruptcy Rules –

Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Evidence Rules –

Judge Debra Ann Livingston, Chair
Professor Liesa L. Richter, Consultant

Advisory Committee on Criminal Rules –

Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter (by telephone); Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers and Julie Wilson, Rules Committee Staff Counsel; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. This meeting is the last for Judge Srikanth Srinivasan, who in a few weeks will become the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Judge Campbell thanked Judge Srinivasan for his contributions as a member of the Committee and wished him well in this new assignment. Judge Campbell welcomed three new members of the Standing Committee: Judge Gene Pratter, Kosta Stojilkovic, and Judge Jennifer Zipps. Judge Campbell also welcomed Judge Raymond Kethledge, who began his tenure as Chair of the Criminal Rules Advisory Committee last October. Judge Campbell noted the addition of a new member of the Rules Committee Staff, Brittany Bunting. Judge Campbell also recognized Julie Wilson, Rules Committee Staff Counsel, for reaching the milestone of 15 years of service with the federal government.

Scott Myers reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2019. The chart also shows the interim Bankruptcy Rules that have been recommended for adoption as local rules with an effective date of February 19, 2020. Also included are the rules approved by the Judicial Conference in September 2019 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2020, provided the Supreme Court approves them and Congress takes no action to the contrary.

Judge Campbell asked the judge members of the Committee if they had occasion in their courts to address new Criminal Rule 16.1, which went into effect on December 1, 2019. No judge member had yet addressed Criminal Rule 16.1. Judge Campbell observed that it would be good to raise awareness about the new Rule. He noted that he had occasion in a recent trial to apply the amended version of Evidence Rule 807, which also took effect last December, and found it much easier to apply than its predecessor. Judge Campbell also noted that the pending amendment to Evidence Rule 404(b) would have been helpful in a recent case, if it had been in effect.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 25, 2019 meeting.**

REPORT ON MULTI-COMMITTEE ITEMS

Judge Chagares, Chair of the Appellate Rules Advisory Committee, reported on the E-filing Deadline Joint Subcommittee which was formed to analyze whether e-filing deadlines should be earlier than midnight. One key question under study is whether the midnight deadline negatively affects quality of life, particularly for young associates and staff. The subcommittee's consideration of e-filing deadlines is in part inspired by filing rules in Delaware. The rules in Delaware state court were amended effective September 2018 to provide for a 5:00 p.m. (ET) electronic-filing deadline. This accorded with similar local provisions in the District of Delaware that provide for a 6:00 p.m. (ET) electronic-filing deadline. The subcommittee has solicited

comments from the American Bar Association, paralegal and legal assistant associations, and law schools. The first public suggestion on this e-filing proposal voicing support for the proposal was received at 1:48 a.m. on the morning of the Appellate Rules Advisory Committee's fall meeting.

Professor Cooper, Reporter to the Civil Rules Advisory Committee, reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee. The subcommittee was formed to consider the implications of the Supreme Court's holding in *Hall v. Hall*, 138 S. Ct. 1118 (2018), that consolidation under Civil Rule 42(a) of originally-separate lawsuits does not merge those lawsuits for purposes of 28 U.S.C. § 1291's final-judgment rule. The *Hall v. Hall* Court suggested that, if this holding created any problems, the Rules Enabling Act process would be the right way to address them. Dr. Emery Lee of the Federal Judicial Center is undertaking a deep review of cases filed in 2015-2017. Those cases were filed, but may or may not have gone to final disposition, before the Court's decision in *Hall v. Hall*; it may be necessary to expand the period of study to include cases filed in three subsequent years.

Judge Chagares reported on a proposal, concerning the computation of deadlines, that was considered by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules at their respective fall 2019 meetings. The proposal came from Sai, who has submitted helpful rules suggestions over the years. Sai proposed a rule that would require courts to calculate all deadlines and tell the parties the dates of those deadlines. The committees recognized that such a practice would be helpful to litigants, particularly to pro se litigants, but concluded that it would be impracticable, and unduly burdensome, to task the courts with such a duty. Accordingly, the advisory committees have removed this proposal from their agendas.

Professor Hartnett, Reporter to the Appellate Rules Advisory Committee, described the advisory committees' consideration of another suggestion submitted by Sai. The standards for *in forma pauperis* (i.f.p.) status currently vary across districts, and Sai proposes replacing those varying standards with a nationally uniform one. Sai also raised concern about the Administrative Office forms that courts use to gather information bearing on i.f.p. status; Sai argues that some questions on these forms are ambiguous and/or unduly intrusive. After the advisory committees considered this proposal at their fall 2019 meetings, the Civil Rules Committee removed the proposal from its agenda, but the Appellate Rules Committee retained the proposal on its agenda, and the Criminal Rules Committee expressed the intention to follow the other committees' lead on the matter. The Appellate Rules Committee's interest in this item, Professor Hartnett explained, stemmed partly from the fact that – unlike the other sets of national Rules – the Appellate Rules have an official Form (Form 4) dealing with requests to proceed i.f.p. in the courts of appeals. Further, Supreme Court Rule 39 directs that litigants use Form 4 when seeking i.f.p. status in the Supreme Court. A participant asked why the Civil Rules Advisory Committee had removed the item from its agenda. Judge Bates, the Chair of that committee, explained that although the committee recognized the potential problems with the variation in standards for i.f.p. status, it could not see how to establish a workable single standard for 94 districts given the variety of financial circumstances across the districts. But, he noted, the Civil Rules Advisory Committee referred the forms questions raised by Sai to the Administrative Office, the entity that maintains certain district-court forms (including Forms AO 239 and 240 concerning requests for i.f.p. status). Professor Cooper, Reporter to the Civil Rules Advisory Committee, noted that that committee did not have occasion to reach questions relating to the scope limitation set by the Rules Enabling Act

– i.e., whether rulemaking on eligibility for i.f.p. status would alter substantive rights. Professor Cooper further questioned the feasibility of establishing a nationally uniform i.f.p. standard in light of regional variations in the cost of living.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Campbell prefaced the report by the Bankruptcy Rules Advisory Committee by thanking that committee for its admirably quick action in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA). Judge Dow in turn commended Professor Gibson and Scott Myers, who took the lead in that project; he noted that the courts have already expressed appreciation for the interim rules and forms. Judge Dow and Professors Gibson and Bartell then delivered the report of the committee, which last met on September 26, 2019, in Washington, DC. The Advisory Committee presented one action item and two information items.

Action Item

Official Form Amendments Made to Implement the HAVEN Act. The Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 became effective on August 23, 2019. The HAVEN Act was designed to exclude certain benefits paid to veterans or servicemembers (or their family members) from the Bankruptcy Code’s definition of “current monthly income.” A debtor’s “current monthly income” is used in means testing computations to determine the debtor’s eligibility for bankruptcy relief. Professor Bartell explained that the HAVEN Act does not affect the Bankruptcy Rules; however, its provisions require changes to three official forms: Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). The Advisory Committee approved the amended forms and recommends that the Standing Committee retroactively approve (and provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Struve, Reporter to the Standing Committee, commended Professor Bartell and Scott Myers for their work on these forms.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Information Items

Interim Rules and Official Forms to Implement the SBRA. The SBRA will go into effect on February 19, 2020. It creates a new subchapter V of chapter 11 of the Bankruptcy Code and provides an alternative to the current reorganization path for small businesses. Professor Gibson explained that the SBRA requires amendments to a number of Bankruptcy Rules and Forms. Because the SBRA will go into effect before the rules amendments could make it through the full Rules Enabling Act process, the Advisory Committee voted to have the amendments issued as

interim rules for adoption as local rules or by standing orders in each of the districts. The Advisory Committee modeled its approach on an expedited process followed in 2005 when interim rules were needed to respond to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At its fall 2019 meeting, the Advisory Committee discussed the proposed draft interim rules and forms and voted to seek approval for their publication for public comment. (There were some post-meeting revisions to the package, and the Advisory Committee approved those revisions by email vote in October 2019.) The resulting eight proposed interim rules and nine official forms were, in turn, approved for publication by the Standing Committee (by email vote). The package was published for four weeks during October and November 2019. The Advisory Committee received seven relevant comments, which provided helpful suggestions. In response, the Advisory Committee made some revisions to the published package and also approved a few interim changes that had not been published – namely, revisions to four additional rules and the issuance of a new rule. By an email vote that concluded in December 2019, the Advisory Committee unanimously decided to recommend the issuance of thirteen interim rules. It also approved nine new or amended official forms. The Advisory Committee approved the official forms pursuant to its delegated authority from the Judicial Conference to issue conforming or technical official form amendments subject to later approval by the Standing Committee and notice to the Judicial Conference. By email vote in December 2019, the Standing Committee unanimously approved the issuance of the rules as interim rules and approved the promulgation of the forms. Judges Campbell and Dow subsequently requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of the interim rules to the districts for adoption as local rules. The Executive Committee unanimously approved the request. Judges Campbell and Dow sent a memorandum to all chief judges of district courts and bankruptcy courts requesting local adoption of the interim rules to implement the SBRA until rulemaking under the Rules Enabling Act can take place. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules. Professor Gibson indicated that the Advisory Committee expects to bring to the Standing Committee's June 2020 meeting a request for approval for publication of permanent rules and forms.

Judge Dow commended the efforts of all involved in finalizing interim Bankruptcy Rules to be adopted by the districts as local rules in response to the SBRA.

Bankruptcy Rules Restyling. Professor Bartell remarked that the restyling process is going well. The style consultants have provided drafts of Parts I and II of the Bankruptcy Rules. The Restyling Subcommittee, reporters, and style consultants have exchanged different views on some changes to Part I. Professor Bartell noted that they are close to the point of finalizing Part I. The subcommittee has three meetings scheduled in the next six weeks to discuss the draft of Part II. The subcommittee expects to present final drafts of Parts I and II to the Advisory Committee at its spring 2020 meeting and, if approved, to request permission to publish from the Standing Committee at its mid-year meeting. Professor Bartell commended the style consultants for their wonderful work on these rules. The subcommittee is thrilled with what it is receiving from the style consultants and thinks that everyone involved in bankruptcy practice will be pleased with the restyled rules.

Judge Campbell noted that the restyling endeavor will be a multiyear effort and has gone very well over the past year. He commended Judge Krieger for her work chairing the subcommittee. Judge Dow thanked the style consultants, Professor Bartell, and Judge Krieger for their work throughout this process. In response to a question about the anticipated publication process, Judge Dow explained that the Advisory Committee intends to seek publication in stages but will hold all restyled rules for final approval and adoption at one time. Judge Dow expects that Parts I and II will be ready to present to the Standing Committee at the Standing Committee's June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on October 30, 2019, in Washington, DC. The Advisory Committee presented several information items.

Rule 3 (Appeal as of Right — How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Proposed amendments to Appellate Rules 3 and 6 and Forms 1 and 2 are out for public comment. The Advisory Committee has received few comments thus far. The Advisory Committee has been considering this project since fall 2017, and its work finds new support in the Supreme Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act. After identifying inconsistencies among different jurisdictions in how notices of appeal are treated, the Advisory Committee proposed rule amendments to reduce inadvertent loss of appellate rights by the unwary. The Advisory Committee expects to seek final approval of the amended rules and forms from the Standing Committee at its mid-year meeting.

Professor Hartnett explained that some litigants have mistakenly believed that they must designate every order they wish to challenge on appeal. The proposed amendment to Appellate Rule 3 would alert readers to the merger principle without trying to codify it. It would also add a provision stating that a notice of appeal encompasses the final judgment as long as it designates "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or an order described in Appellate Rule 4(a)(4)(A) — i.e., an order disposing of the last remaining motion of a type that restarts the time to take a civil appeal. The rule leaves open the ability for litigants to deliberately and expressly limit the scope of the notice of appeal. "Without such an express statement, specific designations do not limit the scope of the notice of appeal." The proposed amendment to Appellate Rule 6 is simply a conforming amendment. The forms amendments reflect, among other things, the distinction between appeals from final judgments and appeals from other appealable orders. Professor Hartnett noted that courts continue to issue decisions that underscore the importance of these amendments. He described a recent decision in which a litigant filed a notice of appeal designating both a specific summary judgment ruling and the final judgment, "as well as any and all rulings by the court." The court concluded that because there had been a specific designation, the notice of appeal did not encompass orders that it did not list.

Professor Hartnett also noted that the Advisory Committee had received two public comments on the proposed amendments — one supportive and one critical. The main critique of

the proposed amendments stems from the language in proposed Appellate Rule 3(c)(5)(A), which refers to an order that adjudicates “all **remaining** claims and the rights and liabilities of all remaining parties.” In contrast, Civil Rule 54(b) omits the word “remaining” and refers to “a judgment adjudicating all the claims and all the parties’ rights and liabilities.” In the commenter’s view, there is not a final judgment until some document is entered that recites the disposition of all claims, not just the remaining claims. The premise of the proposed amendment is contrary to that: once the last remaining claim is resolved, there is a final judgment. The Advisory Committee unanimously supported this approach, which is in accord with leading treatises on federal practice and procedure.

One member inquired as to the purpose behind proposed Rule 3(c)(6), which would allow a litigant to designate a specific part of a judgment or appealable order and expressly exclude others from the scope of the notice of appeal. Professor Hartnett explained that it may sometimes be beneficial for a litigant to limit the scope of their notice of appeal. For example, a litigant may want to appeal an adverse ruling as to one party, without wishing to appeal the court’s determinations as to other parties.

Another member asked if the language in subparagraph (5)(A) — “the rights and liabilities of all remaining parties” — creates tension with Civil Rule 58(e), which sets a default rule that an outstanding request for costs and/or fees does not prevent a judgment from becoming final for appeal purposes. The member suggested deleting “the rights and liabilities of all remaining parties” if it is not necessary to the proposed rule. Professor Struve responded that she understood this phrase to be a reference to the language in Civil Rule 54(b) — “the rights and liabilities of fewer than all the parties.” Professor Cooper suggested that adding the “remaining” language in Appellate Rule 3(c)(5)(A) has the advantage of making clear that a final judgment need not indicate all claims that may have been previously disposed of. Judge Campbell inquired whether the language “all remaining claims” — without referencing rights and liabilities — would suffice. Professor Hartnett explained that the impetus behind including “rights and liabilities” in the new language was to integrate Appellate Rule 3(c) with Civil Rule 54(b). Professor Cooper noted that “claim” is a word with multiple meanings. He observed that the language in Rule 54(b) has existed for a very long time. It would be better, he suggested, for Rule 3(c) not to emphasize the word “claim” standing alone.

A member raised a related question regarding attorney’s fee applications and whether this proposed rule might alter current law under which, as noted, Civil Rule 58(e) sets a default rule that a pending fee application does not prevent a judgment from becoming final for appeal purposes. It was suggested, though, that the same tension currently exists between Civil Rule 58(e) and Civil Rule 54(b). A member noted that Civil Rule 54(b) uses “claims *or* the rights and liabilities” while the proposed language of Appellate Rule 3(c)(5)(A) uses “claims *and* the rights and liabilities.” This member suggested that the disjunctive / conjunctive distinction may be significant. Judge Chagares and Professor Hartnett indicated that the Advisory Committee will continue to consider these issues.

Rule 42 (Voluntary Dismissal). Proposed amendments to Rule 42 are out for public comment. Judge Chagares explained that during the restyling of the Appellate Rules, the phrase “may dismiss” replaced the phrase “shall ... dismiss[]” in Rule 42(b)’s language addressing the

dismissal of an appeal on agreement of the parties. The concern addressed by the proposed amendment stems from the apparent discretion the current rule would give to the courts of appeal not to dismiss an appeal despite the parties' agreement that it should be dismissed. The amendment would change the relevant "may dismiss" to "must dismiss" in what would become the Rule's subdivision (b)(1). In addition, the Advisory Committee restructured Rule 42(b) for overall clarity and added a subdivision (c) to clarify that the rule does not alter the legal requirements governing court approval of settlements. The Advisory Committee has received no comments on this proposed rule change and expects to seek final approval from the Standing Committee at its mid-year meeting.

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares explained that the Advisory Committee has engaged in a comprehensive review of these two rules. Amendments to Rule 35 and 40 that set length limits for responses to petitions for rehearing are on track to take effect on December 1, 2020, if the Supreme Court approves them and Congress takes no contrary action. Apart from those pending amendments, Judge Chagares noted that while the Advisory Committee has not received any complaints about the rules, small changes to harmonize the two rules may be beneficial if unintended consequences can be avoided. Professor Hartnett noted that the benefits of a rewrite of these rules must be balanced against the risk of disrupting current practice. The Advisory Committee's consideration of further potential amendments has thus narrowed and is presently focused on two items. First, the Advisory Committee seeks to underscore the difference between the standards for en banc and panel rehearing. Second, it is reassessing the interaction between petitions for panel rehearing and petitions for *en banc* rehearing, particularly given that the procedures are governed by two separate rules. A review of local rules and internal operating procedures of various circuits revealed a widespread practice of treating an *en banc* petition as including a request for panel rehearing. The Advisory Committee is also considering ways to ensure that a panel cannot block litigants from seeking rehearing en banc (the concern focuses on instances when a panel makes changes to its decision and states that no further petitions for rehearing en banc will be permitted). A related question concerns whether post-panel-rehearing *en banc* petitions should be limited to instances when the panel changes the substance of its initial decision.

One member expressed a view that a qualifier based on "changes to substance" should not be included in any potential amendments to Rules 35 and 40. Even changes that may seem small and stylistic, he argued, can have big effects. The member emphasized that timely-filed petitions for panel rehearing or rehearing *en banc* affect the time for filing petitions for a writ of certiorari. That makes it especially important for the rules governing rehearing petitions to operate mechanically, so that litigants will be able to forecast reliably whether a rehearing petition will suspend the deadline to petition for certiorari. The same member observed that one proposed addition — the statement in proposed new Rule 35(b)(4) that if the Rule 35(b)(1) criteria for rehearing en banc are not present, "panel rehearing pursuant to Rule 40 may be available" — would be more appropriate in a committee note rather than in rule text. Another member asked if subdivision (b)(5) of the proposal should explicitly limit a second petition for rehearing *en banc* to those changes made by the panel after the initial petition for rehearing. Professor Hartnett suggested, though, that in a petition after the panel changes its decision, a party might also want to address changes that were requested but not made. For instance, a panel's revised decision might

cite a supervening Supreme Court precedent without sufficiently addressing the import of that new precedent.

Rule 25 (Filing and Service) and Privacy in Railroad Retirement Act Benefit Cases. In response to a suggestion from the Railroad Retirement Board’s General Counsel, the Advisory Committee has been considering whether privacy protections afforded Social Security benefits cases under Civil Rule 5.2(c) and Appellate Rule 25(a)(5) should be extended to Railroad Retirement Act benefits cases. Judge Chagares noted the similarity between Social Security and Railroad Retirement Act benefits programs. Unlike Social Security cases, however, Railroad Retirement Act benefits cases go directly to the courts of appeal on petition for review. The Advisory Committee is considering whether other types of benefits cases likewise go directly to the courts of appeals for review and implicate similar privacy concerns. Professor Hartnett added that the Judicial Conference Committee on Court Administration and Case Management (CACM) has not objected to the Advisory Committee pursuing a possible rules amendment in this context.

A member suggested that this may become a slippery slope; he noted that ERISA and disability claims cases often involve the same kind of private personal information. Judge Campbell responded that the current proposal arose because the Railroad Retirement Board brought the suggestion to the advisory committee’s attention. And the likelihood that the Appellate Rules would need to address many similar instances is low, given that the goal here is to address instances where an agency decision in a benefits case goes directly to the court of appeals. (In proceedings where agency review is initiated in the district court, Professor Hartnett observed, the Appellate Rules piggyback on the Civil Rules’ privacy approach.)

Another member asked whether the draft language “of a benefits decision of the Railroad Retirement Board” is needed – why not just say “a petition for review under the Railroad Retirement Act”? Civil Rule 5.2(c) applies to “action[s] for benefits under the Social Security Act,” but the rule language does not specify “a benefits decision by the Social Security Administration.” Professor Hartnett responded that there may be other types of Railroad Retirement Board decisions that are subject to review under the Railroad Retirement Act; he promised to check with the Board’s General Counsel.

Another member wondered what systems exist for protecting private information in review proceedings under the Longshore and Harbor Workers’ Compensation Act and the Black Lung Act and whether those same systems should also suffice to protect privacy in review proceedings under the Railroad Retirement Act. Professor Hartnett explained that the ordinary mechanism available in any case would be a motion to seal. Railroad Retirement Act benefits cases are distinctive because they are essentially Social Security benefits cases for railroad workers; it would be very hard to address privacy concerns in such cases through standard redaction procedures. Judge Chagares added that the committee had not found any other types of proceedings that are as similar (as Railroad Retirement Act benefits cases are) to Social Security benefits cases.

Professor Bartell expressed concern about adding “privacy” to the draft amendment of Appellate Rule 25(a)(5). She noted that if the rule extended only the “privacy provisions” of Civil Rule 5.2(c)(1) and (2) to Railroad Retirement Act cases, it would raise questions about which parts of Civil Rule 5.2(c) are being incorporated.

Suggestion Regarding Decision on Grounds Not Argued. The Advisory Committee is considering a suggestion submitted by the American Academy of Appellate Lawyers. This suggestion would require a court of appeals, if contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground. Judge Chagares formed a subcommittee to consider this issue. The threshold question is whether this suggestion is appropriate for rulemaking, or more appropriate as a subject of best practices. A member commented that, in addition to the difficulty of defining “grounds not argued,” the suggested rule amendment may not accomplish anything that litigants could not already achieve through petitions for rehearing.

Suggestion Regarding “Good Cause” Definition for an Extension of Time to File a Brief. The Advisory Committee received a suggestion to specify criteria for finding “good cause” for an extension of time to file a brief. Judge Chagares noted that the term “good cause” appears multiple times in the Appellate Rules and Civil Rules. The Advisory Committee agreed that a good-cause determination depends on many factors and that no bright-line definition would be desirable. The Advisory Committee removed this item from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Civil Rules Advisory Committee, which last met on October 29, 2019, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Social Security Disability Review and Multidistrict Litigation (MDL) subcommittees.

Information Items

Social Security Review Subcommittee. Judge Bates explained that the subcommittee was formed in response to a suggestion submitted by the Administrative Conference of the United States (ACUS). ACUS proposed the adoption of national rules governing district-court review of Social Security Administration decisions, in order to provide greater uniformity and to recognize the appellate nature of such review. The subcommittee has prepared drafts that illustrate possible alternative approaches that a national rule could take. One approach would create a new rule within the Civil Rules; the other would create a new set of supplemental rules. Each of the draft alternatives is more modest than the original suggestion.

Judge Bates explained that the subcommittee and Advisory Committee have again returned to the initial question: whether to embark on this project, notwithstanding the usual preference for keeping the Rules trans-substantive. Beyond trans-substantivity, there are other competing concerns. Some reasons to create special rules for Social Security cases include the support from ACUS and the Social Security Administration, the modesty of the proposal, a preference for uniformity in procedure across districts, and the volume and uniqueness of Social Security cases. Countervailing considerations (in addition to the concerns about substance-specific rulemaking) include the opposition by plaintiffs’ organizations and the DOJ, the likelihood that a national rule would not displace all the variations created by local rules, and a question as to the appropriateness of adopting rule amendments in order to address problems that may relate more closely to the

insufficiency of agency funding. Judge Bates also emphasized the trans-substantivity concerns. Uniformity in federal procedures is a laudable goal of the Rules Enabling Act. Judge Bates recognized the concern about carving out categories of cases for specific rules and the risk of favoritism that poses. He noted that the subcommittee considered whether rules should be created that focus more broadly on cases that — like Social Security cases — are based on an administrative record. Such a broad undertaking would be difficult to achieve, given the variety of agencies and matters that come to the district court for review.

Professor Coquillette remarked that the Rules Committees have received numerous requests to carve out special rules over the years, and Congress has at times seemed inclined to carve out particular categories like patent cases and class actions for special rules. If the Advisory Committee moves forward with a proposal, Professor Coquillette suggested that it should create a supplemental set of Social Security rules, rather than a new Civil Rule.

A member expressed the view that the Rules Committees picking specific areas and carving out special rules could be problematic; that might be a task to which Congress is better suited. A different member suggested that this issue ties in with broader issues about specialized courts.

Several judge members expressed support for the proposal. There is a gap in the rules with regard to these types of actions, and the proposal would provide a practical solution. Regarding trans-substantivity concerns, one noted that the federal courts already use local rules to create substance-specific rules for special types of cases. Professor Cooper observed that district judges plainly have authority to establish practices that go beyond the Rules Enabling Act's scope in the course of deciding cases. The question of the appropriate scope of local rules is more difficult. 28 U.S.C. § 2071(a) says only that local rules “shall be consistent with” any national rules promulgated under the Rules Enabling Act. Does the fact that varying local rules now address a topic justify the adoption of national rules on that topic?

Judge Campbell observed that this is a unique situation in which a government agency has asked the Rules Committees to address a problem. The subcommittee has done a great job and has identified some possible rules that could address inefficiencies in the current system. This stands as a compelling argument in favor of rulemaking. While trans-substantivity is a countervailing concern, the Rules Committees have already crossed that bridge with respect to, for example, admiralty cases and habeas proceedings. Social security cases constitute a large part of the courts' dockets, and the matter is important to a government agency, and these considerations may outweigh the concerns about substance-specific rulemaking. Judge Campbell also expressed his view that the proposal is even-handed and would simplify procedures for all parties. The main question at present is whether to publish a proposal. Judge Campbell added that he favored publication for comment.

A member echoed Judge Campbell's comments, noting that the presumption against substance-specific rules can be overcome. The opposition by the claimants' bar and DOJ, this member suggested, should not be dispositive here because their reasons for opposition do not go to the heart of the problem. The claimants' side argues that a uniform rule will displease judges. If that is the case, it is unclear how that would disadvantage only claimants. The DOJ cites trans-substantivity concerns. The Rules Committees can decide the trans-substantivity question on their

own. In this member's view, the proposal would be beneficial and streamline the process through modest improvements without favoring either side. Another member agreed.

A different member asked about the feasibility of a pilot project with this proposal. Professor Cooper explained that the DOJ has crafted a model rule and offered it to district courts as a suggested local rule (though this is not a formal pilot project). Further, the subcommittee has sought input from magistrate and district judges on how the rules work in Social Security cases. The general feedback is that the Civil Rules do not fit Social Security cases and that the proposed national rule reflects what judges are already doing and would be helpful. Judge Campbell agreed that the proposal parallels what many districts are already doing.

A judge member voiced support for publishing the proposal for public comment. The same member asked if the subcommittee had considered drafting a best-practices guide instead of a rule amendment. This member also noted that, in her district, magistrate judges are tasked with handling Social Security review proceedings. Judge Bates responded that the subcommittee continues to consider a best-practices approach but that it currently views a rule amendment as preferable. He also observed that the proposed rule would not affect how districts structure the handling of Social Security disability review cases.

Professor Coquillette agreed that the proposal should be published for comment and reiterated his support for the supplemental set of rules instead of a new Civil Rule.

A judge member observed that he shared the general concern over trans-substantivity. Based on the proliferation of local rules related to Social Security cases, however, trans-substantivity does not seem to be as much of a concern. The question then is whether to pursue uniformity by means of a national rule.

Subcommittee on Multidistrict Litigation. Judge Bates stated that the subcommittee has focused primarily on four areas: third-party litigation funding (TPLF); early vetting of claims through the use of plaintiff fact sheets (PFS) and defendant fact sheets (DFS); interlocutory review in MDL cases; and judicial involvement in the settlement process and review.

The Advisory Committee decided to remove TPLF from the subcommittee's agenda (as this phenomenon is not unique to or especially prevalent in MDL cases) and has returned it to the Advisory Committee for monitoring.

The subcommittee continues to study "early vetting" as a tool to winnow unsupportable claims and jump start discovery. The subcommittee has concluded that plaintiff fact sheets — and defense fact sheets, secondarily — are used in virtually all "mega" tort MDLs and in most other large MDL proceedings, particularly personal injury MDLs. Because plaintiff fact sheets take a lot of time to develop, a simpler practice called "census of claims" has emerged. All groups involved think this is a worthwhile approach to examine. While it gathers less information, the census of claims practice seems to serve very valuable purposes. Several transferee judges are using this approach in current MDL proceedings.

The issue of interlocutory review in MDL proceedings is under active assessment. The subcommittee is considering whether existing procedural mechanisms, chiefly 28 U.S.C. § 1292(b), provide adequate interlocutory appellate review of certain MDL orders. Judge Bates highlighted the subcommittee's study of Judge Furman's order in *In Re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (SDNY 2019), which granted a party's request for certification of an interlocutory appeal under § 1292(b). Judge Bates explained the difficulty of drafting a rule amendment that would expand options for interlocutory review only to certain kinds of MDLs, or to specific subject matters such as preemption or *Daubert* rulings. The subcommittee continues to consider these questions in the context of possible rule amendments.

The subcommittee also continues to consider the issue of judicial supervision in the MDL settlement process and settlement review. Judge Bates explained that the subcommittee is considering whether this issue is appropriate for rulemaking and whether any such rule should be limited to a certain subset of MDLs. While the academic community has expressed support for greater judicial involvement in MDL settlements, neither the bar nor transferee judges share that position. Judge Bates noted that this is an ongoing effort, and the subcommittee is in the early stages. One member, citing his MDL experience in which courts have been heavily involved, inquired whether there is a need for more judicial involvement in the settlement process. Judge Bates clarified that the subcommittee is looking at non-class-action MDLs where the rules do not offer the same mechanism for judicial involvement as under Civil Rule 23.

A judge member expressed the view that rulemaking may not always be appropriate in the MDL context. It would be difficult to carve out a category of MDL cases to which certain rules should apply. Flexibility in MDLs is preferable to a one-size-fits-all approach. Rather than rulemaking, this member suggested, it would be better to promote best practices through guidance from, for example, the Judicial Panel on Multidistrict Litigation (JPML) and the Manual for Complex Litigation. Of the topics under study, this member suggested, the best candidate for rulemaking would be interlocutory appeals; Section 1292(b) is not a good fit for MDLs.

Another member suggested that this is an area where some rulemaking would be helpful because procedural decisions can have huge substantive implications in MDL proceedings. In this member's experience, large MDLs usually result in settlement. Judicial management and decisions regarding interlocutory appeal have a massive impact on the outcome. As to addressing judicial involvement in the settlement process, however, this member suggested a need for caution.

A different member emphasized that in the mass tort MDL context, Civil Rule 23 brings with it a lot of jurisprudence that gives some backbone as to the roles of lead attorneys. The American Law Institute's project on aggregate litigation provides guidance on what ethical obligations lead attorneys have regarding settlement when representing large groups of clients. This member agreed with the earlier comment that some of these issues go beyond the role of procedure and may not be appropriate for rulemaking. In addition, creating a rule for interlocutory review in MDL proceedings may prolong these cases even further. This would cause practical concerns for clients.

A member noted that, in his experience in the Second Circuit, requests for interlocutory review under § 1292(b) are rarely granted. He asked how different courts are treating these

requests. Professor Marcus explained that the difficulty is finding all the cases in which these requests are made but denied. Judge Bates added that the subcommittee hears anecdotally that certain circuits never grant § 1292(b) requests, but clear data are not readily available to support or contradict these comments. A judge member noted that his research revealed little as far as cases dealing with when it is appropriate to grant § 1292(b) requests in MDL cases.

Another judge member commented that the JPML makes available a very fine body of resources for case management. She asked whether the JPML has a view regarding the need for rulemaking. Regarding interlocutory appeals, this member noted that added delay presents a real concern from a case management perspective.

Rule 4(c)(3) – Service by the U.S. Marshals Service. Professor Cooper explained that present language in Civil Rule 4(c)(3) creates an ambiguity by stating both “the court may order” service by a marshal at the plaintiff’s request and “[t]he court must so order if the plaintiff” has i.f.p. status. One plausible interpretation is that if a plaintiff is granted i.f.p. status, then the court must order service by a marshal. A second interpretation is that the court’s obligation to order service by a marshal is contingent on the plaintiff making a motion. If the rule were amended to remove the ambiguity, the amended rule could adopt either of these approaches, or it could instead adopt a different approach that would direct service by a marshal on behalf of any i.f.p. litigant even when the court does not order the marshals to effect service. The Advisory Committee is in discussions with the U.S. Marshals Service and the Administrative Office regarding possible solutions.

Judge Campbell stated that the staff attorneys in his court confirmed that 100% of prisoner pro se complaints that survive initial screening by the court under 28 U.S.C. § 1915A are served by a marshal, and about 50% of non-prisoner pro se cases are served by a marshal. In the other 50% of non-prisoner pro se cases, Judge Campbell noted that the plaintiffs effect service by other means. This suggests that there is a significant portion of cases where the marshals are not needed.

Rule 12(a) – Filing Times and Statutes. Judge Bates explained that the Advisory Committee has begun looking at Civil Rule 12(a), which sets the time to serve a responsive pleading. The general provision under paragraph (1) — setting the presumptive time at 21 days — includes the qualifying statement: “Unless another time is specified by this rule or a federal statute[.]” The Advisory Committee is considering whether the same qualifier should be added to paragraphs (2) and (3), which apply to the United States and its officers or employees. Judge Bates noted that the Freedom of Information Act sets a 30-day response time, which may apply to cases otherwise governed by Rule 12(a)(2). The Advisory Committee will discuss this issue more in-depth at its spring meeting.

Matters Removed from the Agenda. Judge Bates identified items that the Advisory Committee removed from its agenda after consideration. These items relate to expert witness fees in discovery, proportionality under Rule 26, clear offers under Rule 68, and a proposal that Rule 4(d) be amended to address the practice of “snap removal.”

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Richter provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee presented three information items.

Rule 702 – Admission of Expert Testimony. The Advisory Committee has been examining Evidence Rule 702, following a 2016 report which raised concerns about methods used nationwide for forensic feature-comparison evidence. The report by the President’s Council of Advisors on Science and Technology (PCAST) recommended the preparation of a committee note to Rule 702 that would guide judges as to the admissibility of forensic feature-comparison expert testimony. The Advisory Committee convened a symposium in October 2017 to discuss the PCAST report and related *Daubert* issues. It has continued to discuss potential rule amendments at subsequent Advisory Committee meetings. At its fall 2019 meeting, the Advisory Committee concluded that creating a free-standing rule governing forensic evidence would be inadvisable because such a rule would overlap problematically with Rule 702. Judge Livingston noted that the Advisory Committee is exploring judicial and legal education options on this issue and the Committee’s Reporter is working with the FJC and Duke and Fordham Law Schools to organize judicial-education programming.

The Advisory Committee is continuing to consider a possible amendment that would add an element to Rule 702 to address the problem of experts overstating opinions. Prior to its fall meeting, the Advisory Committee convened a group of judges from around the country for a mini-conference at Vanderbilt University. The panel provided helpful comments about *Daubert* best practices and potential Rule 702 amendments on overstatement in expert opinions. At its spring 2020 meeting, the Advisory Committee will decide whether to move forward with proposed amendments or to put further consideration of Rule 702 on hold. The DOJ has suggested that the Advisory Committee take the position of “watchful waiting” and permit the DOJ to continue its work in this area and to allow its internal changes to percolate through the courts. Judge Livingston noted that the Evidence Rules Committee is working in tandem with the Criminal Rules Committee (which has been developing amendments to Criminal Rule 16 concerning expert disclosures).

Rule 106 – Rule of Completeness. The Advisory Committee received a proposal to amend Rule 106 to provide that a completing statement is admissible over a hearsay objection and to provide that the rule covers oral statements as well as written or recorded statements. Judge Livingston noted that most courts already permit completing oral statements, but under Rule 611 rather than Rule 106. Judge Livingston observed that the original committee note to Rule 106 stated that the rule was limited to writings and recorded statements only “for practical reasons.” Those “practical reasons” might concern situations where completing oral statements are made by different declarants. Another practical concern is disrupting the order of proof in a case.

Judge Livingston explained that the hearsay issue presents the strongest reason for a rule amendment. The Sixth Circuit has a published opinion holding that in order to complete a statement under Rule 106, the completing portion of the statement must also be admissible under the hearsay rules. The Advisory Committee is considering whether and how the Evidence Rules

should allow these completing oral statements to come in as evidence. Some Advisory Committee members have taken the position that a rule amendment should, in effect, create a new hearsay exception, such that the completing portion of a statement comes in for its truth. Others took the position that a completing oral statement should come in for completeness, but not its truth unless it satisfies one of the hearsay exceptions. The Advisory Committee will continue to consider this matter at its next meeting.

Rule 615 – Excluding Witnesses. The Advisory Committee is considering a potential amendment to Evidence Rule 615, which provides that a judge may *sua sponte* — or must, upon request — exclude witnesses from a trial or hearing. Professor Richter noted that sequestration orders under Rule 615 tend to be short, and the brevity of these orders, as reflected in transcripts, creates uncertainty about their scope. For example, such orders may be interpreted as only requiring witnesses to physically leave the courtroom. On the other hand, they may extend beyond physical sequestration and regulate behavior and communications by witnesses outside the courtroom. The Advisory Committee identified a conflict in federal case law regarding these interpretations. Some courts say that for a Rule 615 order’s scope to extend beyond physical sequestration, a judge’s order must explicitly state that external communications are to be limited. Most courts, however, say that it is implicit in the Rule — and thus covered in vague orders — that sequestration extends beyond physical presence in the courtroom. Without specificity in a Rule 615 order, the Advisory Committee is concerned that witnesses will not have notice that the court intends to bar external communications.

The Advisory Committee has identified possible alternative rule amendments to address the issue of the scope of Rule 615 orders. At this point, the Advisory Committee is still considering whether any amendment is appropriate; it will continue to explore these possibilities at its spring meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Criminal Rules Advisory Committee, which met on September 24, 2019, in Philadelphia, Pennsylvania. The Advisory Committee presented three information items.

Rule 16 – Discovery Concerning Expert Reports and Testimony. The Advisory Committee’s draft amendments to Criminal Rule 16 seek to improve the specificity and timeliness of expert disclosures. The Advisory Committee undertook this project following public suggestions that Rule 16 be amended to track more closely the Civil Rule 26 approach to expert disclosures. The Advisory Committee has held two informational sessions in the past two years. Following these sessions, the Advisory Committee identified the main problems with Criminal Rule 16: timing of the disclosure, and disclosures that are too cursory and vague to allow the parties to adequately prepare for trial. The reporters and Rule 16 Subcommittee developed a proposal to address these problems. At its fall 2019 meeting, the Advisory Committee discussed and refined the draft amendments, and unanimously approved them and a proposed committee note.

Judge Kethledge summarized the Advisory Committee’s main points of discussion and debate. First, the Advisory Committee debated whether a numerical or functional deadline for

disclosure would be preferable. The Advisory Committee decided a functional standard — “sufficiently before trial to provide a fair opportunity for” each party to meet the opponent’s evidence — was appropriate because a one-size-fits-all approach does not work well in this context. The rule requires the district court to specify a deadline using this standard. Second, the Advisory Committee considered whether to term the disclosed document something other than a “summary” (as the current Rule calls it). The Advisory Committee elected to eschew the terms “summary” and “report” and instead to focus on the verb “disclose” – thus allowing the amended provisions to speak for themselves regarding required content of the disclosure. The proposed amendments would add to the list of required contents “a complete statement of all opinions” that the party will elicit in its case-in-chief.

While the proposal would not require the witness to prepare the document to be disclosed under Rule 16, it would require that the witness review and sign the document. Judge Kethledge explained that this provision serves an impeachment function. Judge Kethledge noted some of the concerns expressed by the DOJ about the proposal. For the signing requirement, the Department indicated that it does not always have control over the expert witness and may face difficulty getting the witness to sign; the draft includes an option for the disclosing party to “state[] in the disclosure why it could not obtain the witness’s signature through reasonable efforts.”

Judge Kethledge emphasized the deliberative process undertaken by the Rule 16 Subcommittee and the full Advisory Committee in developing this proposal. He commended those involved for contributing constructively and in good faith. The Advisory Committee’s proposal is a product of a fairly delicate compromise. He explained that the Advisory Committee is confident that this proposed amendment would improve practice in criminal cases and allow expert testimony to be more effectively tested than it is at present.

Professor Beale added that the proposal will bring Criminal Rule 16 closer to Civil Rule 26 but she emphasized that criminal practice is different. Professor Beale explained the differences in pre-trial disclosures and discovery between civil and criminal practice. The goal of the proposed amendment is to allow the parties adequate time and opportunity to prepare for trial, and the proposal provides the necessary flexibility for that in the criminal context. Thus, the Advisory Committee drew on certain aspects of Civil Rule 26 but tailored the proposal for criminal practice. Professor King noted that the proposal limits the required disclosure to the expert opinions that will be elicited in the party’s case-in-chief. This reflects special constitutional concerns in criminal cases.

The DOJ representative commented on the Advisory Committee’s excellent process that took into account the Department’s concerns and input and reached a consensus proposal agreeable to everyone.

A judge member inquired whether the “reasonable efforts” standard for obtaining the expert witness’s signature could be clarified. Professor Beale responded that the committee note, which will be considered again at the Advisory Committee’s spring meeting, could address this issue.

Professor Marcus commented that the proposal's duty to supplement the disclosure may cause problems, based on experience with a similar provision under the Civil Rules. Professor King responded that Criminal Rule 16(c) contains a continuing duty to disclose.

Judge Campbell asked what the defendant's "case-in-chief" refers to under the proposed Rule 16(b)(1)(C)(i). Professor Beale explained that "case-in-chief," as it applies to the defense, is when the defense puts on its own witnesses after the government rests. The current rule uses "case-in-chief" in several places – with respect to discovery obligations of both the government and the defense – but not with respect to the defense's expert witness disclosure obligations. Instead, under current subsection (b)(1)(C), the defense must disclose expert witnesses it intends to use as evidence at trial. The Advisory Committee was concerned that the absence of the restricting language "case-in-chief" in subsection (b)(1)(C) might inadvertently require the defendant to disclose *more* than the government. Professor Beale emphasized that it was the Advisory Committee's goal to make the party's obligations both parallel and reciprocal.

Judge Campbell expressed concern about adding the "case-in-chief" language to the defense's expert disclosure obligations. In his view, neither the current rule nor the proposed amendment make the disclosure obligations equal. He pointed out that adding the "case-in-chief" language to the defendant's disclosure obligations could be interpreted as expanding the disclosure obligation to all expert witnesses the defense intends to use, including any rebuttal experts. In contrast, it is not clear that the government would be obligated to disclose rebuttal expert witnesses.

Professor Beale explained that the issue of unequal disclosure standards has not been coming up in practice. She suggested that the language is worth looking at again but added that there may be concern about opening up the disclosure requirements to encompass more than "case-in-chief." Judge Kethledge noted that it is hard to find the right phrase; one possibility might be "disclose every witness you will use." Judge Campbell responded that this is what the rule already requires of the defendant, but not of the government; the Rule, he stressed, should be even-handed.

A member raised the question about the risk of one party trying to game the system under this proposal by under-disclosing and later supplementing. This member highlighted the door-shutting aspect of the Civil Rule 26 approach. The reporters responded that this potential issue had not been raised in any discussions and would be beneficial to address with the Advisory Committee.

A judge member commented that the defendant's "case-in-chief" language already existed in subdivision (b) and that there are practical reasons to use that term. Because a defendant has no obligation to preview his or her defense before trial, the government may not know what expert witnesses it needs for rebuttal. The same situation can arise where a defendant needs to call an expert witness in sur rebuttal. This member suggested that this is a reason to use parallel language and refer to "case-in-chief." Professor King explained that even though the proposal is reciprocal, it is situated within the larger context of various defense rights, including the protection against self-incrimination.

Another member remarked that the duty to supplement expert disclosures under Civil Rule 26 is critical to prevent trial by ambush. The member observed that this concern may not carry over to criminal practice to the same degree.

Professor King asked the Standing Committee members whether it makes sense to close the door on a criminal defendant's ability to supplement when the defendant identifies an additional expert witness during and because of an issue that arises at trial. She noted as a backdrop that the defendant has no duty to put on a defense at all.

Judge Campbell emphasized the tension present in criminal practice: there is an interest in avoiding sandbagging, but the system also must preserve the defendant's rights.

Professor Beale acknowledged these concerns. She reiterated that practitioners have not been reporting problems with delayed supplementation or parties gaming the system. Unlike with new Criminal Rule 16.1, there was no push to add an explicit good-faith element to the duty to supplement in this proposal. Judge Kethledge added that the Advisory Committee developed this proposal with the approach of limiting its efforts to actual, existing problems and building a consensus around them, rather than focusing on speculative problems.

Task Force on Protecting Cooperators. Judge Kethledge noted that the Task Force, chaired by Judge Lewis Kaplan, has made its recommendations, which related primarily to changes in the CM/ECF system and changes to Bureau of Prisons operations and policies. Some of the recommendations are proving challenging and expensive to implement.

In Forma Pauperis Status Suggestion. Judge Kethledge explained that the Advisory Committee chose not to pursue the suggestion regarding i.f.p. status because eligibility under the Criminal Justice Act involves different standards. The Advisory Committee would be interested in being involved with this multi-committee item, if it continues, as far as i.f.p. status relates to habeas cases.

OTHER COMMITTEE BUSINESS

Legislative Report. Julie Wilson delivered the legislative report and directed the Committee to the tracking chart in the agenda book. The chief legislative development concerning the rules committees is the SBRA, which was discussed previously. Along with CACM and the Office of Legislative Affairs, the Rules Committee Staff provided support to Judge Audrey Fleissig and Judge Richard Story last fall when they testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. The hearing and their testimony primarily focused on sealing of court records, cameras in federal courts, and access to the Public Access to Court Electronic Records (PACER) database. Representative Nadler recently introduced H.R. 5645, the "Eyes on the Courts Act of 2020." The bill would provide for media coverage of all federal appellate proceedings, including Supreme Court proceedings. A Sunshine in Litigation Act bill will likely be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Ms. Wilson reported on the *Strategic Plan for the Federal Judiciary*, which sets out the core values of the federal judiciary and strategies for realizing those values. The *Plan* is updated every five years, and 2020 is an update year. Ms. Wilson directed the members to the agenda book containing an update from Judge Campbell on the *Plan* and the Rules Committees' work. Discussion was invited; Judge Campbell will continue to communicate with the Judiciary's Planning Officer regarding updates to the *Plan*.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Washington, DC on June 23, 2020.

Respectfully submitted,

A handwritten signature in black ink, reading "Rebecca A. Womeldorf". The signature is written in a cursive style with a large, stylized initial 'R'.

Rebecca A. Womeldorf
Secretary, Standing Committee