

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Washington, D.C.
June 12, 2018**

TABLE OF CONTENTS

AGENDA9

TAB 1 OPENING BUSINESS

**A. March 2018 Report of the Committee on Rules of Practice
 and Procedure to the Judicial Conference of the United States27**

B. Chart Tracking Proposed Rules Amendments47

C. ACTION: Approval of Minutes

**Draft Minutes of the January 4, 2018 Meeting of the
 Committee on Rules of Practice and Procedure55**

TAB 2 ADVISORY COMMITTEE ON APPELLATE RULES

**A. Report of the Advisory Committee on Appellate Rules
 (May 22, 2018)75**

**ACTION: Rules 3, 13, 26.1, 28, and 32
 (for Final Approval).....76**

ACTION: Rule 25(d)(1) (for Final Approval).....80

**ACTION: Rules 5, 21, 26, 32, and 39 (Technical and
 Conforming Amendments for Final Approval)81**

ACTION: Rules 35 and 40 (for Publication).....84

B. Attachments to the Report

**1. Proposed Amendments for Final Approval and Summaries
 of Public Comments**

 • **Rule 3.....93**

 • **Rule 13.....97**

 • **Rule 26.1.....99**

 • **Rule 28.....105**

 • **Rule 32.....107**

2.	Rule 25(d)(1) (for Final Approval)	111
3.	Proposed Technical and Conforming Amendments for Final Approval	
	• Rule 5	119
	• Rule 21	121
	• Rule 26	123
	• Rule 32	125
	• Rule 39	127
4.	Proposed Amendments for Publication	
	• Rule 35	131
	• Rule 40	133
C.	Table of Agenda Items (May 2018)	137
D.	Draft Minutes of the April 6, 2018 Meeting of the Advisory Committee on Appellate Rules	145

TAB 3 ADVISORY COMMITTEE ON BANKRUPTCY RULES

A.	Report of the Advisory Committee on Bankruptcy Rules (May 21, 2018)	159
	ACTION: Rule 4001 (for Final Approval)	161
	ACTION: Rule 6007 (for Final Approval)	161
	ACTION: Rule 9036 (for Final Approval); Deferral of Action on Rule 2002 and Official Form 410	162
	ACTION: Rule 9037 (for Final Approval)	167
	ACTION: Official Forms 411A and 411B (for Final Approval)	169
	ACTION: Rule 2002 (for Publication)	170
	ACTION: Rule 2004 (for Publication)	172

	ACTION: Rule 8012 (for Publication)	173
B.	Appendices to the Report	
	Appendix A: Items for Final Approval and Summaries of Public Comments	
	• Rule 4001	183
	• Rule 6007	185
	• Rule 9036	189
	• Rule 9037	193
	• Official Form 411A	199
	• Official Form 411B	201
	Appendix B: Items for Publication	
	• Rule 2002	205
	• Rule 2004	211
	• Rule 8012	213
C.	Draft Minutes of the April 3, 2018 Meeting of the Advisory Committee on Bankruptcy Rules	219
TAB 4	ADVISORY COMMITTEE ON CRIMINAL RULES	
A.	Report of the Advisory Committee on Criminal Rules (May 17, 2018)	235
	ACTION: New Rule 16.1 (for Final Approval)	236
	ACTION: Rule 5(e) of the Rules Governing Section 2254 Cases and Rule 5(d) of the Rules Governing Section 2255 Proceedings (for Final Approval)	241
B.	Proposed New Rule 16.1 and Summary of Public Comments	247
C.	Proposed Rule 5(e) of the Rules Governing Section 2254 Cases and Rule 5(d) of the Rules Governing Section 2255 Proceedings and Summary of Public Comments	255

D.	Draft Minutes of the April 24, 2018 Meeting of the Advisory Committee on Criminal Rules	263
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TAB 5 ADVISORY COMMITTEE ON CIVIL RULES

A.	Report of the Advisory Committee on Civil Rules (May 11, 2018)	289
	 ACTION: Rule 30(b)(6) (for Publication)	291
B.	Additional Rule 30(b)(6) Materials	
	 1. Proposed Rule 30(b)(6)	329
	 2. Notes of the January 19, 2018 Conference Call of the Rule 30(b)(6) Subcommittee.....	335
	 3. Suggestion 18-CV-M (Lawyers for Civil Justice)	343
	 4. Suggestion 18-CV-N (American Bar Association)	351
C.	Draft Minutes of the April 10, 2018 Meeting of the Advisory Committee on Civil Rules	357

TAB 6 ADVISORY COMMITTEE ON EVIDENCE RULES

A.	Report of the Advisory Committee on Evidence Rules (May 14, 2018)	397
	 ACTION: Rule 807 (for Final Approval)	398
	 ACTION: Rule 404(b) (for Publication)	400
B.	Proposed Rule 807 and Summary of Public Comments.....	409
C.	Proposed Rule 404(b).....	419
D.	Draft Minutes of the April 26-27, 2018 Meeting of the Advisory Committee on Evidence Rules.....	427

TAB 7 THIRTY YEARS OF THE RULES ENABLING ACT

TAB 8	JUDICIARY STRATEGIC PLANNING	
	A. Memorandum.....	465
	B. Attachments	
	1. Memorandum from Chief Judge Merrick B. Garland, Chair of the Executive Committee, and Chief Judge Carl E. Stewart, Judiciary Planning Coordinator, to the Judicial Conference and Conference Committee Chairs (March 22, 2018)	471
	2. Letter from Judge David G. Campbell to Chief Judge Carl E. Stewart (January 21, 2018).....	475
	3. Letter from Judge David G. Campbell to Judge William Jay Riley (July 5, 2017).....	479
TAB 9	REPORT OF THE RULES COMMITTEE STAFF	
	A. Coordination and Inter-Committee Work	491
	B. Pending Legislation That Would Directly Amend the Federal Rules (115th Congress).....	495

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 12, 2018**

AGENDA

I. Opening Business

- A. Welcome and Opening Remarks – Judge David G. Campbell, Chair
- B. Report on the March 2018 Judicial Conference session
- C. Status of Rules Amendments
- D. **ACTION:** The Committee will be asked to approve the minutes of the January 4, 2018 Committee meeting.

II. Report of the Advisory Committee on Appellate Rules – Judge Michael A. Chagares, Chair

- A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:
 - Proposed amendments to Rules 3 (Appeal as of Right - How Taken), 5 (Appeal by Permission), 13 (Review of a Decision of the Tax Court), 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs), 25 (Filing and Service), 26 (Computing and Extending Time), 26.1 (Corporate Disclosure Statement), 28 (Briefs), 32 (Forms of Briefs, Appendices, and Other Papers), and 39 (Costs).
- B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:
 - Proposed amendment to Rule 35 (En Banc Determination)
 - Proposed amendment to Rule 40 (Petition for Panel Rehearing)
- C. Information items
 - Continuing study of Rule 42(b) (Voluntary Dismissal)
 - Comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing)

- Continuing study of Rule 3 (Appeal as of Right - How Taken) and the merger rule
- Subcommittee formed to consider ruling in *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13 (2017).

III. Report of the Advisory Committee on Bankruptcy Rules – Hon. Dennis Dow, Incoming Chair

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Proposed amendments to Rules 4001(c) (Obtaining Credit), 6007(b) (Motion to Abandon Property), 9036 (Notice by Electronic Transmission), and 9037(h) (Motion to Redact a Previously Filed Document), to go into effect December 1, 2019
- Official Forms 411A (General Power of Attorney), and 411B (Special Power of Attorney), to go into effect December 1, 2018

B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:

- Proposed amendments to Rules 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Person Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee), 2004(c) (Compelling Attendance and Production of Documents), and 8012 (Time for Filing Notice of Appeal)

C. Information items

- Decision to take no further action on suggestion to amend Rule 2013
- Decision to take no further action on suggestion to amend Rule 9019
- Report on process for soliciting feedback on possibility of restyling the Bankruptcy Rules

IV. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- New Rule 16.1 (Pretrial Discovery Conference and Modification); proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts (The Answer and the Reply); and Rule 5(d) of the

Rules Governing Section 2255 Proceedings for the United States District Courts
(The Answer and the Reply)

B. Information items

- Rule 16 (Discovery and Inspection) – consideration of suggestions by Judge Rakoff and Judge Grimm concerning disclosure of experts
- Rule 32 (Sentencing and Judgment) – suggestion to amend Rule 32(e)(2) regarding disclosure of PSRs to defendants
 - Related: Task Force on Protecting Cooperators
- Update on items considered and removed from the docket

V. **Report of the Advisory Committee on Civil Rules** – Judge John D. Bates, Chair

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

- Proposed amendments to Rule 30(b)(6) (Deposition of an Organization)

B. Information items

- Ongoing projects
 - Report on the work of the MDL Rules Subcommittee
 - Report on the work of the Social Security Disability Review Subcommittee
- Update on items considered and either retained for further study or removed from the docket

VI. **Report of the Advisory Committee on Evidence Rules** – Judge Debra Ann Livingston, Chair

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Proposed amendment to Rule 807 (Residual Exception)

B. **ACTION:** The Committee will be asked to approve that the following be published for public comment:

- Proposed amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts–Crimes, Wrongs, or Other Acts)

C. Information items

- Report on ongoing consideration of *Daubert* issues and Rule 702
- Consideration of a proposal by Judge Grimm to amend Rule 106 (Rule of Completeness)

VII. 30 Years of the Rules Enabling Act – Judge Jeffrey Sutton

VIII. Judiciary Strategic Planning – Judge Campbell and Brian Lynch, Long-Range Planning Officer

- The Committee will be briefed on Executive Committee actions to identify elements of the *Strategic Plan for the Federal Judiciary* to receive priority attention over the next two years.
- **ACTION:** The Committee will be asked to approve a progress report to the Executive Committee on the strategic initiatives that the Committee is pursuing to support the implementation of the *Strategic Plan for the Federal Judiciary*

IX. Report of the Rules Committee Staff

A. Coordination and Inter-Committee Work

B. Legislative Update

C. Report on operational aspects of the rules process; submission and consideration of public comments and suggestions, particularly those not reviewed by the Advisory Committees; maintenance of committee records

D. Next Meeting

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	<p>Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156</p>
Reporter, Standing Committee	<p>Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459</p>
Associate Reporter, Standing Committee	<p>Professor Catherine T. Struve University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104</p>
Members, Standing Committee	<p>Honorable Jesse Furman United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501</p> <p>Daniel C. Girard, Esq. Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108</p> <p>Robert J. Giuffra, Jr., Esq. Sullivan & Cromwell LLP 125 Broad Street New York, NY 10004-2498</p> <p>Honorable Susan P. Graber United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204</p> <p>Honorable Frank Mays Hull United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303</p>

<p>Members, Standing Committee (cont'd)</p>	<p>Peter D. Keisler, Esq. Sidley Austin, LLP 1501 K Street, N.W. Washington DC 20005</p> <p>Professor William K. Kelley Notre Dame Law School P. O. Box 780 Notre Dame, IN 46556</p> <p>Honorable Carolyn B. Kuhl Superior Court of the State of California County of Los Angeles 312 North Spring Street, Department 12 Los Angeles, CA 90012</p> <p>Honorable Rod J. Rosenstein Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W. Washington, DC 20530</p> <p>Honorable Amy J. St. Eve United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604</p> <p>Honorable Srikanth Srinivasan United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3905 Washington, DC 20001</p> <p>Honorable Jack Zouhary United States District Court James M. Ashley and Thomas W.L. Ashley United States Courthouse 1716 Spielbusch Avenue, Room 203 Toledo, OH 43604</p>
<p>Advisors and Consultants, Standing Committee</p>	<p>Bryan A. Garner, Esq. LawProse, Inc. 8133 Inwood Road Dallas, TX 75209</p>

<p>Advisors and Consultants, Standing Committee (cont'd)</p>	<p>Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933</p> <p>Joseph F. Spaniol, Jr., Esq. 5602 Ontario Circle Bethesda, MD 20816-2461</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
David G. Campbell Chair	D	Arizona	Member: ---- Chair: 2016	2019
Jesse Matthew Furman	D	New York (Southern)	2016	2019
Daniel C. Girard	ESQ	California	2015	2018
Robert J. Giuffra, Jr.	ESQ	New York	2017	2020
Susan P. Graber	C	Ninth Circuit	2013	2019
Frank Mays Hull	C	Eleventh Circuit	2016	2019
Peter D. Keisler	ESQ	Washington, DC	2016	2019
William K. Kelley	ACAD	Indiana	2015	2018
Carolyn B. Kuhl	JUST	California	2017	2020
Rod J. Rosenstein*	DOJ	Washington, DC		Open
Sri Srinivasan	C	DC Circuit	2017	2020
Amy J. St. Eve	D	Illinois (Northern)	2013	2019
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	2018
Catherine T. Struve Associate Reporter	ACAD	Pennsylvania	2017	2018

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio - Deputy Attorney General

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i>	Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i>	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Associate Reporter, Committee on Rules of Practice and Procedure	Professor Catherine T. Struve University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
Chair, Advisory Committee on Appellate Rules	Honorable Michael A. Chagares United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
Reporter, Advisory Committee on Appellate Rules	Professor Edward Hartnett Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102
Chair, Advisory Committee on Bankruptcy Rules	Honorable Sandra Segal Ikuta United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
Reporter, Advisory Committee on Bankruptcy Rules	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	Professor Laura Bartell Wayne State University Law School 471 W. Palmer Detroit, MI 48202

Chair, Advisory Committee on Civil Rules	Honorable John D. Bates United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
Reporter, Advisory Committee on Civil Rules	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Associate Reporter, Advisory Committee on Civil Rules	Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	Professor Sara Sun Beale Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	Honorable Debra Ann Livingston United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
Reporter, Advisory Committee on Evidence Rules	Professor Daniel J. Capra Fordham University School of Law 150 West 62nd Street New York, NY 10023

Secretary, Standing Committee and Rules Committee Chief Counsel	Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov
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RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Judge Frank Mays Hull <i>(Standing)</i>
	Judge Pamela Pepper <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Judge Susan P. Graber <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. <i>(Standing)</i>
	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge Jesse Furman <i>(Standing)</i>
	Judge Sara Lioi <i>(Civil)</i>
	Judge James C. Dever III <i>(Criminal)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>
<p>Julie Wilson Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3678 Fax 202-502-1755 Julie_Wilson@ao.uscourts.gov</p>
<p>Scott Myers Attorney Advisor (Bankruptcy) Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1913 Fax 202-502-1755 Scott_Myers@ao.uscourts.gov</p>
<p>Bridget M. Healy Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-240 Washington, DC 20544 Phone 202-502-1313 Fax 202-502-1755 Bridget_Healy@ao.uscourts.gov</p>
<p>Shelly Cox Administrative Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-4487 Fax 202-502-1755 Shelly_Cox@ao.uscourts.gov</p>
<p>Frances F. Skillman Paralegal Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3945 Fax 202-502-1755 Frances_Skillman@ao.uscourts.gov</p>

FEDERAL JUDICIAL CENTER LIAISONS

<p>Honorable Jeremy D. Fogel Director Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-100 Washington, DC 20002 Phone 202-502-4160 Fax 202-502-4099</p>	
<p>Tim Reagan <i>(Rules of Practice & Procedure)</i> Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199</p>	<p>Marie Leary <i>(Appellate Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov</p>
<p>Molly T. Johnson <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov</p>	<p>Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov</p>
<p>Laural L. Hooper <i>(Criminal Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov</p>	<p>Timothy T. Lau <i>(Evidence Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov</p>

TAB 1

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TAB 1A

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedurepp. 2–4
- Federal Rules of Bankruptcy Procedurepp. 4–6
- Federal Rules of Civil Procedurepp. 6–11
- Federal Rules of Criminal Procedurepp. 11–14
- Federal Rules of Evidencepp. 14–16
- Judiciary Strategic Planningp. 17

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee) met on January 4, 2018. All members were present.

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

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter (by telephone); Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff (by telephone); Patrick Tighe, Law Clerk to the Standing Committee; and Dr. Tim Reagan and

NOTICE

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

Dr. Emery G. Lee III, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on November 9, 2017, and discussed the following items.

Proposal to Amend Rules to Address References to “Proof of Service”

A proposed amendment to Appellate Rule 25(d) that eliminates the requirement of proof of service when a party files a paper using the court’s electronic filing system was approved by the Conference at its September 2017 session. (JCUS-SEP 17, p. 3) The advisory committee subsequently identified references to “proof of service” in Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1), that require corresponding amendments. The advisory committee determined after discussion that the proposed corresponding changes to remove or revise references to “proof of service” in each of these rules are properly seen as technical corrections for which publication for additional comments is unnecessary.

Upon further review of the proposed amendment to Appellate Rule 25(d) discussed above, and subsequent to its meeting on November 9, 2017, the advisory committee identified a wording change to the pending amendment that will clarify the intent of the rule change. This is a technical change for which publication for additional comments is unnecessary. To permit this change to be made prior to Supreme Court approval of the pending amendment to Rule 25(d), and to allow all Appellate Rule amendments addressing proof of service to proceed together, the advisory committee determined by e-mail vote to recommend withdrawing the proposed amendment to Rule 25(d) now pending before the Supreme Court and the Standing Committee agreed. The advisory committee intends to submit proposed amendments to Rules 5(a)(1),

21(a)(1) and (c), 25(d), 26(c), 32(f), and 39(d)(1), for approval at the Standing Committee’s June 12, 2018 meeting, and ask the Judicial Conference to approve the withdrawal and new proposed amendments at its September 2018 session. The Committee agreed with all of the advisory committee’s recommendations.

Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of Court or Consent of the Parties

Rule 29(a) allows federal and state governments to file amicus briefs without leave of court or consent of the parties. At its April 2012 meeting, the advisory committee considered a suggestion to permit Indian Tribes and cities to file amicus briefs without leave of court or consent of the parties. The advisory committee determined to take no action on the suggestion, with an explanation that the advisory committee would revisit the item in five years. The advisory committee did so at its fall 2017 meeting, and determined that there remained no evidence that Indian Tribes or cities had been denied opportunity to file amicus briefs under the existing rule. Absent such evidence, and given the potential complications and ramifications of a rule change, the advisory committee decided to take no further action on the suggestion.

Rule 3(c)(1)(B) and the Merger Rule

Appellate Rule 3(c)(1)(B) requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.” In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The advisory committee received a suggestion to revise the rule to eliminate the possible “trap for the unwary” reflected in the Eighth Circuit’s interpretation of Rule 3(c)(1)(B). Following discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to study this issue to determine if any action should be taken on the suggestion.

Circuit Split on Whether Attorney’s Fees Are “Costs on Appeal” Under Rule 7

A circuit split has arisen on the question of whether attorney’s fees are “costs on appeal” for purposes of calculating the amount of a bond under Appellate Rule 7. After discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to investigate this issue, and will consult with the Civil Rules Advisory Committee on any resulting rule proposal.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Information Items

The Advisory Committee on Bankruptcy Rules met on September 26, 2017, and discussed the following items.

Rules 2002(h) and 8012

The advisory committee considered amendments to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Both proposals relate to other proposed amendments currently published for public comment. Because the related rules have not yet been finalized, the advisory committee plans to present the proposed amendments to Rules 2002(h) and 8012 at the Standing Committee’s June 2018 meeting.

Withdrawal of Proposed Amendment to Rule 8023 (Voluntary Dismissal)

In August 2016, the advisory committee published for public comment a proposed amendment to Rule 8023, which governs voluntary dismissal of an appeal. The proposed amendment added a cross-reference to Rule 9019, which requires a bankruptcy trustee to get bankruptcy court approval of a compromise or settlement. The advisory committee recommended the amendment in response to a suggestion that appellate courts might be unaware that a bankruptcy trustee’s ability to seek the dismissal of an appeal may be subject to bankruptcy court approval.

Although no comments addressing the proposed amendment were filed, the Department of Justice expressed concern at the advisory committee's spring 2017 meeting that the proposed amendment might create administration difficulties because it seemed to require the clerk or the appellate court to determine the applicability of Rule 9019 with respect to every voluntary dismissal of a bankruptcy appeal. The advisory committee considered the Department of Justice's concerns over the summer. After surveying the case law and finding no decision addressing the circumstance of a trustee voluntarily dismissing an appeal without complying with Rule 9019, the advisory committee decided an amendment to Rule 8023 was not needed and could cause confusion.

Approval of National Instructions Authorizing Alterations

The 2017 amendments to Rule 9009 restrict authority to make alterations to Official Bankruptcy Forms and provide as a general matter that “[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration.” The rule was amended to ensure that a form, such as the Chapter 13 Plan Form, which is intended to provide information in a particular order and format, is not altered.

Rule 9009 includes exceptions to the general prohibition against altering Official Forms. One of those exceptions allows for alterations as provided in the “national instructions for a particular Official Form.” In response to suggestions from several bankruptcy courts, the advisory committee approved national instructions for certain forms that would allow for limited modifications such as the cost-saving practice of adding local court information to the official form notice of a bankruptcy case.

Suggestion to Amend Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals)

The advisory committee received a suggestion from a bankruptcy clerk questioning the need for Rule 2013. The rule requires the bankruptcy clerk's office to compile and maintain a

public record of all fees awarded by the court to trustees, attorneys, and other professionals, and transmit the record to the U.S. trustee's office. The clerk asserts that CM/ECF has eliminated the need for the type of records Rule 2013 was designed to produce because reports about fee awards can now be generated on demand. The advisory committee is working with the FJC and will seek information from the U.S trustee's office to evaluate the current compliance with and the need for Rule 2013.

Exploration of Whether the Bankruptcy Rules Should be Restyled

Over the past two decades, each set of federal rules other than the Federal Rules of Bankruptcy Procedure have been comprehensively restyled. In the past, concerns have been raised that restyling of the Bankruptcy Rules should not be undertaken because of their close association with statutory text. For example, the Bankruptcy Rules continue to use the now disfavored word "shall" in order to be consistent with the Bankruptcy Code's use of that term. Nevertheless, incremental restyling has occurred, and in the process of revising Part VIII of the bankruptcy rules, which address bankruptcy appeals, and other individual rules, the new style conventions from other rule sets generally have been incorporated.

In response to suggestions from the style consultants that the time has come to comprehensively restyle the Bankruptcy Rules, the advisory committee has established a subcommittee to explore the advisability of such a project. The subcommittee anticipates that it will make at least a preliminary report to the advisory committee at its spring 2018 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The advisory committee met on November 7, 2017. Discussion focused primarily on its ongoing consideration of possible amendments to Rule 30(b)(6), a suggestion from the Administrative Conference of the United States regarding social security review cases,

suggestions urging rules for multidistrict litigation (MDL) proceedings, and a suggestion that Rule 26 be amended to require disclosure of third party litigation financing agreements.

Rule 30(b)(6) (Depositions of an Organization)

The advisory committee continued its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, in May 2016, the Rule 30(b)(6) subcommittee solicited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision for objections to Rule 30(b)(6) deposition notices; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

The advisory committee posted an invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. In addition, members of the subcommittee participated in two conferences focused on the rule in an effort to receive additional input from the bar.

The input received revealed significant disagreements as to what are the most serious problems with the rule. One set of concerns focused on perceived over-reaching in use of the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic use of the judicial admission possibility. A competing set of concerns focused on organizations'

preparation of their witnesses; some say organizations too often evade their responsibilities and that enforcement of the duty to prepare is too lax.

Positive comments were also received. It was reported that very often, after notice of a Rule 30(b)(6) deposition is given, the parties engage in constructive exchanges that produce improvements from the perspective of both the noticing party and the organization and that facilitate an orderly inquiry. Based on input from the bar on the six amendment ideas, the subcommittee determined that proceeding with any of them would likely produce controversy rather than improve practice. At the same time, it seemed that a rule amendment that prompts, or even requires, parties to communicate about recurrent problem areas might be the best approach for improving practice. Initially, the subcommittee focused on possible amendments to Rule 16(c) (to require the court to consider including provision for Rule 30(b)(6) depositions in a case management order) or Rule 26(f) (to direct the parties to discuss the matter during their discovery planning conference). Ultimately, however, the subcommittee returned to Rule 30(b)(6) itself, drafting language that adds the requirement that the parties communicate about Rule 30(b)(6) depositions when a party proposes to take such a deposition.

At the fall 2017 meeting, the advisory committee discussed the draft language. Members provided helpful feedback, including the following: (1) any amendment should make clear that there is a bilateral obligation to confer; (2) the organization should be expected to discuss the identity of the person to be offered as its designee as well as the matters for examination; and (3) the inclusion in the draft that the parties “attempt” to confer might be problematic. There was also discussion about whether an amendment to Rule 26(f) would in fact be helpful.

Since the meeting, the subcommittee has continued to work on a draft proposed amendment. It plans to present a proposed amendment for publication to the advisory committee at its meeting in April 2018.

Social Security Disability Review Cases

As previously reported, the advisory committee has added to its agenda the consideration of a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference “develop for the Supreme Court’s consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).” The suggestion was referred to the advisory committee, as it is the appropriate committee to study and to advise about rules for civil actions in the district courts.

A subcommittee was formed to consider the ACUS suggestion and to gather additional data and information from the various stakeholders. As a first step, government and claimant representatives were invited to a meeting on November 6, 2017. Participants included the Vice Chair/Executive Director of the ACUS; the General Counsel of the Social Security Administration; the Counsel to the Associate Attorney General, Department of Justice; the Deputy Director of Government Affairs of the National Organization of Social Security Claimants’ Representatives; and a representative of the American Association for Justice. The meeting began with formal statements and developed through open give-and-take discussion that substantially focused, and seemed to narrow, the issues.

At its meeting the next day, the advisory committee engaged in a lengthy discussion of the ACUS suggestion. A similarly robust discussion occurred at the January 2018 meeting of the Standing Committee. No final decision has been made regarding the ACUS suggestion; questions and concerns remain regarding the advisability of promulgating rules for specific types of cases and whether any such rules would be effective. However, the advisory committee through its subcommittee is committed to thoroughly considering the suggestion and anticipates several additional months of information gathering before deciding whether to pursue draft rules.

MDL Proceedings

At its fall 2017 meeting, the advisory committee formed a subcommittee to consider three proposals for specific rules for MDL proceedings – actions transferred for “coordinated or consolidated pretrial proceedings” under 28 U.S.C. § 1407. Two of the proposals suggested amendments to the Civil Rules to add provisions applicable to all MDL proceedings. Several of these proposed amendments are born of a common concern: large MDL proceedings often attract claimants whose purported claims have no foundation in fact, and there is no effective means for screening them out early. Other proposed amendments address bellwether trial practice and an expansion of the opportunities for interlocutory appellate review.

A third proposal would only apply to those MDL proceedings (about 20) involving more than 900 individual cases. It proposes that after discovery has been completed and the bellwether cases selected, the remaining work would be divided among five judges “to decide whether to dispose of a case on motion, settle, or remand.” Judges from other districts could have intercourt assignments to sit with the MDL court for these purposes.

The advisory committee engaged in a preliminary discussion of these suggestions at its fall 2017 meeting. It was the consensus of the advisory committee that more information is needed, especially input from the plaintiffs’ bar and experienced MDL judges, as all of the proposals submitted thus far are from representatives of the defense bar. The subcommittee has begun information gathering. In considering whether there is an opportunity to improve MDL practice by amending current rules or adopting new rules, the subcommittee will coordinate closely with the Judicial Panel on Multidistrict Litigation.

Third Party Litigation Financing Agreements

The advisory committee has received a suggestion to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The advisory committee considered and declined to act upon similar proposals in 2014 and again in 2016. At its fall 2017 meeting, the advisory committee recognized that the issue is complicated and that any consideration must include input from both proponents and opponents of disclosure. The committee referred the issue to the MDL subcommittee, since one of the MDL proposals discussed above explicitly calls for disclosure of third party financing agreements. Additionally, such funding agreements are often used in MDL proceedings. The subcommittee will study the issue in an effort to determine whether it is something that should be pursued.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The advisory committee met on October 24, 2017. Among the topics for discussion were the consideration of the final report of the cooperator's subcommittee, a suggestion to amend Rule 32, and the development of a manual on complex criminal litigation.

Cooperator's Subcommittee

The main topic of discussion at the fall 2017 meeting was a report from the cooperator's subcommittee which was tasked with developing amendments to the Criminal Rules to address concerns regarding dangers to cooperating witnesses posed by access to information about cooperation in case files. The rules committees were asked to develop possible rule amendments

to implement the recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016.

The subcommittee presented its final report detailing its comprehensive study of the issue, its development of several packages of rules proposals, and its recommendations to the full advisory committee. The report included the development of rules amendments to implement the CACM guidance, as well as four alternative approaches and related rules amendments: (1) amendments omitting the requirement in the guidance for bench conferences in every case during the plea and sentencing hearings; (2) amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document; (3) amendments omitting the bench conferences and directing that cooperation-related documents be submitted directly to the court and not filed, rather than filed under seal; and (4) amendments designed to implement the CACM guidance and to supplement it with additional rules amendments that might be deemed necessary or desirable to carry out the CACM Committee's approach and objectives. The subcommittee also reported that it had begun, but not completed, consideration of a new draft Criminal Rule 49.2 that would limit remote access to categories of documents that frequently refer to cooperation, but would allow full access to those documents at the courthouse.

The subcommittee reported that in its view the package of rules amendments developed to implement the CACM guidance would fully do so. However, the subcommittee reported that it did not recommend adoption of that rules package or any of the other alternative sets of rules amendments it developed.

After robust discussion, the advisory committee agreed with the subcommittee's recommendation that no rules amendments on this issue be pursued at this time. All members agreed that the threat of harm to cooperators is a serious problem that should be addressed, but

the advisory committee determined that rules amendments were not the best way to address the problem at this time. Various concerns were expressed, including the notion that the proposed amendments would make judicial proceedings less transparent, and that the amendments would result in sweeping changes that may not be necessary. Members were also of the view that other changes (*e.g.*, possible recommendations by the Task Force on Protecting Cooperators that changes be made by the Bureau of Prisons and to the CM/ECF system) should be implemented before embarking on rules amendments.

The advisory committee also decided to hold in abeyance any final recommendation on the subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2, but provided feedback to the subcommittee on its working draft.

Rule 32(e)(2) (Sentencing and Judgment—Disclosing the Report and Recommendation)

Also at the fall 2017 meeting, the advisory committee decided to add to its agenda a suggestion to amend Rule 32(e)(2) which states: “The probation officer must give the presentence report to the defendant, the defendant’s attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.” Probation officers often receive requests from defendants for copies of their presentence reports (PSRs). There is concern that this provision might contribute to the problem of threats and harm to cooperators. These requests may be the result of pressure from other inmates to provide materials that could reveal whether there was cooperation. Rule 32(e)(2) deliberately grants the right to receive the PSR to the defendant in order to increase the chances that incorrect information would be identified and corrected. At present, however, PSRs are often served only on counsel, not on the defendant. Given this reality and the concern that providing PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question of whether to amend Rule 32(e)(2) was referred to the cooperator’s subcommittee for consideration.

Manual on Complex Criminal Litigation

The Rule 16.1 subcommittee has been charged with exploring the possibility of developing a manual on complex criminal litigation that would parallel the Manual on Complex Civil Litigation. With input from the subcommittee, the FJC has agreed to develop a special topics page on its website focused exclusively on complex criminal litigation. The page will initially include existing relevant materials. No decision has been made yet whether all of the materials originally prepared for judicial use will be available to the public. Going forward, the FJC will spearhead the development of a manual, including obtaining input on topics from a broader group.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 26, 2017. In conjunction with this meeting, the advisory committee convened a group of experts to discuss topics related to forensic expert testimony, Rule 702, and *Daubert*.

Conference on Forensic Expert Testimony, Rule 702, and *Daubert*

The conference consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether Evidence Rules amendments could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel consisted of judges and practitioners, and discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The conference provided much material for the advisory committee to evaluate.

Possible Amendment to Rule 801(d)(1)(A)

Rule 801(d)(1)(A) currently provides that prior inconsistent statements of a testifying witness, made under oath at a formal proceeding, may be admitted for substantive purposes. The

advisory committee continued its consideration of an amendment that would expand the rule to allow for substantive admissibility of prior inconsistent statements that are audiovisually recorded. At the advisory committee's request, the FJC prepared and issued surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. In addition, at the invitation of the advisory committee, several comments were submitted. At its next meeting, the advisory committee will consider this input, and decide whether or not to proceed with an amendment to Rule 801(d)(1)(A).

Possible Amendments to Rule 404(b)

The advisory committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. The advisory committee has resolved not to propose an amendment that would add an "active contest" requirement to Rule 404(b), concluding that such a requirement would be too rigid and should be left to the court's assessment of probative value and prejudicial effect. The advisory committee will continue to consider other possible amendments to Rule 404(b).

Possible Amendment to Rule 106

The advisory committee is considering whether Rule 106, the rule of completeness, should be amended to provide that a completing statement is admissible over a hearsay objection, and to provide that the rule – which currently is limited to written or recorded statements – should be expanded to cover oral statements as well.

Possible Amendment to Rule 609(a)(1)

The advisory committee is considering a suggestion to abrogate Rule 609(a)(1), which provides for admissibility (subject to a balancing test) of a witness's prior criminal convictions that did not involve dishonesty or a false statement. The reason for the suggestion is a reliance on principles of "restorative justice," i.e., that a person who has been convicted and released into

society should not be saddled with the opprobrium of a prior conviction, and that non-falsity convictions as a class are of very limited probative value and are highly prejudicial. The suggestion was considered with the knowledge that Rule 609(a)(1) and its applicable balancing tests are the result of a compromise following extensive congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The advisory committee will continue its consideration of Rule 609 at its spring meeting.

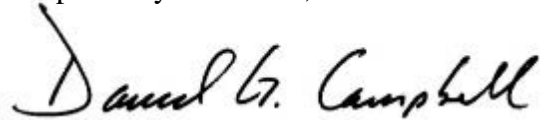
Rule 606(b) and the Supreme Court's Decision in *Pena-Rodriguez v. Colorado*

The advisory committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. In that case, the Court held that application of Rule 606(b), which bars testimony of jurors regarding deliberations, violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. The advisory committee previously declined to pursue an amendment due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. At its spring 2018 meeting, the advisory committee will revisit the issue of a possible amendment, but notes that continued review of the case law indicates that the lower courts are adhering to (and not expanding) the *Pena-Rodriguez* holding. The goal of any amendment would be to assure that Rule 606(b) would not be subject to unconstitutional application.

JUDICIARY STRATEGIC PLANNING

The Standing Committee considered the request to comment on two questions related to the *Strategic Plan for the Federal Judiciary*, and has provided a response to Chief Judge Carl Stewart, the judiciary's planning coordinator.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

TAB 1B

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the JCUS and transmitted to the Supreme Court (Sept 2016)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)
 REA History: transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to CV 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)
 REA History: transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002 (c), 8011	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C).	FRAP 4, 25
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c)	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)
 REA History: transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: submitted to Standing Committee for approval (June 2018)

REA History: approved by Advisory Committees (Spring 2018); unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication by Standing Committee (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply	
2255 R 5	Makes clear that movant has an absolute right to file a reply	

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
 Meeting of January 4, 2018 | Phoenix, Arizona

TABLE OF CONTENTS

Attendance	1
Opening Business.....	2
Approval of the Minutes of the Previous Meeting.....	3
Task Force on Protecting Cooperators.....	3
Report of the Advisory Committee on Criminal Rules	4
Report of the Advisory Committee on Civil Rules.....	7
Report of the Advisory Committee on Bankruptcy Rules	11
Report of the Advisory Committee on Evidence Rules.....	12
Report of the Advisory Committee on Appellate Rules	13
Report of the Administrative Office	15
Concluding Remarks.....	16

ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair Judge Jesse M. Furman Robert J. Giuffra, Jr., Esq. Daniel C. Girard, Esq. Judge Susan P. Graber Judge Frank Mays Hull Peter D. Keisler, Esq.	Professor William K. Kelley Judge Carolyn B. Kuhl Judge Amy St. Eve Elizabeth J. Shapiro, Esq.* Judge Srikanth Srinivasan Judge Jack Zouhary
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The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
 Judge Michael A. Chagares, Chair
 Professor Gregory E. Maggs, Reporter

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

Advisory Committee on Bankruptcy Rules –
 Judge Sandra Segal Ikuta, Chair
 Professor S. Elizabeth Gibson, Reporter

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

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

* Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve (by telephone)	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Julie Wilson (by telephone)	Attorney Advisor, RCS
Scott Myers (by telephone)	Attorney Advisor, RCS
Bridget Healy (by telephone)	Attorney Advisor, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to “show their papers,” such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP’s union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals’ access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with the Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, so a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the “master sealed event” approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force’s mission to consider whether rules or policy changes would encourage more cooperation. The Task Force’s charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee’s decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee

could revisit rules changes depending on the outcome of the Task Force's work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for

examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a “meet and confer” element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States (“ACUS”) proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS’s proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants’ representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider special rules for discovery because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee’s determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration

would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about transsubstantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater transsubstantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer transsubstantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering transsubstantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. Business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created an MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months gathering

information. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials compiled by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine these issues further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges

consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation

Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School,

where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President's Council of Advisors on Science and Technology's ("PCAST") report on forensic science in criminal courts and a potential "best practices" manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A) (prior inconsistent statement under oath). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b) (crimes, wrongs, or other acts); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Civil Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court's decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion

item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court's electronic-filing system, replacing "proof of service" with "filed and served." Given the pending amendment to Rule 25(d), the Advisory Committee decided that references to "proof of service" in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of "filed and served" in Rule 25(d), suggesting elimination of the term "and served." Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee's style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court's consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee's consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks' offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the

suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are “costs on appeal” under the rule. The Advisory Committee determined to inform the Civil Rules Committee of the issue and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff (“RCS”). The Standing Committee reviewed Scott Myers’ report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators,” which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act (“LARA”). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt’s staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts’ authority to deny Congress’s ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on “The

Role and Impact of Nationwide Injunctions by District Courts.” Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary’s Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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TAB 2A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. It approved proposed amendments falling into four categories.

First, it approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to (1) electronic service (Rules 3 and 13) and (2) disclosure statements (Rules 26.1, 28, and 32).

Second, it approved a proposed amendment that had previously been submitted to the Supreme Court but withdrawn for revision and for which it now seeks final approval. This proposed amendment, discussed in Part III of this report, relates to proof of service (Rule 25(d)).

Third, it approved proposed amendments, not previously published for comment, that it views as conforming and technical amendments for which it seeks final approval. These proposed amendments, discussed in Part IV of this report, relate to proof of service (Rules 5, 21, 26, 32, and 39).

Fourth, it approved proposed amendments for which it seeks approval for publication. These proposed amendments, discussed in Part V of this report, relate to length limits applicable to responses to petitions for rehearing (Rules 35 and 40).

The Committee also considered several other items, removing three of them from its agenda. These items are discussed in Part VI of this report.

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 13, 26.1, 28, and 32. These amendments were published for public comment in August 2017.

The proposed amendments to Rules 3 and 13—both of which deal with the notice of appeal—are designed to reflect the move to electronic service. Rule 3 currently requires the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

There were no public comments on the proposed amendments to Rules 3 and 13, and the Committee seeks final approval for them as published.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ **sending** a copy to each party’s counsel of record—excluding the appellant’s—or, if a party is proceeding pro se, to the party’s last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant; ~~either by personal service or by mail addressed to the defendant.~~ The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk’s failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ **sends** copies, with the date of

~~mailing~~ **sending**. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~ **sending it** to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

The proposed amendment to Rule 26.1 would change the disclosure requirements designed to help judges decide if they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.”

There were no public comments on the proposed amendments to Rules 28 and 32. The Committee seeks final approval for Rule 28 as published and Rule 32 in a slightly-modified form discussed in Part IV, *infra*.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

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

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;

- certificates of counsel;
 - the signature block;
 - the proof of service; and
 - any item specifically excluded by these rules or by local rule.
- * * * * *

There were four comments, however, regarding the proposed amendment to Rule 26.1. First, the National Association of Criminal Defense Lawyers (NACDL) suggested that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection (b) dealing with organizational victims in criminal cases. Second, Charles Ivey suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. Professor Elizabeth Gibson, the reporter to the Bankruptcy Rules Committee, was consulted in response to this comment. Third, journalist John Hawkinson objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the Committee Note was required to understand it. Finally, Aderant CompLaw suggested language changes to eliminate any ambiguity about who must file a disclosure statement.

The Committee revised the proposed amendment to Rule 26.1 and accompanying Committee Note, in response to these comments.

The Committee Note was revised to follow more closely the Committee Note for Criminal Rule 12.4 and account for the NACDL comment.

Professor Gibson suggested that no change was needed in response to the Ivey comment, but did suggest that Rule 26.1(c) be revised to address a potential gap in the proposed amendment, and the Committee agreed. In particular, the published proposal required that certain parties “must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must” provide particular information. That language was changed to require that certain parties “must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).”

In an effort to clarify the proposed amendment in response to the Hawkinson and Aderant CompuLaw comments, the Committee took what in the published version had been a separate subparagraph 26.1(d) dealing with intervenors and folded it into a new last sentence of 26.1(a). In addition, the phrase “wants to intervene” was changed to “seeks to intervene” in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but not truly “want” to intervene. Other stylistic changes were made as well.

The Committee seeks final approval for Rule 26.1 as revised.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~ Nongovernmental Corporations and Intervenor. Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

~~(b)~~**(d) Time for Filing; Supplemental Filing.** A party must file the The Rule 26.1(a) statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~ be included before the table of contents: in the principal brief; and

(3) A party must supplement its statement be supplemented whenever the information that ~~must be disclosed~~ required under Rule 26.1(a) changes.

~~(e)~~**(e) Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Attachment B1 to this report contains the text of the proposed amendments to Rules 3, 13, 26.1, 28, and 32.

III. Action Item for Final Approval After Withdrawal and Revision

The Committee seeks final approval for a proposed amendment to Rule 25(d). This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court, but after discussion at the January 2018 meeting was withdrawn for revision with the expectation that a revised version would be presented at the June 2018 meeting.

This proposed amendment to Rule 25(d) is designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version was withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The prior version provided, "A paper presented for filing other than through the court's electronic-filing system must contain either of the following: * * *" As revised, the proposed amendment provides, "A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system: * * *"

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served;
or

(B) proof of service consisting of a statement by the person who made service certifying:

- (i) the date and manner of service;
- (ii) the names of the persons served; and
- (iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)]¹, the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Attachment B2 to this report contains the text of the proposed amendment to Rule 25(d).

IV. Action Item for Final Approval Without Public Comment

Rules 5 (appeals by permission), 21 (extraordinary writs), 26 (computing time), Rule 32 (form of papers), and 39 (costs), all currently contain references to “proof of service.” If the proposed amendment to Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Committee seeks final approval of what it views as technical and conforming amendments to these Rules. Some stylistic changes are proposed as well.

These amendments were also discussed at the January 2018 meeting of the Standing Committee, and comments were provided by the style consultants at that meeting, with the expectation that revised versions would be presented at the June 2018 meeting.

Rule 5 would no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it would provide that “a party must file a petition with the circuit clerk and serve it on all other parties ***.”

¹ An amendment to include this corrected citation has been approved by the Supreme Court.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed with the circuit clerk with proof of service~~ and serve it on all other parties to the district-court action.

* * * * *

Similarly, the phrase “proof of service” in Rule 21(a) and (c) would be deleted and replaced with the phrase “serve it on” and “serving it.”

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

The term “proof of service” would also be deleted from Rule 26(c). Stylistically, the expression of the current rules for when three days are added would be simplified: “When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).”

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a), ~~unless the paper is delivered on the date of service stated in the proof of service. For purposes of this~~

~~Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.~~

* * * * *

Rule 32(f) lists the items that are excluded when computing any length limit. One such item is “the proof of service.” To take account of the frequent occasions in which there would be no such proof of service, the article “the” is proposed to be deleted. And given that change, the Committee agreed that it made sense to delete all of the articles in the list of items. If both this proposed amendment and the other proposed amendment to Rule 32 (discussed in Part II above) are approved, the two sets of changes should be merged.

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

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ cover page;
- a ~~corporate~~² disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

The phrase “with proof of service” would also be deleted from Rule 39 and replaced with the phrase “and serve ***.”

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, ~~with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

² The word “corporate” is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

Attachment B3 to this report contains the text of the proposed amendments to Rules 5, 21, 26, 32, and 39.

V. Action Item for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 35 and 40. These amendments would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none stated for responses to those petitions. While some courts of appeals routinely include a length limit in the order permitting the filing, and experienced practitioners understand that in the absence of such an order the length limits for the petitions themselves apply, the Committee believes that it would be good to have the length limit stated in the rules themselves.

The Committee also observed that Rule 35 (which deals with en banc determinations) uses the term “response,” while Rule 40 (which deals with panel rehearing) uses the term “answer.” The proposed amendment would change Rule 40 to make it consistent with Rule 35, with both using the term “response.”

Rule 35. En Banc Determination

* * * * *

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

* * * * *

(2) Except by the court’s permission:

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

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

* * * * *

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

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

(a) Time to File; Contents; Answer ~~Response~~; Action by the Court if Granted

* * * * *

(3) ~~Answer~~ **Response.** Unless the court requests, no ~~answer~~ response to a petition for panel rehearing is permitted. ~~But~~ ~~o~~ Ordinarily, rehearing will not be granted in the absence of such a request. If a

response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

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

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Attachment B4 to this report contains the text of the proposed amendments and the proposed Committee Notes to Rules 35 and 40.

VI. Information Items

The Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21. An appropriate subcommittee has been formed.

A subcommittee has also been formed to consider whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will consider whether it would be appropriate to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. Ordinarily, under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But under a line of cases in the Eighth Circuit, if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, a negative inference is drawn that other, unmentioned, orders are not being appealed.

A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion. On the other hand, there may be situations in which judicial approval of settlements is required.

The Committee decided to remove three items from its agenda.

First, a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology, especially with briefs that cite to the electronic record of the district court, will transform how appendices are done and may solve the problem. Therefore, the Committee decided to remove this matter from the agenda, but revisit it in three years.

Second, the Committee considered a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. In light of how few cases in the courts of appeals involve amicus briefs, and the very different amicus practice in the Supreme Court, the Committee decided to take this matter off the agenda.

Third, the Committee had been considering issues involving costs on appeal, and previously asked the Civil Rules Committee for feedback. The Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works. Accordingly, the Committee decided to remove the matter from its agenda.

Finally, the Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

A draft of the minutes from the Committee's April 6, 2018 meeting is included at Attachment C.

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TAB B1

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Attachment 1

**Proposed Amendments Previously Published for
Public Comment**

and

**Submitted to the Standing Committee for Final
Approval**

(Rules 3, 13, 26.1, 28, and 32)

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

- (1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, ~~either by personal service or by mail addressed to the defendant.~~ The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals

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

FEDERAL RULES OF APPELLATE PROCEDURE

named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

- (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.
- (3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

Amendments to Subdivision (d) change the words “mailing” and “mails” to “sending” and “sends,” and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

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FEDERAL RULES OF APPELLATE PROCEDURE

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~ sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

Changes Made After Publication and Comment

FEDERAL RULES OF APPELLATE PROCEDURE

No changes were made after publication and comment.

Summary of Public Comments

No comments were submitted.

FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 26.1 ~~Corporate~~ Disclosure Statement**

2 (a) ~~Who Must File~~ **Nongovernmental Corporations and**

3 **Intervenors.** Any nongovernmental ~~corporate~~

4 corporation that is a party to a proceeding in a court of

5 appeals must file a statement that identifies any parent

6 corporation and any publicly held corporation that

7 owns 10% or more of its stock or states that there is

8 no such corporation. The same requirement applies to

9 a nongovernmental corporation that seeks to

10 intervene.

11 **(b) Organizational Victim in a Criminal Case.** In a

12 criminal case, unless the government shows good

13 cause, it must file a statement that identifies any

14 organizational victim of the alleged criminal activity.

15 If the organizational victim is a corporation, the

16 statement must also disclose the information required

FEDERAL RULES OF APPELLATE PROCEDURE

17 by Rule 26.1(a) to the extent it can be obtained
18 through due diligence.

19 (c) **Bankruptcy Cases.** In a bankruptcy case, the debtor,
20 the trustee, or, if neither is a party, the appellant must
21 file a statement that (1) identifies each debtor not
22 named in the caption and (2) for each debtor in the
23 bankruptcy case that is a corporation, discloses the
24 information required by Rule 26.1(a).

25 ~~(b)~~ **(d) Time for Filing; Supplemental Filing.** ~~A party~~
26 ~~must file the~~ The Rule 26.1(a) statement must:

27 (1) be filed with the principal brief or upon filing a
28 motion, response, petition, or answer in the court
29 of appeals, whichever occurs first, unless a local
30 rule requires earlier filing.;

31 (2) ~~Even if the statement has already been filed, the~~
32 ~~party's principal brief must include the statement~~

FEDERAL RULES OF APPELLATE PROCEDURE

33 be included before the table of contents; in the
34 principal brief; and

35 (3) A party must supplement its statement be
36 supplemented whenever the information ~~that~~
37 ~~must be disclosed~~ required under Rule 26.1(a)
38 changes.

39 ~~(e)~~ (e) **Number of Copies.** If the Rule 26.1(a) statement is
40 filed before the principal brief, or if a supplemental
41 statement is filed, ~~the party must file~~ an original and 3
42 copies must be filed unless the court requires a
43 different number by local rule or by order in a
44 particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

FEDERAL RULES OF APPELLATE PROCEDURE

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Changes Made After Publication and Comment

- Instead of adding a separate subsection (d) to deal with intervenors, a sentence dealing with intervenors is added to the end of subsection (a) stating that the requirement of subsection (a) applies to a

FEDERAL RULES OF APPELLATE PROCEDURE

nongovernmental corporation that seeks to intervene. The title of subsection (a) is changed accordingly, and “corporate party” is changed to “corporation that is a party.” The phrase “wants to intervene” is changed to “seeks to intervene.”

- The term “bankruptcy proceeding” is changed to “bankruptcy case” in subsection (c). The requirements of identifying debtors not named in the caption and providing information about corporate debtors are separately numbered. A cross-reference to the information required by subsection (a) is added, and the material that repeated the information required in subsection (a) is deleted.
- The timing requirements for filing the disclosure statement are broken out into separately-numbered subsections and the language simplified.
- The Committee Note is reorganized to reflect that the provision dealing with intervenors is no longer in a separate subsection, to include an overview paragraph, and to align with the Committee Note to the proposed 2018 amendment to Criminal Rule 12.4(a)(2).

Summary of Public Comment

Peter Goldberger, National Association of Criminal Defense Lawyers (AP-2017-0002-0007)—Language be added to the Committee Note to help deter overuse of the “good cause” exception regarding identification of organizational victims.

Charles Ivey (AP-2017-0002-0005)—Language should be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings under 11 U.S.C. § 303 and petitioning creditors be identified.

FEDERAL RULES OF APPELLATE PROCEDURE

John Hawkinson, freelance journalist (AP-2017-0002-0008)—The requirements imposed on an intervenor should be clear from the text of the rule itself without having to read the Committee Notes.

Ellie Bertwell, Aderant CompuLaw (AP-2017-0002-0006)— Language should be added to eliminate any ambiguity about who must file a disclosure statement.

FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 28. Briefs**

2 **(a) Appellant’s Brief.** The appellant’s brief must
3 contain, under appropriate headings and in the order
4 indicated:

5 (1) a ~~corporated~~ disclosure statement if required by
6 Rule 26.1;

7 * * * * *

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of Rule 26.1.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

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FEDERAL RULES OF APPELLATE PROCEDURE

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

2 * * * * *

3 **(f) Items Excluded from Length.** In computing any
4 length limit, headings, footnotes, and quotations count
5 toward the limit but the following items do not:

- 6 • the cover page;
- 7 • a ~~corporated~~ disclosure statement;
- 8 • a table of contents;
- 9 • a table of citations;
- 10 • a statement regarding oral argument;
- 11 • an addendum containing statutes, rules, or
12 regulations;
- 13 • certificates of counsel;
- 14 • the signature block;
- 15 • the proof of service; and
- 16 • any item specifically excluded by these rules or
17 by local rule.

FEDERAL RULES OF APPELLATE PROCEDURE

18

* * * * *

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of Rule 26.1.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

TAB B2

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Attachment 2

Proposed Amendment Previously Submitted
to the
Supreme Court but Withdrawn for Revision
and
Submitted After Revision
to the
Standing Committee For Final Approval
(Rule 25(d)*)

* This amendment proposed to Rule 25(d) is drafted on the assumption that the proposed amendment to Rule 25(d) promulgated by the Supreme Court in April of 2018, which corrects a citation in Rule 25(d)(2), is not rejected by Congress.

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE***

1 **Rule 25. Filing and Service**

2 * * * * *

3 **(d) Proof of Service.**

4 (1) A paper presented for filing must contain either
5 of the following if it was served other than
6 through the court's electronic filing system:

7 (A) an acknowledgment of service by the
8 person served; or

9 (B) proof of service consisting of a statement
10 by the person who made service certifying:

11 (i) the date and manner of service;

12 (ii) the names of the persons served; and

13 (iii) their mail or electronic addresses,

14 facsimile numbers, or the addresses of

* New material is underlined in red; matter to be omitted is lined through.

FEDERAL RULES OF APPELLATE PROCEDURE

15 the places of delivery, as appropriate
 16 for the manner of service.

17 (2) When a brief or appendix is filed by mailing or
 18 dispatch in accordance with
 19 [Rule 25(a)(2)(A)(ii)]*, the proof of service must
 20 also state the date and manner by which the
 21 document was mailed or dispatched to the clerk.

22 (3) Proof of service may appear on or be affixed to
 23 the papers filed.

24 * * * * *

Committee Note

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when filing and service is made through a court’s electronic-filing system. The notice of electronic filing generated by the court’s system serves that purpose.

* An amendment to include this corrected citation has been approved by the Supreme Court.

TAB B3

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Attachment 3

Proposed Conforming and Technical Amendments

Not Previously Published for Public Comment

and

Submitted to the Standing Committee for

Final Approval

(Rules 5, 21, 26, 32*, and 39)

* This amendment proposed to Rule 32 is drafted on the assumption that the other proposed amendment to Rule 32, concurrently being submitted to the Standing Committee, is adopted.

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 5. Appeal by Permission**

2 **(a) Petition for Permission to Appeal.**

3 (1) To request permission to appeal when an appeal
4 is within the court of appeals' discretion, a party
5 must file a petition ~~for permission to appeal. The~~
6 ~~petition must be filed~~ with the circuit clerk ~~with~~
7 ~~proof of service~~ and serve it on all other parties to
8 the district-court action.

9 * * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to "proof of service" to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

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

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FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 21. Writs of Mandamus and Prohibition, and**
2 **Other Extraordinary Writs**

3 **(a) Mandamus or Prohibition to a Court: Petition,**
4 **Filing, Service, and Docketing.**

5 (1) A party petitioning for a writ of mandamus or
6 prohibition directed to a court must file ~~a~~the
7 petition with the circuit clerk ~~with proof of~~
8 ~~service on~~and serve it on all parties to the
9 proceeding in the trial court. The party must also
10 provide a copy to the trial-court judge. All
11 parties to the proceeding in the trial court other
12 than the petitioner are respondents for all
13 purposes.

14 * * * * *

15 **(c) Other Extraordinary Writs.** An application for an
16 extraordinary writ other than one provided for in
17 Rule 21(a) must be made by filing a petition with the
18 circuit clerk ~~with proof of service~~and serving it on the

FEDERAL RULES OF APPELLATE PROCEDURE

19 respondents. Proceedings on the application must
20 conform, so far as is practicable, to the procedures
21 prescribed in Rule 21(a) and (b).

22 * * * * *

Committee Note

The term “proof of service” in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court’s electronic filing system.

FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 26. Computing and Extending Time**

2 * * * * *

3 (c) **Additional Time aAfter Certain Kinds of Service.**

4 When a party may or must act within a specified time
5 after being served, and the paper is not served
6 electronically on the party or delivered to the party on
7 the date stated in the proof of service, 3 days are
8 added after the period would otherwise expire under
9 Rule 26(a), ~~unless the paper is delivered on the date of~~
10 ~~service stated in the proof of service. For purposes of~~
11 ~~this Rule 26(c), a paper that is served electronically is~~
12 ~~treated as delivered on the date of service stated in the~~
13 ~~proof of service.~~

* * * * *

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d).

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FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 32. Form of Briefs, Appendices, and Other**
2 **Papers**

3 * * * * *

4 **(f) Items Excluded from Length.** In computing any
5 length limit, headings, footnotes, and quotations count
6 toward the limit but the following items do not:

- 7 • ~~the~~ cover page;
- 8 • a ~~corporate~~^{*} disclosure statement;
- 9 • a table of contents;
- 10 • a table of citations;
- 11 • a statement regarding oral argument;
- 12 • ~~an~~ addendum containing statutes, rules, or
13 regulations;
- 14 • certificates of counsel;
- 15 • ~~the~~ signature block;
- 16 • ~~the~~ proof of service; and

* The word “corporate” is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

- 17 • any item specifically excluded by these rules or
18 by local rule.

* * * * *

Committee Note

The amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 39. Costs**

2 * * * * *

3 **(d) Bill of Costs: Objections; Insertion in Mandate.**

4 (1) A party who wants costs taxed must—within 14
5 days after entry of judgment—file with the
6 circuit clerk, ~~with proof of service,~~ and serve an
7 itemized and verified bill of costs.

8 * * * * *

9 **Committee Note**

In subdivision (d)(1) the words “with proof of service” are deleted and replaced with “and serve” to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

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TAB B4

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A

4 party may petition for a hearing or rehearing en banc.

5 * * * * *

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

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

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

13 * * * * *

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

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

18 * * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if a court orders one.

Rule 40. Petition for Panel Rehearing

* * * * *

**(a) Time to File; Contents; ~~Answer~~Response; Action
by the Court if Granted**

* * * * *

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

* * * * *

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

4 FEDERAL RULES OF APPELLATE PROCEDURE

- (1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and
- (2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if a court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

TAB 2C

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FRAP Item	Proposal	Source	Current Status
11-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18

FRAP Item	Proposal	Source	Current Status
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
15-AP-A/H	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18

FRAP Item	Proposal	Source	Current Status
11- AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	<p>Discussed and retained on agenda 04/13</p> <p>Discussed and retained on agenda 10/15</p> <p>Discussed and retained on agenda 04/16</p> <p>Discussed and retained on agenda 10/16</p> <p>Discussed and retained on agenda 10/16</p> <p>Draft approved for submission to Standing Committee 05/17</p> <p>Draft approved for publication by Standing Committee 06/17</p> <p>Draft published for public comment 08/17</p> <p>Final approval for submission to Standing Committee 4/18</p>
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	<p>Discussed and retained on agenda 10/11</p> <p>Discussed and retained on agenda 09/12</p> <p>Discussed and retained on agenda 04/13</p> <p>Discussed and retained on agenda 04/14</p> <p>Discussed and retained on agenda 10/14</p> <p>Discussed and retained on agenda 04/15</p> <p>Discussed and retained on agenda 10/15</p> <p>Draft approved 04/16 for submission to Standing Committee</p> <p>Approved for publication by Standing Committee 06/16</p> <p>Revised draft approved 05/17 for resubmission to Standing Committee following public comments</p> <p>Revised draft approved by the Standing Committee 06/17</p> <p>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17</p> <p>Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018</p> <p>Final approval of subsection (d)(1) for submission to Standing Committee 4/18</p>
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	<p>Discussed and retained on agenda 10/15</p> <p>Discussed and retained on agenda 04/16</p> <p>Discussed and retained on agenda 10/16</p> <p>Draft approved 05/17 for submission to Standing Committee</p> <p>Draft approved for submission to Standing Committee 05/17</p> <p>Draft approved for publication by Standing Committee 06/17</p> <p>Draft published for public comment 08/17</p> <p>Final approval for submission to Standing Committee 4/18</p>

FRAP Item	Proposal	Source	Current Status
18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting. Proposed draft for publication approved for submission to Standing Committee 4/18.
16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed to consider issue. Discussed at 4/18 meeting, and continued review.
17-AP-G	Rule 42(b)–discretionary “may” dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee was formed to review. Discussed at 4/18 meeting and continued review.
18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting. Subcommittee formed.
17-AP-F	Rule 29 – letters of blanket consent	Stephen E. Sachs	Discussed at 4/18 meeting and removed from agenda.
Costs on appeal suggestion	Whether Rule 7 needs to be amended to deal with whether attorneys’ fees are included in costs on appeal.	Committee	Discussed at 11/17 meeting. Referred to the Civil Rules Committee. Note this issue was previously discussed at the 10/16 meeting. Discussed at 4/18 meeting and removed from agenda.
Review of rules regarding appendices	New business from 11/17 meeting	Committee	Discussed at 11/17 meeting and a subcommittee was formed to review. Discussed at 4/18 meeting and removed from agenda. Will reconsider in three years.

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TAB 2D

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Minutes of the Spring 2018 Meeting of the
Advisory Committee on the Appellate Rules
April 6, 2018
Philadelphia, Pennsylvania

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 6, 2018, at approximately 9:00 a.m., at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III.

Also present were Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure; Patrick Tighe, Rules Law Clerk, RCSO; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules, participated in part of the meeting by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He introduced Edward Hartnett, the new Reporter, and Patricia S. Dodszeit, the former chief deputy clerk and now the Clerk of United States Court of Appeals for the Third Circuit and Clerk of Court Representative. He thanked Bridget Healy, Shelly Cox, and Rebecca Womeldorf for organizing the meeting. He then briefly reminded everyone of the rule making process under the Rules Enabling Act, and noted that

the only amendment to the Federal Rules of Appellate Procedure that took effect on December 1, 2017, was an amendment to FRAP 4(a)(4)(B) that restored subsection (iii).

II. Approval of the Minutes

The draft minutes of the November 8, 2017, Advisory Committee meeting were corrected to reflect that Kevin Newsome was appointed to the United States Court of Appeals for the Eleventh Circuit, and approved as amended.

III. Discussion Items

A. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, Published for Public Comment in August 2017, Particularly Proposal to Amend Rule 26.1 to Provide More Information Relevant to Recusal (08-AP-A; 08-AP-R; 11-AP-C)

Judge Chagares noted that there were no public comments on the proposed amendments to Rules 3, 13, 28, and 32, and no member of the Committee had any objection to them. He then opened discussion of the proposed amendment of Rule 26.1, dealing with disclosures designed to help judges decide if they must recuse themselves. This proposed amendment had been published for public comment, and was being considered in light of those comments.

Before turning to the particular proposals, an attorney member asked whether information about third-party funding of litigation showed up anywhere to inform recusal decisions. Judge Campbell noted that this issue was under active consideration by the Civil Rules Committee. Mr. Coquillette noted that the issue was also under consideration by state legislatures and bar associations. Those who oppose requiring disclosure observe that judges would not invest in third-party litigation funders, but a judge member pointed out that their relatives might.

Judge Chagares then turned to 26.1, noting that the version before the Committee had been revised in light of the comments and the input of Ms. Struve and the style consultants. In particular, the published version had a separate subparagraph 26.1(d) dealing with intervenors; for clarity that was folded into a new last sentence of 26.1(a).

Judge Chagares identified a glitch in the version of 26.1(a) in the agenda book (page 125). It refers to any “nongovernmental corporation to a proceeding.” The glitch could be fixed by adding the word “party,” so that it would read “nongovernmental corporate party to a proceeding.” Judge Campbell noted that it

could also be fixed by adding the phrase “that is a party,” so that it would read “nongovernmental corporation that is a party to a proceeding.” The Committee was content with either phrasing, leaving the matter to coordination with the Committee on Bankruptcy Rules.

An attorney member questioned whether the word “proceeding” should be changed to “case,” for consistency with Rule 26.1(c). Judge Pepper stated that the Bankruptcy Committee wanted to be sure that the 26.1(c) provision dealing with bankruptcy refer to “case” rather than “proceeding,” but that “proceeding” was appropriate for 26.1(a), because there may be proceedings in the courts of appeals that are not cases. Judge Campbell advocated not changing things that don’t need changing, and the Committee decided to leave the word “proceeding.”

An academic member observed that a proposed intervenor may seek intervention because of a need to protect its interests, but not truly “want” to intervene, and therefore suggested changing the word “wants” to “seeks” in the final sentence of 26.1(a). The Committee agreed, so that the final sentence would read, “The same requirement applied to a nongovernmental corporation that seeks to intervene.”

Turning to 26.1(b), dealing with organizational victims in criminal cases, Judge Chagares noted that the only proposed change from the published version was stylistic. Rule 26.1(c), dealing with bankruptcy cases, had a stylistic change from the published version that replaced redundant language with a cross-reference to 26.1(a). In keeping with the wishes of the Bankruptcy Committee, “proceeding” in this subsection was changed to “case,” to avoid confusion with the term “adversary proceeding” in bankruptcy cases.

The reporter pointed out that the phrasing of the version of 26.1(d) before the Committee was problematic in that 26.1(d)(3) provided that the “statement must . . . supplement the statement,” and suggested it be changed to the “statement must . . . be supplemented.” An attorney member noted that a 26.1(d)(2) had a similar problem, in that it provided that the “statement must . . . include the statement,” and suggested that it be changed to the “statement must . . . be included.”

Turning to the Committee Note, a judge member asked if the word “mainly” was needed, and another judge member suggested striking it. An attorney member pointed to the need to restore the word “of” to the phrase “disclosure of the names of all the debtors.” Another attorney member suggested that the phrase “the names of the debtors” should be restored, because the pronoun “they” might be read to refer to “bankruptcy cases,” rather than the intended referent “the names of the debtors.” Invoking the rule of the last antecedent, a judge member agreed.

As so amended, the Committee agreed to forward the proposed amendment to Rule 26.1 to the Standing Committee.

B. Proposal to Amend Rule 25(d) to Eliminate Unnecessary Proofs of Service in Light of Electronic Filing (and Technical Conforming Amendments to Rules 5, 21, 26, 32, and 39) (11-AP-D)

Judge Chagares explained that this proposal was designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version of this amendment to Rule 25(d) was approved by the Standing Committee and sent to the Supreme Court, but withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The version before the Committee (page 137 of the agenda book) is designed to be consistent with other Rules. It requires that a paper presented for filing must have an acknowledgement or proof of service "if it was served other than through the court's electronic filing system." In response to a question from Judge Campbell, it was confirmed that this version is consistent with the Bankruptcy Rule.

The Committee had no concern with conforming amendments to Rules 5, 21, 39 eliminating references to "proof of service." Judge Campbell raised a concern about the conforming amendment to Rule 26, asking whether the three-day rule should apply to all papers served electronically or only those served through the court's electronic filing system, given that a party might not serve until several days after filing. After several members of the Committee observed that the clock under Rule 26(c) starts upon service, not filing, the Committee agreed that there was no need to change the version of Rule 26(c) as proposed on page 155 of the agenda book. At the suggestion of an academic member of the Committee, the last clause of the Committee Note—which refers to a court's electronic filing system—was deleted.

The Committee approved the elimination of the articles from the list of items in Rule 32(f), and also eliminated the first sentence of the Committee Note referring to proof of service.

Judge Chagares confirmed that the prior reporter had done a global search for "proof of service," so that these are the only needed conforming amendments.

The Committee agreed that these were technical amendments, so that, in its view, there was no need for further public comment.

C. Rule 3(c)(1)(B) and the Merger Rule (16-AP-D)

Professor Sachs reported on behalf of the subcommittee formed to study the designation of the judgment or order appealed from in a notice of appeal. Under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But there is a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. That is, a negative inference is drawn that other, unmentioned, orders are not being appealed.

The subcommittee's work led it to other adjacent issues, including the proper handling of a notice of appeal when the district court did not enter a separate judgment. The subcommittee sought to get a sense of the Committee as to the extent of the problem, and whether the focus should be on the narrow issue that prompted the agenda item or on these broader issues.

Professor Struve pointed out that there is a great deal of confusion in this area, including the proper handling of appeals from post-judgment orders where the party is really seeking review of the underlying prior order, and appeals from an initial order but not an order denying reconsideration (or vice versa). It is nonetheless quite challenging to draft a rule that fixes these problems without creating new ones.

An attorney member stated that the line of cases in the Eighth Circuit is problematic and somewhat terrifying, because clients often question whether a simple notice of appeal from a final judgment is enough, and seek to have particular orders mentioned to make sure they are covered. Looking under this rock, however, revealed lots of other problems. Judge Chagares noted that in all his years on the bench, he had seen a problem regarding the order designated only once.

A judge member asked whether this was a jurisdictional matter that could only be handled by Congress. Several members of the Committee responded that issues involving the content of the notice of appeal, as opposed to the time for appeal, were not jurisdictional. Professor Sachs suggested that one approach might be to broadly authorize amendments to notices of appeal, but that allowing amendments out of time might raise jurisdictional and supersession issues.

An attorney member stated that the current Rule, which tells the reader to "designate the judgment, order, or part thereof being appealed," is very ambiguous. It is written to cover both appeals from final judgments and appeals from interlocutory orders, and gives no indication that an appeal from a final judgment brings up prior interlocutory orders. It invites the inexperienced lawyer to list everything. But a rule cannot explain the entire merger doctrine. A different attorney member suggested that a Rule could state that an appeal from a final judgment brings up the final judgment and all interlocutory orders, but Professor Struve noted that the merger doctrine doesn't cover all prior orders. Professor Sachs

raised the question of whether the merger doctrine also applies when an appeal is properly taken from an interlocutory order.

A judge member suggested that, from the appellee's perspective, it would be good to know what is actually being appealed. Attorney members noted that the question of what issues will be raised on appeal is addressed in subsequent filings.

The reporter suggested that perhaps the Rule should call on the appellant to designate simply the *appealable* judgment or order, leaving to the merger doctrine the question of what issues are *reviewable* on appeal from that appealable judgment or order.

As for the question of whether to address the broader issues or only the narrow issues, and even whether a rogue line of cases in one circuit justifies a Rule change, Judge Chagares reminded the Committee that upending an established Rule, at times, can cause more confusion than clarity. Justice French agreed to join the subcommittee.

D. Improving Appendices

Judges Chagares observed that a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology may solve the problem.

Ms. Dodszeit stated that the Clerks recommend waiting. The technology is changing quickly, and electronic appendices, with briefs that cite to the electronic record of the district court, will make for a great shift in how appendices are done.

A judge member noted that the biggest problem is duplication. An attorney member reminisced about appendices that ran 20,000 pages, but that current practice of a proof brief, with an appendix that includes what is actually cited, avoids that problem.

Judge Campbell stated that trial exhibits are not placed on the electronic docket, but are frequently put in electronic form for use of the jury. Perhaps they should be put on the electronic docket.

The Committee decided to remove this matter from the agenda, but revisit it in three years.

E. Dismissals under Rule 42(b) (17-AP-G)

Mr. Landau reported for the subcommittee examining Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation

signed by all parties. Some cases, relying on the word “may,” hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The parallel Supreme Court Rule (Rule 46.1), by contrast, uses the word “will” rather than “may.” The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion.

A judge member asked whether there was ever a legitimate reason to not dismiss. The reporter asked whether laws that require judicial approval of settlements, such as the Tunney Act, apply to settlements on appeal. Others raised the possibility of class actions. Judge Campbell stated that class actions are dealt with in forthcoming Civil Rules.

An attorney member stated that some judges are concerned with what appear to be conflicts of interest between attorneys with institutional interests who want to flush a case after oral argument and the client who is being sold out. Mr. Coquillette stated that such a lawyer would be violating lots of rules of professional conduct, and that there are other remedies for such behavior. Judge Kozinski once wrote a dissent contending that an attorney with an institutional interest was giving up on a case with no gain to the client in return, prompting an attorney member to ask how the judge could know that there was no gain in return.

The subcommittee will continue its examination.

F. Rule 29 Blanket Consent to Amicus Briefs (17-AP-F)

Professor Sachs presented a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. A blanket consent procedure would reduce the burden on amici and parties in seeking and providing individualized consent, and perhaps on the court deciding motions if consent is not obtained in time. Mr. Byron noted that there are some cases in which the Department of Justice has to respond to many emails seeking consent, and this amendment would help a little, but that the emails are not much of a burden so that it isn't really needed.

Ms. Dodszeit reported that there were about 100 cases in that past five years in the Court of Appeals for the Third Circuit with even one amicus brief. She also reported that, under current practice, if the Clerk were to receive a blanket consent letter, it would be noted on the docket and the Clerk would act in accordance with it.

In light of the very different amicus practice in the Supreme Court compared to the courts of appeals, the Committee decided to take this matter off the agenda, with thanks to Professor Sachs for raising the issue.

G. Costs on Appeal

This matter had previously been referred to the Civil Rules Committee for feedback. Judge Chagares reported that the Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works.

Accordingly, the Committee decided to remove the matter from its agenda.

H. Supreme Court Decision in *Hall v. Hall*

The reporter presented a discussion of the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. The reporter noted that this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved.

The Committee decided that this matter is appropriately handled by the Civil Rules Committee, while some members suggested keeping an eye on the trap-for-the-unwary concern and looking to see if the provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

I. Length of Answers/Responses to Petitions Under Rules 35 and 40 (18-AP-A and 18-AP-B)

Mr. Byron presented a proposal to add length limitations to the answers/responses to petitions for rehearing and rehearing en banc under Rules 35 and 40. He noted that experienced practitioners understand that the length limitations for the petitions themselves apply, but that it would be good to have this stated in the Rules themselves.

Judge Chagares noted that the draft before the Committee offered two alternative phrasings. As for Rule 35, the Committee opted for “The length

limitations in Rule 35(b)(2) apply to a response.” As for Rule 40, the Committee opted for “The requirements of Rule 40(b) apply to a response to a petition for panel rehearing.”

A judge member noted that his court always puts a length limitation in the order permitting the filing. Mr. Byron responded that not all courts of appeals do so.

Mr. Byron added that it might be appropriate to undertake a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21.

The reporter presented a second issue. Rule 35 uses the term “response,” while Rule 40 uses the term “answer.” He suggested that Rule 40 be changed to “response,” pointing to Black’s Law Dictionary definitions of the two terms. Ms. Dodszeit suggested that Rule 35 be changed to “answer,” pointing to the use of “answer” in other Rules to designate a document filed only with the Court’s permission in response to a petition. The reporter noted that the Supreme Court Rules use the term “response” for a document filed only with the Court’s permission in response to a petition, and that Fed. R. App. P. 32(c)(2) refers to “a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition.”

The Committee opted for the word “response” in both the Rule and the Committee Note, and deleted some unnecessary words in the proposed Note. Despite some concerns about the proposed Note stating that the Advisory Committee changed the language for stylistic reasons, the Committee decided to leave in that language—which was modelled on language from the Restyling Project—pending review by the style consultants. (18-AP-A).

The Committee also decided to pursue a more general study of Rules 35 and 40, and Danielle Spinelli was added to the subcommittee. (18-AP-B).

IV. New Matters

Judge Chagares invited discussion of possible new matters for the Committee’s consideration, and, in particular, matters that would increase efficiency and promote the just, speedy, and inexpensive resolution of cases. Mr. Landau noted that the Supreme Court had distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). He suggested that the Committee might want to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee was formed, consisting of Mr. Landau, Judge Kavanaugh, and Judge Chagares.

V. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and the meeting. He announced that the next meeting would be held on October 26, 2018, in Washington, DC.

The Committee adjourned at approximately 12:30 p.m.

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TAB 3

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TAB 3A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 21, 2018

I. Introduction

The Advisory Committee on Bankruptcy Rules met in San Diego, California, on April 3, 2018. The draft minutes of that meeting are attached.

At the meeting the Committee considered comments that were submitted in response to the publication in August 2017 of proposed amendments to five rules and one Official Form. After making some changes in response to comments, the Committee gave final approval to four of the published rules. It voted to hold in abeyance the proposed amendments to the other published rule and to the Official Form. It also voted to seek final approval without publication of the reestablishment of two power-of-attorney forms as Official Forms, rather than Director's Forms.

The Committee considered new suggestions for rule amendments and voted to seek the publication of proposed amendments to three rules this summer.

Finally, the Committee approved the distribution of a survey administered by the Federal Judicial Center to seek feedback from relevant constituencies regarding the desirability of restyling the Bankruptcy Rules in a manner similar to the other federal rules.

The action items presented by the Committee are discussed below in Part II, organized as follows:

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2017—

- Rule 4001(c);
- Rule 6007(b);
- Rule 9036; and
- Rule 9037(h).

(A2) Approval without publication—

- Reestablishment of Director's Forms 4011A and 4011B as Official Forms.

B. Items for Publication

- Rule 2002(f), (h), and (k);
- Rule 2004(c); and
- Rule 8012.

Part III of this report consists of three information items regarding (i) the Committee's decision to take no further action on a suggestion to amend Rule 2013; (ii) the Committee's decision to take no further action on a suggestion to amend Rule 9019; and (iii) an update on the Committee's consideration of whether to propose that the Bankruptcy Rules be restyled.

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2017.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2017 and are discussed below. Bankruptcy Appendix A includes the rules and forms that are in this group.

Action Item 1. Rule 4001(c) (Obtaining Credit). The proposed amendment to Rule 4001(c) would make that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. It requires a motion, in accordance with Rule 9014 (governing contested matters), that contains specific disclosures and information. A suggestion received by the Committee posited that many of the required disclosures are unnecessary in and unduly burdensome for most chapter 13 cases and that they should be made inapplicable in chapter 13. The Committee reviewed the history of Rule 4001(c), which showed that the provision was designed to address issues particular to chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address issues pertinent to chapter 13 cases.

There were no comments on the proposed amendment. In giving final approval to the amendment at the spring meeting, the Committee added a title to the new paragraph (4), “*Inapplicability in Chapter 13 Case,*” and subsequently made stylistic changes in response to the comments of the style consultants.

Action Item 2. Rule 6007(b) (Abandonment or Disposition of Property). The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five comments were submitted on the proposed amendments. Two of them, submitted by Judge Robert Kressel of the U.S. Bankruptcy Court for the District of Minnesota, and by Chief Judge Kathy Surratt-States, writing on behalf of the judges of the Eastern District of Missouri bankruptcy court and the clerk of that court, expressed concern about the last sentence of the proposed amendments, which states that the court order “effects the abandonment.” They noted that the court was not abandoning the property but was merely granting a motion to compel the abandonment by the trustee or debtor in possession. In response to the comments, the Committee inserted the words “trustee’s and debtor in possession’s” immediately before the word “abandonment” in the last sentence of the amendments.

Two comments, submitted by Kelly Black, a bankruptcy attorney from Mesa, Arizona, and by Ryan W. Johnson, Clerk of the Bankruptcy Court for the Northern District of West Virginia, criticized the language of the second sentence in the proposed amendments that requires both service and notice of the motion on all creditors because they believe these requirements to be too burdensome. The Committee noted that there are many local practices with respect to service and notice, and it decided that requiring service on all parties, although occasionally more burdensome, is the only way to ensure all parties get the appropriate notice. Therefore, the Committee declined to make any change in response to those comments.

Comments from Aderant CompuLaw made suggestions relating to the 14-day period for objecting to the motion to compel abandonment. They pointed out the different beginning point for the 14-day period in Rule 6007(a) (notice of the proposed abandonment) and proposed Rule 6007(b) (service of the motion to compel abandonment) and noted that under Rule 9006(a), the period under Rule 6007(b) would be increased by three days, unlike under Rule 6007(a). They therefore suggested that either Rule 6007(a) should be changed to require service, or Rule 9006(a) should be changed to increase the period by three days after mailing. They also suggested that both Rule 6007(a) and Rule 6007(b) should read “within 14 days after” instead of “within 14 days of.” The Committee declined to make any change in response to those comments because no amendment is proposed either to Rule 6007(a) or to Rule 9006(a).

The style consultants suggested numerous changes to Rule 6007(b). Because the current amendment is intended to parallel the text of Rule 6007(a) (which is not being amended at this time), the Committee declined to accept the suggestions, but will revisit the issue if the restyling project goes forward.

Action Item 3. Rule 9036 (Notice and Service Generally); Deferral of Action on Rule 2002(g) and Official Form 410. On the Committee’s recommendation, the Standing Committee in August 2017 published for public comment proposed amendments to two rules and to one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts. These proposals were made as part of the Committee’s ongoing study of noticing issues in bankruptcy cases. The published amendments to Rule 2002(g) (Addressing Notices) were proposed to allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The Committee Note explained that a “creditor’s election on the proof of claim, or an equity security holder’s election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.”

The published amendments to Rule 9036 allowed not only clerks but also parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court’s electronic-filing system on registered users of that system. They also allowed service or noticing on any person by any electronic means consented to in writing by that person. Under the proposed amendment, electronic service would be complete upon filing or sending, but it would not be effective if the filer or sender received notice that the electronic service was not received by the person to be served.

The proposed amendments to these two rules were published along with proposed amendments to Official Form 410 (Proof of Claim), which added a check box for opting into email service and noticing. The form, as proposed for amendment, instructed the creditor to check the box “if you would like to receive all notices and papers by email rather than regular mail.”

Four sets of comments were submitted addressing these proposed amendments. They were submitted by Ryan Johnson (Clerk, Bankr. N.D.W. Va.); Chief Judge Kathy Surratt-States (Bankr. E.D. Mo.); Eva Roeber (Chief Deputy Clerk, Bankr. D. Neb.) (on behalf on the Bankruptcy Noticing Working Group); and jointly by the Bankruptcy Judges Advisory Group and the Bankruptcy Clerks Advisory Group (“BJAG/BCAG”). Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised several substantial issues about the published amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Committee voted unanimously to hold the amendments to Rule 2002(g) and Official Form 410 in abeyance, but to approve the amendments to Rule 9036 with some minor revisions.

Technological Feasibility—All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (“BNC”), which is responsible for sending court notices by means other than CM/ECF, would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to BNC by clerk’s office personnel, and, as Judge Surratt-States stated, “With no work measurement credit to accompany this workload increase, it is unrealistic to assume that courts will take on these duties without considerable difficulty.”

Writing on behalf of the Bankruptcy Noticing Working Group, Ms. Roeber explained the technology problem as follows:

To effectuate the Committee’s proposed amendments, the judiciary will have to undertake a great deal of programming and reconfiguration of the Case Management/Electronic Case Files (CM/ECF) and the Bankruptcy Noticing Center (BNC) systems, especially for the amendments to Rule 2002(g)(1) and the Proof of Claim form. For instance, the BNC and CM/ECF systems must be altered to receive and process email addresses submitted on the proof of claim/interest under Rule 2002(g)(1), handle a greater volume of bounced back emails, and to ensure correct email addresses on case mailing lists, among other changes.

Similarly, the BJAG/BCAG comment said that “[w]hile we are pleased with the Committee’s direction in promoting electronic noticing rules enhancements, there is currently no technically feasible way in either the judiciary’s Case Management/Electronic Case Filing (CM/ECF) system or the Bankruptcy Noticing Center (BNC) contract to manage creditor email opt-in.”

Both Ms. Roeber and BJAG/BCAG stated that the programming and testing that would be required to implement the proposed opt-in rule most likely could not be undertaken for some time. They explained that resources are currently being devoted to implementing the NextGen system for the bankruptcy courts, and in addition the contract with BNC will expire this fiscal year and will be “recompeted.” In light of these complications, these commenters asked that the effective date of the proposed amendments to Rule 2002(g) and Official Form 410 be delayed for two years from final approval, that is, until December 1, 2021. Judge Surratt-States also expressed the need for delay in the effective date of those amendments. Ms. Roeber added that the amendments to Rule 9036 could go into effect within the normal timeframe

In order to gain a better understanding of the challenges of implementing the proposed email opt-in provision, members of the Committee and the reporter consulted with the Committee’s clerk representative and Administrative Office (“AO”) staff members who work with BNC and the Bankruptcy Noticing Working Group. They agreed that a delay in implementation was needed because the CM/ECF system is not currently programmed to pull an email address from a proof of claim for noticing. It would need to be programmed to do this. It would also need to be programmed to include an electronic address in the zipped file sent with the notice to the BNC.

Priorities—Three of the submitted comments expressed concerns about the possibility that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions that allow a creditor to designate an address for notice and service, including § 342(f) of the Bankruptcy Code, § 342(e), Rule 2002(g)(1)(A), Rule 2002(g)(4), and Rule 9036.

BNC currently implements these provisions as follows. Consistent with Code § 342(f) and Rule 2002(g)(4), a creditor can fill out a form designating a preferred mailing address for cases in all bankruptcy courts or in courts that the creditor specifies. If the name on the form matches a name on the court-provided mailing list in a case (usually derived from the debtor’s schedules), BNC will substitute the preferred address and send a notice there instead. The form alerts the creditor to the fact that “[n]otices generated by trustees, attorneys, debtors and other entities may continue to be mailed to the address of record filed by the debtor.”

Under the authority granted in Rule 9036, BNC also has created the Electronic Bankruptcy Noticing program (“EBN”). To participate, an entity fills out a form requesting notices sent by BNC to be sent by email to a designated email address. The same matching process described above is used to substitute the email address for the mailing address provided by the court. As with the preferred address, EBN just applies to notices sent by BNC. Clerk’s offices use email addresses for registered users of the CM/ECF system based on the system’s user agreement, which specifies that registering for CM/ECF constitutes consent to receive court notices through the system.

The concern raised by the comments is that it is not clear how an email address on a proof of claim and the checked opt-in box affect the existing priorities and thus it is not clear which email address prevails if there are conflicting ones. Ms. Roeber suggested the following order of priorities: (1) CM/ECF email address for registered users; (2) BNC email address; and (3) proof-of-claim opt-in email address. She proposed stating in the Committee Note to Rule 2002(g) that providing an email address on a proof of claim or other filed request pursuant to Rule 2002(g) does not constitute consent to electronic notice or service under Rule 9036. This statement would be contrary to the proposed Committee Note accompanying the amendments to Rule 2002(g), which states, “A creditor’s election on the proof of claim, or an equity securityholder’s election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.”

Wording Suggestions—In their comments Ms. Roeber and BJAG/BCAG suggested a change in the wording of the opt-in instruction on the proof-of-claim form in order to clarify the scope of the consent being given. Ms. Roeber said that the form should “clarify that an electronic noticing election and email address provided on the form are applicable only in the case in which that form was submitted. It should also be clarified that not all papers in the case will be sent to the claimant by email.” She endorsed proposed language submitted by BJAG/BCAG. They suggested that the language accompanying the opt-in box be modified as follows:

Check this box if you would like to receive all notices and papers that you are entitled to receive in this case by email instead of regular mail. Such notices and papers do not include any complaint or motion required to be served in accordance with Rule 7004.

Mr. Johnson commented that Rule 9036 should make clear that the clerk’s office is not responsible for notifying parties that their attempted service by CM/ECF failed.

* * *

The Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. Some members were concerned, however, about approving the rule and form amendments now but delaying their effective date until 2021. During that more-than-three-year interim, technological advances might result in better means of employing electronic service and noticing than what is currently proposed.

While the commenters sought a delay in implementation, not a rejection of the proposed amendments, the Committee concluded that the comments about determining priorities among conflicting creditor addresses complicated the issue. Parties do not have access to BNC’s

database of email addresses, so the proof-of-claim opt-in was proposed in order to facilitate email service by parties on creditors that are not registered users of CM/ECF. Thus, assuming that the email address on the proof of claim would be accessible to parties, unlike the EBN email address, the Committee's intent in proposing the amendments would be not served by having an EBN address prevail over a conflicting proof-of-claim address. Likewise, the decision to opt in to email noticing and service needs to be treated as consent in order to be consistent with § 342(e) and (f) and Rule 9036.

The discussion of possibly conflicting email addresses pointed out to the Committee that this bankruptcy rules issue needs to be considered in coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Ideally there would be one method for a creditor to designate an email address, with access to the information given to all persons who will be sending notices or serving papers. The Committee on Court Administration and Case Management ("CACM") has created a subcommittee that is looking at BNC issues, and Judge Bernstein is a liaison from our Committee to that group. Whether working through the CACM subcommittee or through consultation with the relevant groups, the Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be held up for now so that a broader perspective could be gained on how best to facilitate electronic service by parties on other parties that are not registered users of CM/ECF.

The Committee decided that the reasons for holding the amendments to Rule 2002(g) and Official Form 410 in abeyance do not apply to the proposed amendments to Rule 9036. The latter amendments would (1) allow both clerks and parties to serve and give notice by CM/ECF to registered users; (2) allow other means of electronic service and noticing to be used for parties that give their written consent to such service and noticing; and (3) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus there does not seem to be any reason to hold them up, and the Committee recommends that the Standing Committee approve the amendments to Rule 9036, with the following post-publication changes:

- The last sentence of the rule was changed to refer to "any pleading or other paper [rather than complaint or motion] to be served in accordance with Rule 7004" because some objections, pleadings other than complaints (for insured depository institutions), and chapter 13 plans must be served in that manner.
- The following sentences were added to the Committee Note in response to Mr. Johnson's comment: "The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is

responsible for making effective service.” Identical language appears in the Committee Note to Rule 8011.

- The words “or notice” after “service” were added to the third sentence of the rule to be consistent with the wording of the remainder of the rule.
- Stylistic changes were made in response to the comments of the style consultants.

Action Item 4. Rule 9037(h) (Motion to Redact a Previously Filed Document). The proposed amendment to Rule 9037 would add a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Committee proposed the amendment in response to a suggestion (14-BK-B) submitted by CACM.

Three comments were submitted regarding this amendment. The first, submitted by Charles Ivey IV (BK-2017-0003-0005), suggested that the proposed amendment be expanded further to allow parties to submit a redacted document as an alternative to an existing sealed document that is subject to Rule 8009(f). Rule 8009(f) governs the handling on appeal of documents placed under seal by the bankruptcy court. Without elaborating, Mr. Ivey said that Rule 8009(f) creates many unwanted consequences that significantly prolong and complicate bankruptcy appeals. As an alternative to the designation of sealed documents to be included in the record on appeal, he suggested that proposed Rule 9037(h) also permit a party to request that a redacted version of the sealed document be submitted. If the bankruptcy court granted this motion to substitute the redacted document, he said, the bankruptcy clerk's office would transmit the redacted document as part of the final record on appeal.

The Committee decided that Mr. Ivey’s suggestion would expand the amendment to address a situation that it has not considered and that it was not attempting to deal with when it proposed the amendment. It therefore voted unanimously to make no changes to the published amendment in response to this comment.

The second comment was submitted by Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006). He said that a party who did not file the previous (unredacted) document but is requesting that a document be restricted from viewing due to the improper disclosure of personal identifying information should be specifically exempted from paying the redaction fee. Furthermore, he said, debtors or any entity whose personal information is wrongfully disclosed should not be required by Rule 9037(h) to file a redacted document, such as a proof of claim and its attachments, on behalf of the party originally filing the document.

Mr. Johnson explained that currently many courts addressing this situation restrict viewing of the offending document at the request of the non-filing party and then enter an order directing the original party to file a motion to redact, pay the fee, and attach the redacted version of the offending document. Mr. Johnson was concerned that these procedures might be contrary to proposed Rule 9037(h). He noted that the language regarding a court’s ability to “order

otherwise” is ambiguous because the language appears in subsection (h)(1) and then is repeated in subparagraph (h)(1)(C). He expressed concern that once a motion to redact is filed, it is unclear whether a court can alter the requirements of subparagraphs (h)(1)(A) and (B).

Judicial Conference policy addresses the issue Mr. Johnson raised concerning the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that “[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor.” Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Committee thought that Mr. Johnson had raised a valid point about the ambiguity concerning when the rule allows a bankruptcy court to depart from its requirements. As published, subdivision (h)(1) begins with the language “Unless the court orders otherwise.” That language could be read to apply to all of (h)(1) were it not for the inclusion of the same language in subdivision (h)(1)(C), thereby possibly suggesting that similar authority is not granted under (h)(1)(A) and (B). The Committee voted unanimously to revise subdivision (h)(1) to make it one sentence that is prefaced with the clause, “Unless the court orders otherwise,” and to delete that language from subdivision (h)(1)(C).

The final comment was submitted by Chief Judge Robert E. Grant (Bankr. N.D. Ind.) (BK-2017-0003-0012). He suggested that there was a gap in proposed Rule 9037(h) as there was nothing in the rule that actually required the filing of a redacted version of the original document as a condition to the restrictions upon public access. Under the rule as published, he said, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view. Accordingly, he stated that it was at least theoretically possible that a motion to redact could be submitted and granted but the redacted document is never filed, with the result being that the original filing, as well as the motion to redact it, would be restricted from public view unless the court took further action.

Judge Grant suggested that the rule be revised so that the restrictions upon public access would not occur until the motion was granted and a redacted or amended version of the original document was actually filed with the court. He explained that most courts readily respond to motions to redact, and the difference in timing between the immediate technological restrictions on public access, contemplated by the proposed rule, and the entry of an order granting or denying the motion to redact should be relatively slight. He further noted that the order granting the motion could state that restrictions upon public access would be put in place upon the filing of a redacted version of the original document which, if submitted along with the motion to redact, could occur immediately.

When the Committee initially considered how best to provide for the redaction of already filed documents, it was aware that bankruptcy courts were using a variety of procedures for handling these requests. Of special importance to the Committee was devising a procedure that would provide maximum protection from public view of unredacted documents. To avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document, the proposed rule required immediate restriction on public access of the motion itself and the unredacted original document. Access to those documents would remain restricted if the court granted the motion to redact. Although the rule did not expressly say so, the underlying intent, and arguably the implication, of the rule was that the redacted document, which was filed with the motion, would then be placed on the record as a substitute for the original document that remained protected from public view. The first sentence of the penultimate paragraph of the Committee Note explained: “If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted.”

To eliminate any uncertainty, the Committee decided that the best way to respond to the issue Judge Grant raised was to add before the second sentence of subdivision (h)(2), “If the court grants it, the redacted document must be filed.” The Committee, however, did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

A few stylistic changes were made in response to suggestions from the style consultants, and the Committee Note was revised to reflect the changes made to the rule.

(A2) Conforming changes proposed for approval without publication.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed form amendments that are discussed below. The forms as proposed for amendment are in Bankruptcy Appendix A.

Action Item 5. Official Forms 411A and 411B (Power of Attorney). As part of the Forms Modernization Project, the power-of-attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director’s Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. Rule 9010(c), however, provides that “[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*” (emphasis added). In order to bring the rule and forms into conformity, the Committee voted unanimously to return the power-of-attorney forms to Official Form status. Because there will be no change in the content of the forms, the Committee seeks approval of this redesignation of the forms without publication. If approved, the new Official Forms will have an effective date of December 1, 2018, and, in keeping with the new numbering system for forms, will be designated Official Forms 411A and 411B.

The Forms Modernization Project group recommended that the power-of-attorney forms be changed to Director's Forms in order to allow greater flexibility in their use, in light of the prospect of amended Rule 9009 increasing restrictions on making modifications to Official Forms. The Committee Note accompanying this amendment explained, "Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed."

The Committee later realized that using Director's Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). The Committee concluded that Director's Forms are not needed to allow modifications of the power-of-attorney forms. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here—Rule 9010(c)—only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted by the Committee to permit modifications of those forms, and they are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Committee's fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting modifications of the power-of-attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii).

B. Items for Publication

The Committee recommends that the following rule amendments be published for public comment in August 2018. The rules in this group appear in Bankruptcy Appendix B.

Action Item 6. Rule 2002(f), (h), and (k) (Notices). Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Committee seeks publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2002(f). Rule 2002(f)(7) currently requires the clerk, or someone else designated by the clerk, to give notice to the debtor and all creditors of the "entry of an order confirming a chapter 9, 11, or 12 plan." Noticeably absent from the list is an order confirming a chapter 13 plan. The Committee received a suggestion (12-BK-B) from Matthew T. Loughney (Chair, Bankruptcy Noticing Working Group), that such notice also be given in chapter 13 cases. As he explained, "There is not a rule specifically addressing the notice of entry of an order confirming a chapter 13 plan, and no reason is identified in the Committee note for this omission."

Additional research revealed that in 1988 the Committee's reporter proposed an amendment to Rule 2002(f) that would have made the rule applicable to confirmation of a plan under any chapter, but the Committee, without explanation in the minutes, rejected that amendment. Ascertaining no reason currently for the exclusion of chapter 13 plans and agreeing with Mr. Loughney that "it would be helpful to have a rule that specifically addresses this notice in chapter 13 cases in order that it be made clear who should receive it," the Committee voted unanimously at the spring 2017 meeting to seek publication for public comment of the proposed amendment.

Rule 2002(h). Rule 2002(h) provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the court) to give "the debtor, the trustee, all creditors and indenture trustees" at least 21 days' notice by mail of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement in chapter 7 cases with respect to creditors that fail to file a timely proof of claim. Bankruptcy Judge Scott W. Dales (W.D. Mich.) submitted a suggestion (12-BK-M) that this exception also be made applicable to chapter 13 cases. He noted the time and cost associated with providing extensive notice in chapter 13 cases and lawyers' desire to mitigate these expenses to the extent possible.

In considering the proposed amendment, the Committee concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in both chapter 12 and chapter 13, as well as chapter 7, cases support an amendment. Members pointed out that even creditors that do not file timely proofs of claim will still be required to receive notice of the filing of the case and the date of the meeting of creditors (which notice also includes relevant deadlines); notice of the confirmation hearing; and, if the proposed amendment to Rule 2002(f)(7) is approved, notice of the confirmation order. Because an amendment to Rule 3002 that became effective on December 1, 2017, changes the deadline for filing a proof of claim, the time provisions of Rule 2002(f)(7) would also be amended.

Rule 2002(k). Included in the package of amendments accompanying the chapter 13 plan form was an amendment to Rule 2002 that added a new subdivision (a)(9). The amendment went into effect on December 1, 2017, and it provides that at least 21 days' notice be given to the debtor, trustee, creditors, and indenture trustees of "the time fixed for filing objections to confirmation of a chapter 13 plan." Previously Rule 2002(b) had required that at least 28 days' notice of that deadline for filing objections be given.

In making this change and relocating the provision from subdivision (b) to subdivision (a)(9), the need to amend Rule 2002(k) was overlooked. Subdivision (k) provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee. Included within this provision is the requirement to provide the U.S. trustee with notices under subdivision (b). Thus, prior to December, the rule required transmitting notice to the U.S. trustee of the deadline for objecting to confirmation of a chapter 13 plan.

Because that deadline is now located in subdivision (a)(9), which is not specified in subdivision (k), the rule no longer requires that notice be transmitted to the U.S. trustee. The Committee voted at the spring meeting to publish an amendment that would cure this oversight by amending the first sentence of Rule 2002(k) to include a reference to subdivision (a)(9).

Action Item 7. Rule 2004(c) (Examination). Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion (17-BK-B) that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (“ESI”). Our Committee discussed the suggestion at the fall 2017 and spring 2018 meetings. By a close vote, the Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

The proposal before the Committee at the fall meeting, recommended by the Subcommittee on Business Issues, would have added to Rule 2004(c) a provision similar to the proportionality requirement of Civil Rule 26(b)(1). The following sentence would have been added to the end of the paragraph:

A request for the production of documents or electronically stored information in connection with an examination under this rule shall be proportional to the needs of the case and of the party seeking production, in light of the following factors, to the extent relevant: the importance of the issues at stake, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving issues, whether the burden or expense of the proposed discovery outweighs its likely benefit, and the purpose for which the request is being made.

Members of the Committee expressed differing views about whether consideration of proportionality is appropriate for Rule 2004 examinations and what factors a bankruptcy court should consider in assessing proportionality. Some members said that the current rule is working and that Rule 2004 examinations are supposed to be broad, so no additional limitation should be imposed. Another member suggested that proportionality should be required for requests for ESI but not for paper documents. Others agreed with the Subcommittee that a proportionality requirement should be imposed both for requests for documents and for ESI. A judge member said that disputes arise concerning the scope of document and ESI requests in connection with Rule 2004 examinations and that it would be helpful to have a standard in the rule that imposes some limit. The Associate Reporter said that it seemed that the main concern expressed by those

supportive of the proposed amendment was that documents and ESI are sometimes sought for an improper purpose, and she suggested that any amendment should focus on that concern.

In a straw poll, the Committee voted 6 to 5 in favor of the concept of adding a proportionality requirement, although specific language was not agreed upon. There seemed to be general support for the other proposed amendments to Rule 2004(c), which would add references to ESI and conform the rule to the amended subpoena rules. The proposal was sent back to the subcommittee for further consideration and a recommendation at the spring meeting.

At the spring meeting, the Subcommittee recommended that Rule 2004(c) be amended to incorporate the concept of proportionality, while giving bankruptcy judges flexibility in interpreting and imposing that requirement. Its proposal was to require that a request for the production of documents or electronically stored information in connection with a Rule 2004 examination be “proportional to the needs of the case and of the party seeking production,” but without specifying the factors that should be considered in making that determination. The Subcommittee suggested that such an approach would be consistent with the notion that Rule 2004 examinations are supposed to be broad ranging and relatively unconfined, while still providing a means of reining in requests for documents and ESI when the costs and efforts of complying are disproportionate to the needs of the case.

Again the Committee was closely divided about the proportionality proposal. Those opposing it did not think that the elimination of specific factors improved the amendment, and some members expressed concern that such a provision would lead to more litigation. After a full discussion, the Committee voted 7 to 6 not to proceed with a proportionality amendment.

The Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. Doing so acknowledges the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004. The Committee also unanimously approved publication of the revised subpoena provisions of Rule 2004(c), which eliminate the reference to “the court in which the examination is to be held.” This change conforms the rule to the current provisions of Civil Rule 45 and Bankruptcy Rule 9016, under which a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it.

Action Item 8. Rule 8012 (Corporate Disclosure Statement). Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party’s stock (or file a statement that there is no such corporation). It is modeled on FRAP 26.1. The Appellate Rules Committee has proposed amendments to FRAP 26.1 that were published for comment in August 2017, including one that

is specific to bankruptcy appeals. Our Committee now requests that conforming amendments to Rule 8012 be published for public comment this summer.

Prior to publication of the amendments to FRAP 26.1, the Appellate Rules Committee consulted with our Committee about the possible addition of a provision to deal specifically with bankruptcy cases. Although initially considering a broader provision, the Appellate Rules Committee agreed with our recommendation that, insofar as bankruptcy appeals are concerned, an amendment was needed to require only the disclosure of the names of any debtors not revealed by the caption and that the requirements of subdivision (a) should be made to apply to any corporate debtors. At the fall 2017 meeting, our Committee voted to propose similar amendments to Rule 8012, subject to considering any changes made to the Rule 26.1 amendments in response to comments.

At the spring meeting, the Committee considered and approved for publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1 for which final approval is being sought. These amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the debtor. This subdivision would require the disclosure of the names of any debtors in the underlying bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in the underlying bankruptcy case, the disclosure of the information required of corporations under subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements.

III. Information Items

Information Item 1. Decision to Propose No Amendments to Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals). The Committee received a suggestion (17-BK-A) from Kevin P. Dempsey, Clerk of the Bankruptcy Court for the Southern District of Indiana, that questioned whether there is a need any longer for Rule 2013. Mr. Dempsey proposed that the Committee consider substantially modifying the rule to eliminate its requirements that the clerk maintain a public record of awarded fees and make an annual summary available to the public and the United States trustee.

Rule 2013(a) requires the clerk to maintain a public record of all fees awarded by the court to (1) trustees; (2) attorneys and other professionals employed by trustees; and (3) examiners. The record must identify each case in which fees were awarded and indicate for each case who received the fees and in what amount. Subdivision (b) requires the clerk annually to prepare a summary of the record by individual or firm name, indicating the total fees each was awarded during the year. The summary must be made available without charge to the public, and a copy of it must be transmitted to the U.S. trustee. The original Committee Note explains that the purpose of the rule is to “prevent what Congress has defined as ‘cronyism’” and to

“instill greater public confidence in the system” by ensuring that courts do not disproportionately employ or compensate certain individuals.

Mr. Dempsey said, based on his experience and discussions with other clerks, that compliance with Rule 2013 “is spotty.” He suggested that CM/ECF has replaced the need for the type of record that the rule calls for. Information about fee awards is available electronically, and reports can be generated on demand. He said that his office would provide such a report without charge to anyone who asked. To ensure that all courts would follow a similar practice, he proposed that, rather than being abrogated, Rule 2013 be amended to require the clerk to make information about fees awarded to professionals available upon request, perhaps with a limit on the time period covered by the report.

At the fall 2017 meeting, the Committee voted to ask Dr. Molly Johnson of the Federal Judicial Center to survey bankruptcy clerks to determine the degree of compliance with the rule and clerks’ views about its usefulness, and also to gather input from the Executive Office for U.S. Trustees and academics. She reported on her research at the spring meeting. Among the findings were the following:

- Most bankruptcy clerks of court (84%) report that they maintain the public record required under Rule 2013, and about 2/3 of them (62.5%) prepare an annual summary. Most who do this (90%) use the “Professional Fees Awarded” report in CM/ECF to generate the summary.
- Most clerks (63%) do not transmit their annual summary to the U.S. trustee, most frequently because they believe the U.S. trustee office can run the report itself or get it from the court’s website, or because the U.S. trustee has not requested it.
- About 2/3 (68%) of clerks who generate the Rule 2013 reports believe their reports are generally accurate, while the remainder are uncertain or believe the reports are not entirely accurate.
- A quarter of bankruptcy clerks (25%) responding to the survey said they believe Rule 2013 is no longer necessary and should be abrogated. Almost half (49%) said the rule should be amended to require the clerk of court to make information about fees awarded to professionals available on request, but not require that an annual report be prepared. Only 17% believe the rule should be retained in its current form, while 8% believe it should be amended in some other way.
- Based on a survey of U.S. trustees conducted by Ramona Elliott of the Executive Office for United States Trustees, U.S. trustee offices do have a need for the Rule 2013 reports

and use them primarily in the oversight of chapter 7 trustees. Some offices that do not currently receive the reports expressed an interest in having them. The Executive Office for United States Trustees also believes that, from the public's perspective, the purpose of the rule in ensuring transparency supports retaining the report requirement.

- Academic researchers that were contacted said they do not use the information generated under Rule 2013 in their scholarly research. One professor said he looked into using these records in professional fees research, but found them “virtually useless” for research, in part because fees awarded to professionals serving debtors in possession are not required to be reported and the information about them is “grossly incomplete.”

After a full discussion, the Committee voted to take no further action on the suggestion. Members thought that the rule is still serving a useful purpose and that there is not a problem with it that needs addressing. Several thought that clerk education about the rule would be useful, and the Committee's clerk representative said that he would call that need to the attention of the Bankruptcy Clerks Advisory Group.

Information Item 2. Decision to Propose No Amendments to Rule 9019 (Compromise and Arbitration). The Mediation Committee of the American Bankruptcy Institute proposed an amendment to Rule 9019 to require districts to adopt local rules to provide for mediation of any dispute arising in a bankruptcy case. The Committee decided that no uniform federal rule is necessary or appropriate, given the wide adoption of local rules dealing with mediation that are working well.

Information Item 3. Restyling of Bankruptcy Rules. The Committee's Restyling Subcommittee is tasked with recommending to the Committee whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

In order to make that recommendation, the Subcommittee decided that it would be necessary to obtain input from those who would be affected by such a restyling. In preparation for doing so, the Subcommittee undertook two tasks.

First, the Subcommittee asked the style consultants to prepare a restyled version of Part IV of the Federal Rules of Bankruptcy Procedure, so that those asked for their views on the restyling process would have a concrete example of restyled rules to look at. The style consultants produced a draft of a restyled Rule 4001 in January. The reporters and the Subcommittee chair provided comments on the draft, and the style consultants sent a revised version in which they accepted some, but not all, of the comments. Second, the Associate

Reporter and Molly Johnson of the Federal Judicial Center prepared a cover memo and survey to obtain comments on the possibility of restyling the Bankruptcy Rules.

At the spring meeting, the Committee decided to use as an exemplar only one section of the restyled rule, Rule 4001(a), without any footnotes or comments from the style consultants. It also decided to eliminate from the draft any changes that the Committee found unacceptable or questionable. The Committee explained in the cover memo to the survey that the exemplar is not being proposed by the Committee for adoption, nor is the Committee seeking substantive comments on the rule. Additional language was added to emphasize that substance and “sacred words” will prevail over style rules.

The cover memo and survey have been posted on the AO’s rules website as an Invitation for Comments, and they have also been sent directly to bankruptcy judges and clerks of court, as well as interested organizations, such as the NCBJ, NACBA, CLLA, NABT, NACTT, ABI, ABA Business Law Section Bankruptcy Committee, American College of Bankruptcy, National Bankruptcy Conference, and AALS Debtor-Creditor Committee. The deadline for making comments is June 15. The Subcommittee will be analyzing the responses and discussing them in preparation for making a recommendation to the Committee at its September meeting.

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Appendix A

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 4001. Relief from Automatic Stay; Prohibiting**
2 **or Conditioning the Use, Sale, or Lease of**
3 **Property; Use of Cash Collateral;**
4 **Obtaining Credit; Agreements**

5 * * * * *

6 (c) OBTAINING CREDIT.

7 * * * * *

8 (4) *Inapplicability in a Chapter 13 Case. This*
9 *subdivision (c) does not apply in a chapter 13 case.*

10 * * * * *

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

2 FEDERAL RULE OF BANKRUPTCY PROCEDURE

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision. This amendment does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit.

Changes Made After Publication and Comment

- Stylistic changes were made.

Summary of Public Comment

No comments were submitted.

1 **Rule 6007. Abandonment or Disposition of Property**

2 * * * * *

3 (b) MOTION BY PARTY IN INTEREST. A party
4 in interest may file and serve a motion requiring the trustee
5 or debtor in possession to abandon property of the estate.
6 Unless otherwise directed by the court, the party filing the
7 motion shall serve the motion and any notice of the motion
8 on the trustee or debtor in possession, the United States
9 trustee, all creditors, indenture trustees, and committees
10 elected pursuant to § 705 or appointed pursuant to § 1102
11 of the Code. A party in interest may file and serve an
12 objection within 14 days of service, or within the time fixed
13 by the court. If a timely objection is made, the court shall
14 set a hearing on notice to the United States trustee and to
15 other entities as the court may direct. If the court grants the
16 motion, the order effects the trustee's or debtor in

4 FEDERAL RULE OF BANKRUPTCY PROCEDURE

- 17 possession's abandonment without further notice, unless
18 otherwise directed by the court.

Committee Note

Subdivision (b) of the rule is amended to specify the parties to be served with the motion and any notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) more closely with the procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice or effect the abandonment of property ordered by the court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

Changes Made After Publication and Comment

- The words “trustee’s and debtor in possession’s” were inserted immediately before the word “abandonment” in the last sentence of subdivision (b).

Summary of Public Comment

Judge Robert Kessel (Bankr. D. Minn.) (BK-2017-0003-0004). The last sentence of the proposed amendment is inconsistent with the provisions of § 554(b) of the Code, which provides for abandonment of property by the trustee, not the court.

Chief Judge Kathy Surratt-States (Bankr. E.D. Mo.) (BK-2017-0003-0009). The Bankruptcy Code does not

allow the court to abandon property – only the trustee. The last sentence should be deleted, and it should be left to local court procedure to ensure that the trustee has abandoned the property related to the motion by a party in interest.

Kelly Black (BK-2017-0003-0003). The merger of the service and notice requirements in the proposed amendments substantially increases the burden on parties seeking to compel abandonment of property. Service of the motion should be limited to the trustee or debtor in possession and parties who have liens or other interests in the property to be abandoned.

Ryan W. Johnson (Clerk, Bankr. N.D. W. Va.) (BK-2017-0003-0006). Service should be limited to the trustee or debtor in possession, and other parties in interest should just receive notice. The rule should not remove the clerk’s office as the entity responsible for issuing the notice. It should incorporate the language used in Rule 2002 that “the clerk, or some other person as the court may direct, shall give” the notice. If notice and service of the motion are separated, Official Form B420A will be insufficient to effect proper notice of a motion to compel abandonment, and a new Official Form may be required that specifically identifies the property requested to be abandoned.

Aderant CompuLaw (BK-2017-0003-0013). Although Rule 6007(a) gives any party in interest 14 days after mailing of the notice of proposed abandonment by the trustee to object, Rule 6007(b) gives a party in interest 14 days after service of the motion to compel abandonment to object. Rule 6007(b) allows three additional days to act if service is made by mail, but it does not apply to the mailing of notice. The time to object under (a) and (b) should be the same. Also the language of both Rule 6007(a) and 6007(b) should be amended to change “within 14 days of” to “within 14 days after.”

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6 FEDERAL RULE OF BANKRUPTCY PROCEDURE

1 **Rule 9036. Notice and Service Generally by**
2 **Electronic Transmission**

3 Whenever these rules require or permit sending a
4 notice or serving a paper by mail, the clerk, or some other
5 person as the court or these rules may direct, may send the
6 notice to—or serve the paper on—a registered user by
7 filing it with the court’s electronic-filing system. Or it may
8 be sent to any person by other electronic means that the
9 person consented to in writing. In either of these events,
10 service or notice is complete upon filing or sending but is
11 not effective if the filer or sender receives notice that it did
12 not reach the person to be served. This rule does not apply
13 to any pleading or other paper required to be served in
14 accordance with Rule 7004.~~the clerk or some other person~~
15 ~~as directed by the court is required to send notice by mail~~
16 ~~and the entity entitled to receive the notice requests in~~
17 ~~writing that, instead of notice by mail, all or part of the~~

18 ~~information required to be contained in the notice be sent~~
19 ~~by a specified type of electronic transmission, the court~~
20 ~~may direct the clerk or other person to send the information~~
21 ~~by such electronic transmission. Notice by electronic means~~
22 ~~is complete on transmission.~~

Committee Note

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery has increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

8 FEDERAL RULE OF BANKRUPTCY PROCEDURE

With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and it may be limited by other conditions.

Changes Made After Publication and Comment

- The words “or some other person as the court or these rules may direct” were inserted in place of “or other party” in the first sentence of the rule.
- The last sentence of the rule was changed to refer to “any pleading or other paper [rather than complaint or motion] to be served in accordance with Rule 7004.”
- The following sentences were added to the Committee Note: “The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.”
- The words “or notice” were added after “service” in the third sentence of the rule.
- Stylistic changes were also made.

Summary of Public Comment

Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006). Rule 9036 should clarify that the clerk's office is not responsible for notifying parties that their attempted service on particular entities by means of the court's electronic-filing system failed.

Eva Roeber (Chief Deputy Clerk, Bankr. D. Neb.) (BK-2017-0003-0011). Although the proposed changes to Rule 2002(g) and Official Form 410 should be delayed two years to allow sufficient time for the courts to implement the opt-in provision, the amendments to Rule 9036 could go into effect within the normal timeframe.

1 **Rule 9037. Privacy Protection for Filings Made with**
2 **the Court**

3 * * * * *

4 (h) MOTION TO REDACT A PREVIOUSLY
5 FILED DOCUMENT.

6 (1) *Content of the Motion; Service.* Unless the
7 court orders otherwise, if an entity seeks to redact
8 from a previously filed document information that is
9 protected under subdivision (a), the entity must:

10 (A) file a motion to redact identifying the
11 proposed redactions;

12 (B) attach to the motion the proposed
13 redacted document;

14 (C) include in the motion the docket or
15 proof-of-claim number of the previously filed
16 document; and

17 (D) serve the motion and attachment on
18 the debtor, debtor's attorney, trustee (if any),
19 United States trustee, filer of the unredacted
20 document, and any individual whose personal
21 identifying information is to be redacted.

22 (2) *Restricting Public Access to the Unredacted*
23 *Document; Docketing the Redacted Document.* The
24 court must promptly restrict public access to the
25 motion and the unredacted document pending its
26 ruling on the motion. If the court grants it, the court
27 must docket the redacted document. The restrictions
28 on public access to the motion and unredacted
29 document remain in effect until a further court order.
30 If the court denies it, the restrictions must be lifted,
31 unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

Unless the court orders otherwise, the motion must identify the proposed redactions, and the moving party must attach to the motion the proposed redacted document. The attached document must otherwise be identical to the one previously filed. The court, however, may relieve the movant of this requirement in appropriate circumstances, for example when the movant was not the filer of the

unredacted document and does not have access to it. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the court must docket the redacted document, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Changes Made After Publication and Comment

- Rule 9037(h)(1) was reorganized into a single sentence.
- The words “unless the court orders otherwise,” were deleted from subdivision (h)(1)(C).
- The following sentence was added to subdivision (h)(2): “If the court grants it, the court must docket the redacted document.” The title of subdivision (h)(2) was changed to reflect this addition.
- Stylistic changes were also made, and conforming changes were made to the Committee Note.

Summary of Public Comment

Charles Ivey IV (BK-2017-0003-0005). The proposed amendment to Rule 9037 should be expanded to allow parties to submit a redacted document as an alternative to an existing sealed document that is subject to Rule 8009(f).

Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006). A party who did not file the previous (unredacted) document but is requesting that a document be restricted from viewing due to the improper disclosure of personal identifying information should be specifically exempted from paying the redaction fee. Debtors or any entity whose personal information is wrongfully disclosed should not be required by Rule 9037(h) to file a redacted document, such as a proof of claim and its attachments, on behalf of the party originally filing the document.

Chief Judge Robert E. Grant (Bankr. N.D. Ind.) (BK-2017-0003-0012). There is a gap in proposed Rule

9037(h). Nothing in the rule actually requires the filing of a redacted version of the original document as a condition to the restrictions upon public access. Under the rule as written, the only redacted version of the original document is the one attached to the motion itself, and that copy, along with the entire motion, is restricted from public view. It is at least theoretically possible that a motion to redact could be submitted and granted, but the redacted filing never made. The restrictions upon public access should not occur until the motion is granted and a redacted or amended version of the original document is actually filed with the court.

United States Bankruptcy Court

_____ District Of _____

In re _____
Debtor

Case No. _____
Chapter _____

GENERAL POWER OF ATTORNEY

To _____ of * _____, and
_____ of * _____.

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the debtor in the above-entitled case; [if appropriate] to vote for a trustee of the estate of the debtor and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

[If executed by an individual] Acknowledged before me on _____.

[If executed on behalf of a partnership] Acknowledged before me on _____,
by _____ who says that he [or she] is a member of the partnership
named above and is authorized to execute this power of attorney in its behalf.

[If executed on behalf of a corporation] Acknowledged before me on _____,
by _____ who says that he [or she] is _____
of the corporation named above and is authorized to execute this power of attorney in its behalf.

[Official character.]

* State mailing address.

Committee Note

This form replaces Director’s Bankruptcy Form 4011A, which, in turn, was derived from former Official Form 11A in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director’s Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that “[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*” (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.

United States Bankruptcy Court

_____ District Of _____

In re _____
Debtor

Case No. _____
Chapter _____

SPECIAL POWER OF ATTORNEY

To _____ of * _____, and
_____ of * _____.

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned [*if desired*: and with full power of substitution,] to attend the meeting of creditors of the debtor or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the debtor.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

[*If executed by an individual*] Acknowledged before me on _____.

[*If executed on behalf of a partnership*] Acknowledged before me on _____,
by _____ who says that he [*or she*] is a member of the partnership
named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____,
by _____ who says that he [*or she*] is _____
of the corporation named above and is authorized to execute this power of attorney in its behalf.

[*Official character.*]

* State mailing address.

Committee Note

This form replaces Director’s Bankruptcy Form 4011B, which, in turn, was derived from former Official Form 11B in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director’s Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that “[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*” (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.

APPENDIX B

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Appendix B

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

For Publication for Public Comment

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief Is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 * * * * *

8 (f) OTHER NOTICES. Except as provided in
9 subdivision (l) of this rule, the clerk, or some other person
10 as the court may direct, shall give the debtor, all creditors,
11 and indenture trustees notice by mail of:

12 * * * * *

13 (7) entry of an order confirming a chapter 9,
14 11, ~~12~~, or 13 plan;

15 * * * * *

16 (h) NOTICES TO CREDITORS WHOSE CLAIMS

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

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

17 ARE FILED. ~~In a chapter 7 case, after 90 days following~~
18 ~~the first date set for the meeting of creditors under § 341 of~~
19 ~~the Code,~~

20 (1) Voluntary Case. In a voluntary chapter 7
21 case, chapter 12 case, or chapter 13 case, after 70 days
22 following the order for relief under that chapter or the
23 date of the order converting the case to chapter 12 or
24 chapter 13, the court may direct that all notices
25 required by subdivision (a) of this rule be mailed only
26 to:

- 27 · the debtor,
- 28 · the trustee,
- 29 · all indenture trustees,
- 30 · creditors that hold claims for which proofs
31 of claim have been filed, and
- 32 · creditors, if any, that are still permitted to
33 file claims because an extension was granted

34 under Rule 3002(c)(1) or (c)(2).

35 (2) Involuntary Case. In an involuntary
36 chapter 7 case, after 90 days following the order for
37 relief under that chapter, the court may direct that all
38 notices required by subdivision (a) of this rule be
39 mailed only to:

- 40 . the debtor,
- 41 . the trustee,
- 42 . all indenture trustees,
- 43 . creditors that hold claims for which proofs
- 44 of claim have been filed, and
- 45 . creditors, if any, that are still permitted to
- 46 file claims ~~by reason of~~ because an extension
- 47 was granted ~~pursuant to~~ under Rule
- 48 3002(c)(1) or (c)(2).

49 (3) Insufficient Assets. In a case where notice
50 of insufficient assets to pay a dividend has been given

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

51 to creditors ~~pursuant to~~under subdivision (e) of this
52 rule, after 90 days following the mailing of a notice of
53 the time for filing claims ~~pursuant to~~under
54 Rule 3002(c)(5), the court may direct that notices be
55 mailed only to the entities specified in the preceding
56 sentence.

57 * * * * *

58 (k) NOTICES TO UNITED STATES TRUSTEES.

59 Unless the case is a chapter 9 municipality case or unless
60 the United States trustee requests otherwise, the clerk, or
61 some other person as the court may direct, shall transmit to
62 the United States trustee notice of the matters described in
63 subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1),
64 (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and
65 notice of hearings on all applications for compensation or
66 reimbursement of expenses.

67 * * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

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6 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 **Rule 2004. Examination**

2 * * * * *

3 (c) COMPELLING ATTENDANCE AND
4 PRODUCTION OF DOCUMENTS OR
5 ELECTRONICALLY STORED INFORMATION. The
6 attendance of an entity for examination and for the
7 production of documents or electronically stored
8 information, whether the examination is to be conducted
9 within or without the district in which the case is pending,
10 may be compelled as provided in Rule 9016 for the
11 attendance of a witness at a hearing or trial. As an officer
12 of the court, an attorney may issue and sign a subpoena on
13 behalf of the court ~~for the district in which the examination~~
14 ~~is to be held~~ where the case is pending if the attorney is
15 admitted to practice in that court ~~or in the court in which~~
16 ~~the case is pending~~.

17 * * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

1 **Rule 8012. ~~Corporate Disclosure Statement~~**

2 (a) ~~WHO MUST FILE~~ NONGOVERNMENTAL
3 CORPORATIONS AND INTERVENORS. Any
4 nongovernmental ~~corporate party~~ corporation appearing in
5 the district court or BAP must file a statement that
6 identifies any parent corporation and any publicly held
7 corporation that owns 10% or more of its stock or states
8 that there is no such corporation. The same requirement
9 applies to a nongovernmental corporation that seeks to
10 intervene.

11 (b) DISCLOSURE ABOUT THE DEBTOR. The
12 debtor, the trustee, or, if neither is a party, the appellant
13 must file a statement that (1) identifies each debtor not
14 named in the caption and (2) for each debtor in the
15 bankruptcy case that is a corporation, discloses the
16 information required by Rule 8012(a).

17 ~~(b)~~ (c) TIME TO FILE; SUPPLEMENTAL FILING.

- 18 ~~A party must file the~~ A Rule 8012 statement must:
- 19 (1) be filed with ~~its~~ the principal brief or upon
- 20 filing a motion, response, petition, or answer in the
- 21 district court or BAP, whichever occurs first, unless a
- 22 local rule requires earlier filing.;
- 23 (2) Even if the statement has already been filed,
- 24 ~~the party's principal brief must~~ be included ~~include a~~
- 25 ~~statement~~ before the table of contents in the principal
- 26 brief.; and
- 27 (3) A party must supplement its statement be
- 28 supplemented whenever the ~~required~~ information
- 29 required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. App. P. 26.1(c). Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of

10 FEDERAL RULES OF BANKRUPTCY PROCEDURE

appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

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TAB 3C

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 3, 2018
San Diego, CA

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
District Judge Marica S. Krieger
District Judge Pamela Pepper
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
Jeffrey Hartley, Esquire
David A. Hubbert, Esq.
Thomas Moers Mayer, Esquire
Jill Michaux, Esquire
Debra Miller, Chapter 13 Trustee
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
(the Standing Committee)
Circuit Judge Susan Graber
Bankruptcy Judge Mary Gorman
Professor Cathie Struve, associate reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Walle, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Sandra Ikuta welcomed everyone to San Diego, and congratulated Judge Dennis Dow on his appointment as the next chair of the Committee.

2. Approval of minutes of Washington, D.C., September 26, 2017 meeting

The minutes were approved with one small edit.

3. Oral reports on meetings of other committees:

(A) January 4, 2018 Standing Committee meeting

Professor Elizabeth Gibson provided the report. This Committee had no action items to report at the meeting, but instead provided a report on several information items, including the potential project to restyle the bankruptcy rules. A draft of the Standing Committee minutes was included at Tab 3 of the agenda materials.

(B) November 7, 2017 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report about the Civil Rules Committee meeting. He noted that they are considering amendments to the mandatory disclosure rules and issues regarding third-party litigation funding.

(C) November 9, 2017 Meeting of the Advisory Committee on Appellate Rules

Judge Pamela Pepper provided the report regarding the Appellate Rules Committee meeting. She stated that they are considering an amendment to Rule 26.1, including changes to subsection (c) regarding disclosures in bankruptcy appeals. Also, there is a proposed amendment to Rule 25(d)(1) to match amendments made to the other federal rules. Judge Pepper explained the revised proposed amendment. Finally, she noted that the Appellate Rules Committee will consider possible amendments to Rules 3 and 7.

(D) December 7, 2017 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report for the Bankruptcy Administration Committee. The Bankruptcy Committee continues to work on the issue of unclaimed funds, and one solution may be legislation. If legislation is put forward, the Bankruptcy Rules may be impacted. She detailed a discussion with the Bankruptcy Committee regarding an administrative form used by the Administrative Office to collect case information, and if the form is still necessary.

4. Report by the Subcommittee on Consumer Issues

- (A) Consider comments and make recommendation concerning the published amendment to Rule 4001(c) removing chapter 13 post-petition credit matters from the scope of the rule. See memo by Professor Laura Bartell, included in the agenda materials.

Professor Laura Bartell provided the report on the proposed amendment to Rule 4001(c). The group discussed the purpose of the amendment, clarifying that it was not to eliminate the need to file motions for post-petition credit in chapter 13 cases when required by Section 364 of the Bankruptcy Code. The proposed amendment would reduce the requirements for requesting post-petition credit in chapter 13 cases, distinguishing them from chapter 11 cases. A suggestion was made to add a subtitle heading such as “Inapplicability in Chapter 13 Cases” for new subsection (4) to highlight the purpose of the amendment, and to match the remainder of the section. The proposed amendment with the new subheading for subsection (4) was approved by motion and vote.

- (B) Consider comments and make recommendations concerning the published amendments to Rule 6007(b) regarding service of a party in interest’s motion to compel abandonment. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell explained that five comments were filed regarding the proposed amendment to Rule 6007(b). In response to the comments, the subcommittee suggested adding the words “trustee’s and debtor in possession’s” immediately before the word “abandonment” in the last sentence of the amendments to make it clear that the abandonment was not by the court itself. No further changes were suggested in response to the comments. The proposed amendment with the added language was approved by motion and vote.

- (C) Consider comments and make recommendation concerning the proposed amendment to Rule 9037(h) regarding redaction procedures for documents that contained unredacted protected privacy information before being filed in a case. See memo by Professor Gibson, included in the agenda materials.

Professor Gibson advised that the Committee determined to take up the proposed amendments to Rule 9037 to add a new subdivision (h) in response to a suggestion from the Committee on Court Administration and Case Management. The proposed amendment was published in August 2017. There were several comments filed, and the subcommittee suggested several revisions in response to the comments. A revised version of the proposed rule was included in the agenda materials, although Professor Gibson noted that the revised proposed rule would have to be submitted to the style consultants prior to being finalized. In response to the comments, a change was proposed to revise subdivision (h)(1) to make it one sentence that is prefaced with the clause, “Unless the court orders otherwise,” and to delete that language from subdivision (h)(1)(C) to avoid any confusion for courts in interpreting the rule.

One member raised the issue of whether the document to be redacted is still available to CM/ECF users once a motion is filed. Ken Gardner advised that most courts restrict public

access to the document in question once the motion is filed, including for the person filing the motion. Others noted that in some courts the restriction is automatic. Professor Gibson explained that the proposed amendment was revised to strengthen the language regarding restricting access and filing a redacted document. Corresponding changes were made to the Committee Note. Judge Campbell suggested a revised heading to include a reference to redacted document filings.

An issue was discussed regarding the inclusion of the redacted document with a motion. Professor Gibson suggested language requiring the movant to attach a copy of the redacted document with the initial motion, but also require an explanation of the needed redactions in the motion. She advised that one of the filed comments suggested adding language requiring the docketing of the redacted document if the motion is granted. The proposed change would add before the second sentence of subdivision (h)(2), “If the court grants it, the redacted document must be filed.” A minor stylistic change was suggested. The proposed amendment to Rule 9037, including the suggested changes, was approved by motion and vote. The Committee Note, revised to reflect the changes, was approved as well.

5. Report by the Subcommittee on Business Issues

- (A) Consider comments and make recommendations concerning published amendments to Rules 2002(g) and 9036, and Official Form 410A, to expand the use of electronic noticing. See memo by Professor Gibson in the agenda materials.

Professor Gibson explained that proposed amendments to Rules 2002(g) and 9036, and Form 410, were published for comment in August 2017. The purpose of the amendments was to expand the use of electronic noticing and service in bankruptcy courts. Several comments were filed, including comments that raised concerns about the technical implementation of the proposed amendments. These comments noted that current CM/ECF is not able to retrieve an email address from Form 410. The change, as proposed for amendment, added to the form a check box and instructed the creditor to check the box “if you would like to receive all notices and papers by email rather than regular mail.” The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest.

Those commenting did not object to the concept of adding a checkbox to the form, but they said that the change would require considerable re-programming in CM/ECF and other court software, and that it would take time. They requested that the effective date of the rules be

delayed. Another issue noted was the prioritization of contact email addresses submitted by users through various sources. If, for example, a party is registered for CM/ECF noticing (or Electronic Bankruptcy Noticing if not a registered CM/ECF user), and that party submits a different email address on Form 410, it would be difficult to determine which address should take priority when receiving notices from a court.

Based on these concerns, the subcommittee decided to delay the proposed amendments to Rule 2002(g) and Form 410, and to seek additional input from the Committee on Court Administration and Case Management and the Administrative Office's Noticing Working Group regarding the technical feasibility issues.

The Committee determined to go forward with approval of the proposed amendments to Rule 9036. Those changes are consistent with the amendments to Civil Rule 5 (which Rule 7005 makes applicable in bankruptcy) and the amendments to Rule 8011, which are on track to go into effect on December 1, 2018.

The Committee voted unanimously to hold the amendments to Rule 2002(g) and Official Form 410 in abeyance, but to approve the amendments to Rule 9036, with minor changes made in response to the comments. The changes include two sentences added to the Committee Note for Rule 9036 in response to a comment. The added sentences read: "The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service."

- (B) Recommendation concerning suggestion 17-BK-B from the ABA Business Law Section to incorporate "proportionality" language into document requests made under Bankruptcy Rule 2004. See memo by Professor Gibson, included in the agenda materials.

Professor Gibson advised that this suggestion is to amend Rule 2004(c) to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information ("ESI"). The suggestion was considered at the fall 2017 Committee meeting, with a recommendation that it be reconsidered by the subcommittee and re-presented at the spring meeting. There was support for the proposed amendments to Rule 2004(c) which would add references to ESI and conform the rule to the amended subpoena rules, but differing views on the need for an amendment to address proportionality. Based on the discussion at the fall meeting, the subcommittee revised the proposed amendment, retaining the concept of a proportionality requirement, but not specifying factors to determine proportionality.

One member stated an objection to the revised language, arguing that the purpose of Rule 2004, in contrast to Civil Rule 26, is a general exploration of the case rather than specific issues. Others responded that the reason for including the proportionality language is to prevent unduly burdensome and expensive requests for documents and ESI. A suggestion was made that the language regarding proportionality be moved to a different subsection of Rule 2004, and, if left in subsection (c), that the subsection heading be changed. Others voiced concern is that the amendment would lead to an increase in litigation, questioning whether the subpoena rules would provide the protection the proposed rule amendments are attempting to address. By a 7 to 6 vote, the Committee voted to remove the proportionality language.

The Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. This would acknowledge the form in which information now commonly exists. The Committee also unanimously approved publication of the proposed amendments to the subpoena provisions of Rule 2004(c) to eliminate the reference to “the court in which the examination is to be held” to conform the rule to provisions of Civil Rule 45 and Bankruptcy Rule 9016.

- (C) Recommendation concerning suggestion 17-BK-D from the ABI Mediation Committee for an amendment to Rule 9019 that would require bankruptcy courts to establish local rules for mediation. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell stated that the subcommittee identified several areas of consideration for the suggestion, the first being whether amendments regarding mediation are needed at all. She advised that the subcommittee is seeking guidance from the Committee prior to going further with the suggestion. Most members noted their support for mediation, but few believed the rule amendments are needed. The Committee generally agreed that the rule amendments are not necessary; if parties want to seek mediation, they will, and local procedures are sufficient. Judge Campbell advised that at this time there isn't an overall effort within the federal rules committees to develop rules regarding mediation.

- (D) Recommendation concerning suggestion 17-BK-A from Kevin Dempsey, Clerk (IL-S) to revise and modernize the record keeping requirements of Rule 2013. See memo by Professor Gibson and memo by Molly Johnson summarizing survey of bankruptcy courts, included in the agenda materials.

Professor Gibson explained that the suggestion was to modify Rule 2013 to eliminate its requirements that the clerk maintain a public record of awarded fees and make an annual summary available to the public and the United States trustee. Kevin Dempsey suggested that CM/ECF has replaced the need for the type of record that the rule calls for. He proposed that, rather than being abrogated, Rule 2013 be amended to require the clerk to make information about fees awarded to professionals available upon request.

At the request of the Committee, Molly Johnson completed a survey to determine if the rule is being used by courts. In addition, she gathered information regarding the use of the rule by the Executive Office for U.S. trustees and academics. Dr. Johnson reported on her survey, advising that most bankruptcy clerks responded that they prepare the required annual summary and maintain the public record; however, fewer than half submit the summary to the U.S. trustee's office, for a variety of reasons. Also, she found that very few courts receive requests for the information. From her study, she learned that in most courts, the report is generated through CM/ECF, even though the CM/ECF version of the report doesn't completely comply with Rule 2013. She explained that in some cases, orders are not included in the report based on mistakes in how orders are titled, or in variations in order titles. The suggestion is to keep the rule but not require the annual summary, and the majority of those responding agreed with this suggestion, to make the information available upon request rather than automatically.

Ramona Elliott reported on her survey of the U.S. trustees' offices. She stated that the report is useful for monitoring chapter 7 trustees. Many of the reports are posted on local courts websites, and this may be a possible change to the rule, i.e., to include the report on courts' websites. Ken Gardner spoke with several bankruptcy clerks, and he advised that if the information is properly entered into CM/ECF, the report will be accurate. Finally, Ms. Johnson stated that few academics use the Rule 2013 report.

The Committee discussed the suggestion and survey results, with several members suggesting that the rule be amended to work better with today's court environment. Others noted that an educational effort would be helpful, and that it would be helpful to communicate the information to the Bankruptcy Clerks Advisory Group. After this discussion, the Committee voted to take no further action on the suggestion.

6. Report by the Restyling Subcommittee

Consider process for soliciting feedback on possible restyling of the Federal Rules of Bankruptcy Procedure. See memo by Professor Bartell, along with the proposed survey questions and the example of restyled rule, included in the

agenda materials.

Judge Dow initiated the discussion regarding the proposal to restyle the bankruptcy rules. He explained that the subcommittee determined to seek the input of the bankruptcy community, and in that effort, asked Dr. Johnson to prepare a survey. The survey will be sent to various groups, with a link to the survey available on uscourts.gov as well. Many organizations will be contacted, including the NCBJ, NACBA, CLLA, NABT, NACTT, ABI, ABA Business Law Section Bankruptcy Committee, American College of Bankruptcy, National Bankruptcy Conference, and AALS Debtor-Creditor Committee. The subcommittee sought approval of the process of surveying the bankruptcy community, and said it would report back to the Committee on the results of the survey at the fall meeting. Professor Bartell noted that the sample restyled rule is not something that the subcommittee has approved, but it is merely the rule as restyled by the style consultants. The subcommittee suggested that it be included with the survey to give participants an understanding of the nature of restyling.

The group discussed the survey and whether to include the style consultants' comments along with the sample restyled rule. One member noted that there may be a way to survey the broader question of whether the rules need to be restyled. Professor Gibson responded that she believes the restyled rule example helps. It provides a framework for understanding the nature of restyling. Other members suggested referring survey participants to restyled Civil Rules as examples. Several members agreed with this suggestion to avoid getting into bankruptcy-specific responses. Others stated that including a bankruptcy rule is more reflective of the potential restyling process, and that this will get better responses.

Judge Campbell explained that the point of restyling in general is to make the rules clearer, less cluttered, and more consistent. The other federal rules have been restyled. The Standing Committee will take the advice of this Committee as to whether the project should move forward.

Generally, the group agreed that including restyled Rule 4001 with the survey makes sense, but that the footnotes would be distracting. Instead, a note could be added that the rule example is merely that, and not an approved amended rule. Judge Dow suggested that Rule 4001, as restyled, be reviewed again by the subcommittee, and a version be developed that best reflects the comments made at the meeting, including a decision whether to attach just subsection (a) or the entire rule. In addition, the subcommittee will add introductory language for the survey regarding the inclusion of terms of art and the desire to avoid substantive rule changes. The group agreed with these ideas, and that if these changes are made, the survey can be sent out.

Information Items

7. Items Awaiting Transmission to the Standing Rules Committee

- (A) Recommendations for proposed amendments to Rule 2002(f)(7) and (h) for publication. The proposed amendment to subsection (f)(7) was made by the Advisory Committee at its spring 2017 meeting. The proposed amendment to (h) was made by the Advisory Committee at its spring and fall 2017 meetings. The proposed amendments are incorporated into a technical amendment to Rule 2002(k) which is proposed for publication in August 2018.

Professor Gibson explained that the subcommittee recommends publication of three amendments to Rule 2002. The proposed amendments to subsections (f) and (h) were approved at the spring and fall 2017 meetings, respectively. The proposed amendment to Rule 2002(k) is technical, and would add a reference to subsection (a)(9). If approved, the combined proposed amendments to Rule 2002 will be presented to the Standing Committee.

The Committee approved the combined proposed amendments to Rule 2002, recommending that they be published for comment. The amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

- (B) Recommendation approved by the Advisory Committee at its fall 2017 meeting to publish an amendment to Rule 8012 that would conform to a proposed Appellate Rule 26.1 amendment.

Professor Gibson explained that the Appellate Rules Committee will consider proposed amended Rule 26.1 at its spring meeting. Bankruptcy Rule 8012 will conform to these amendments. The group discussed the proposed amendments to Appellate Rule 26.1, specifically, the use of the word “cases” versus “proceedings” in subsection (c). Generally, the group agreed with the use of the term “cases.” An edit was suggested to the Appellate Rule 26.1’s Committee Note to delete the reference to “adversary proceedings.”

The Committee approved for publication amendments to Rule 8012 that track the relevant amendments to Appellate Rule 26.1.

8. Report concerning Advisory Committee on Civil Rules consideration of an amendment to Rule 30(b)(6) and implications for bankruptcy. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell reported that Judge Goldgar advised the Civil Rules Committee that the Committee generally supports the proposed changes to Civil Rule 30(b)(6), but that it would not support amendments to Civil Rule 26(f)(2), if they were to go forward.

9. Items Retained for Further Consideration.

The matters listed below are part of the noticing project and will be considered in the future.

- (A) Suggestion 14-BK-E (Richard Levin, National Bankruptcy Conference) proposing an amendment to Bankruptcy Rule 3001 to require a corporate creditor to specify address and authorized recipient information and the promulgation of a new rule to create a database for preferred creditor addresses under section 347. In addition, the suggestion discusses the value of requiring electronic noticing and service on large creditors in bankruptcy cases for all purposes (other than process under Bankruptcy Rule 7004).
- (B) Comment 12-BK-040 (BCAG). This suggestion was submitted as a comment in response to proposed revisions to Rule 9027. It suggested that the reference to Amail@ in Rule 9027(e)(3) be changed to “transmit.” Because the comment did not implicate the part of Rule 9027 being amended, the comment was retained as suggestion for further consideration).
- (C) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040 were submitted separately by Judge Robert J. Kressel, the National Conference of Bankruptcy Judges, Judge S. Martin Teel, Jr., and the Bankruptcy Clerks Advisory Group. The comments were made response to pending amendments to Rule 8003(c)(1), and have been retained as suggestions for further consideration. They recommend that the obligation to serve a notice of appeal rest with the appellant or be permitted by electronic means.
- (D) Suggestion/Comment BK-2014-0001-0062 (Chief Judge Robert E. Nugent, U.S. Bankruptcy Court for the District of Kansas, on behalf of the NCBJ). This suggestion proposes amendments regarding service of entities under Bankruptcy

Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b)).

(E) Informal Suggestion (David Lander, former committee member), proposing rule in context of electronic noticing that would require particular notice to, or service on, a party when a motion or pleading is adverse to that party, as opposed to that party just receiving the general e-notice of a filing in the case.

10. Coordination Items, see memo of March 1, 2018, by Mr. Myers.

No report was made at the meeting.

11. Future meetings:

The fall 2018 meeting will be in Washington, DC, on September 17, 2018.

12. New business.

13. Adjourn.

Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee-s meeting. No objections were noted, and all recommendations were approved by acclamation at the meeting.

1. Subcommittee on Consumer Issues

Recommendation for technical amendment to Rule 2002(k) regarding chapter 13 noticing of plan objections to include transmittal of the notice to the United States trustee. See memo by Professor Gibson in the agenda materials

2. Subcommittee on Business Issues

Recommendation of no change regarding suggestion 17-BK-D from A. Lysa Simon to add credit unions to the types of "insured depository institutions" described in 7004(h) as entitled to service of process in a contested matter or

adversary proceeding by certified mail. See memo by Professor Gibson in the agenda materials.

3. Subcommittee on Forms Issues

Recommendation for technical amendments to the general and special power of attorney forms (Forms 4011A and 4011B), changing them to Official Bankruptcy Forms 411A and 411B to conform to the requirements of Rule 9010(c). See memo by Professor Gibson in the agenda materials.

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TAB 4A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 17, 2018

I. Introduction

The Advisory Committee on Criminal Rules met on April 24, 2018, in Washington, D.C. This report presents two action items. The Committee unanimously recommends that the Standing Committee transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) New Rule 16.1 (pretrial discovery conference), and
- (2) Amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings (right to file a reply).

The report also discusses several other information items, including the Committee's decision to undertake a full review of proposals to bring pretrial discovery concerning expert witnesses under Criminal Rule 16 closer to that required by Civil Rule 26.

II. Action Item: New Rule 16.1

Proposed new Rule 16.1 has its origins in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “gigabytes of information.” The Committee’s work on the proposal revealed that discovery issues involving electronically stored information (ESI) could be adequately addressed in most cases by an early discussion between counsel, and were not limited to “complex” cases, or cases with a high volume of ESI. Accordingly, the proposed rule is not limited to such cases, and provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

The proposed amendment is not included in Rule 16 itself, but would instead be a new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the Committee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting “no later than” 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial discussion, which can then be followed by additional conversations. Subsection (b) bears some resemblance to Civil Rule 26(f), but is more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. A modification would be required, for example, if the schedule or manner of discovery in the case is governed by a standing order or local rule. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached. The rule does not prescribe a time period for seeking judicial assistance.

The proposed rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the court to accept their agreement or otherwise limit the court's discretion. Under the proposed rule, district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders. To avoid any confusion, this point is emphasized in the Committee Note, which states: "Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure."

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving electronically stored information (ESI). The Committee Note draws attention to this point and states that counsel "should be aware of best practices." As an example of these best practices, it cites the ESI protocol developed by the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) (Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (2012)). The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

Publication of the rule produced six comments. Although all were supportive of (or did not question) the amendment's general approach of requiring the prosecution and defense to confer about discovery soon after arraignment, several expressed concerns and/or suggested changes in the text or Committee Note. The comments raised the following issues:

- (1) Should the text or note state that the amendment does not preclude shorter times for discovery required by local court rules or court orders?
- (2) Should the text or note be amended to state that the amendment does not grant new discovery authority or override current statutory limitations (e.g., the Classified Information Procedures Act (CIPA) and the Jencks Act)?
- (3) Should the rule explicitly state that it does not apply to pro se defendants?
- (4) Should the amendment be relocated or renumbered?
- (5) Should the rule require the parties to confer "in good faith"?
- (6) Should the rule require the parties to file a joint discovery report?

The Committee concluded that the existing Committee Note was sufficient to address the concern about local rules and orders setting shorter times for discovery, but it agreed to propose revisions to the Note addressing statutory limitations such as CIPA and the applicability of the rule to pro se defendants. It also accepted the suggestion that the wording of subsection (b) should be revised to parallel Rule 16(d)(2)(A). With the exception of a few minor changes recommended by the style consultants, the Committee declined to make other changes in the rule as published.

a. Local rules

Two comments (CR-2017-0009 and CR-2017-0011) expressed concern about the effect of the proposed rule in districts where local rules already require the government to make specific disclosures at particular times, especially where those disclosures must be made before the time set for the pretrial discovery conference (14 days after arraignment). The comments suggested changes to the text or Committee Note. In the drafting process the Committee sought to preserve the authority of district courts to impose additional discovery requirements by local rule or court order. As published, the Committee Note states (emphasis added):

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Committee concluded that no further clarification is needed, in either the text or the Committee Note, to respond to the concerns about local rules requiring early disclosures.

b. New discovery authority

The Department of Justice (CR-2017-0010) expressed concern that the language in (b) might be read to “grant[] new discovery authorities that could cause serious problems and undermine important protections contained in other laws.” As published, (b) provided (emphasis added):

(b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

The Department noted that this language varies slightly from current Rule 16(d)(2)(A).

The Committee agreed to conform the language of the proposed rule to the phrasing of Rule 16(1)(b). There is no substantive difference between the phrasing used in the rule as published (“the timing, manner, or other aspect of disclosure”) and the parallel words in Rule 16 (“time, place, or manner, or other terms and conditions of disclosure”). Although it seems unlikely that these slight differences would form the basis for a successful argument that Rule 16.1 was intended to be different in some important respect, the Committee had no objection to tracking the phrasing of Rule 16(d)(2)(A) in new Rule 16.1(b). As revised, the proposed rule provides:

After the discovery conference, one or both parties may ask the court to determine or modify the ~~timing, manner, or other aspect of disclosure~~ time, place, or manner, or other terms and conditions of disclosure to facilitate preparation for trial.

The Department also suggested that the text of the rule be amended to state that the court may determine or modify the disclosure “in accordance with Rule 16 and other applicable law,” and that the following language be added to the Committee Note:

. . . nothing in this new rule is designed to change substantive discovery rules, grant the courts authorities in addition to what is provided for under Rule 16 and other applicable law, or change the safeguards provided in various security and privacy laws such as the Jencks Act or the Classified Information Procedures Act (“CIPA”).

In its comment on the rule, NACDL (CR-2017-0012) opposed that suggested change, praising the flexibility of the rule as published and stating its understanding that the rule “rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case.”

The Committee did not accept the Department’s suggestion that the text of the rule be revised to add references to Rule 16 “and other applicable law.” Adding a requirement that the court must act “in accordance with . . . other applicable law” to this rule might suggest that unless the same language is added to other rules the courts have carte blanche to ignore other relevant laws. The style consultants were unanimous in rejecting this language.

The Committee agreed, however, that it would be appropriate to add language to the Committee Note addressing the Department’s concern by recognizing the limited nature of the new rule. The placement of the new language (underlined below) shows that the new rule alters neither existing statutory safeguards for security and privacy, nor local rules or standing orders:

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

c. Pro se parties

Two comments addressed the application of the amendment to pro se parties, though they disagreed on the proper approach. The Department of Justice (CR-2017-0010) suggested that the Committee Note squarely address the point, implicit in the text, that the requirement of a pretrial conference is applicable only to attorneys and hence not to pro se defendants. NACDL (CR-2017-0010) disagreed, suggesting that “‘attorney for the defendant’ is properly understood to include defendants representing themselves.” Further, NACDL argued, the Committee Note

should confirm this understanding. It observed that where conferring with a pro se defendant would be impractical, the government can seek relief on a case-by-case basis.

These comments squarely presented for Committee discussion the question whether the prosecution should have a duty to confer with a pro se defendant concerning discovery within 14 days after arraignment, assuming that it would be feasible to do so. On the one hand, most pro se defendants lack the training and experience to understand the discovery process, and conferring in such circumstances would often be difficult. On the other hand, cases involving pro se defendants may include quantities of ESI, and such defendants—even more than those represented by counsel—have a very significant interest in the timing and form of discovery.

The Committee again concluded, consistent with its assumption prior to publication, that for a variety of practical reasons it would not be appropriate to require the government to confer about discovery with each pro se defendant within 14 days of arraignment, and that the text should make this point more clearly. As published subsection (a) required “the attorneys for the government and the defendant” to confer and try to agree on the timetable and procedures for pretrial disclosures. As revised, subsection (a) refers to “the attorney for the government and the defendant’s attorney.”

Although the Committee agreed that it is not practical to require discovery conferences with pro se defendants, it also recognized that it is essential for such defendants to have pretrial access to material necessary to prepare their defense. To emphasize this point, the Committee unanimously supported adding to the Committee Note a statement about the courts’ existing discretion to manage discovery and their responsibility to ensure pro se defendants “have full access to discovery.” An addition to the Committee Note reads:

For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

d. Relocating or renumbering the amendment

Two comments addressed the location of the new provision. The Justice Department suggested that it might be desirable to delete subsection (b) and move the new provision imposing a duty to confer to Rule 16. A Concerned Citizen suggested (CR-2017-005), instead, that the new rule come after Rule 10 (arraignment) and before Rule 16 (discovery). This would, Concerned Citizen urged, preserve the present order of the rules, which follows the chronology of the typical criminal case. Citizen favored placing the new rule between Rules 11 and 12.

The Committee concluded that no change should be made in the numbering or location of the rule. A new, separate rule will be much more visible than placement within Rule 16, which

is already very long and complex. A simple freestanding rule also parallels Rule 17. The Committee saw no reason to relocate the new rule.

e. Additional requirements of good faith and joint discovery reports

One commentator, Professor Daniel McConkie (CR-2017-0007), suggested that Rule 16.1, like the Civil Rules, should expressly impose the requirement of conferring in “good faith.” He noted that there are situations in which one party is not engaged and the other party “needs the ability to file a motion with some teeth to call out that bad behavior.” In the drafting process the Committee considered including a good faith requirement, but it declined to do so. Indeed, members noted that discovery in criminal cases currently proceeds more smoothly than it does in civil cases, despite the explicit requirement of “good faith.”

Professor McConkie also described local rules that require both discovery conferences and pretrial joint discovery reports, and he urged the Committee to add similar provisions to Rule 16.1. Although the Committee did not specifically consider the requirement of a joint defense report, in the drafting process it did consider—and decided against—more detailed requirements beyond conferring within 14 days after arraignment. Members were not persuaded that it would be desirable to add such a requirement.

f. Style changes

The Committee accepted several changes recommended by the style consultants, which did not affect the substance of the proposed rule.

The consultants recommended changes in the captions to more accurately reflect the subject of subsection (b). The revised caption is “Request for Court Action.”

The consultants recommended the text in subsection (a) refer, for clarity, to “the attorney for the government and the defendant’s attorney” rather than the “the attorneys for the government and the defendant.”

Finally, the consultants recommended the deletion of a comma.

The Committee unanimously recommends that the Standing Committee approve new Rule 16.1 and the accompanying Committee Note, as amended after publication, for transmittal to the Judicial Conference.

III. Action Item: Rule 5(d) of the Rules Governing Section 2255 Proceedings and Rule 5(e) of the Rules Governing Section 2254 Cases

Judge Richard Wesley first drew the Committee’s attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that “The

moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the Committee Note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a review of the cases, the Committee concluded that the text of the current rule is contributing to a misreading of the rule by a significant number of district courts. A similar problem was found in cases interpreting parallel language in Rule 5(e) of the Rules Governing 2254 actions. Both rules currently provide that a prisoner may file a reply "within a time fixed by the judge." Apparently the reference to filing "within a time fixed by the judge" can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The amendment published for public comment makes it clear that the moving party (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.

The Committee Note states that the Rule "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

A parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings was also published for public comment. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The Committee that revised the amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

Only three comments were received. Two addressed issues that had been considered before publication: whether there was any need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." These issues had been debated at length before publication, and the Committee decided there was insufficient reason to revisit them.

The third comment, from NACDL, expressed support for the proposed amendments to Rule 5 of both the 2254 and 2255 Rules, but suggested a related change. NACDL argued that inmates should be told about the reply and when it should be filed at the time the court orders the respondent to file a response; it proposed an additional amendment to Rule 4 of the Section 2254 and 2255 Rules. Although the Committee was not persuaded that an amendment to the Rules was warranted, it did approve the addition of the following sentence to the Committee Notes accompanying the Rule 5 amendments dealing with notice to prisoners of the time to reply:

Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

In the Committee's view, this addition would serve as a helpful reinforcement of best practices, and it would not require republication.

With this change to the Committee Notes for both Rules 5, the Committee voted unanimously to approve the Rule 5 amendments for transmittal to the Standing Committee.

The Committee unanimously recommends that the Standing Committee approve the amendment to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings, and the accompanying Committee Notes as amended after publication, for transmittal to the Judicial Conference.

IV. Information Items

The Committee also decided to take a close look at the provisions governing discovery of expert witnesses, and it tabled or decided not to pursue several other proposed amendments.

The Committee received two proposals from district judges suggesting that it would be beneficial to expand pretrial discovery of expert witness testimony, bringing the requirements in criminal cases closer to the current requirements in civil cases. Both judges urged that expanded discovery was needed to help the parties prepare for trial, and to provide the necessary basis for rulings on *Daubert* motions. Members agreed that the scope of pretrial disclosure of expert testimony is an important issue that needs to be addressed, though it will not lend itself to a simple solution. There are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil proceedings. Additionally, the Department of Justice has adopted new internal guidelines calling for significantly expanded discovery of expert forensic witnesses. It has now trained all of its prosecutors on the new departmental guidelines, but it may take some time for the effects to be fully realized. The Committee will gather information from a wide variety of sources, and hopes to hold a mini-conference to help it understand the issues and develop a proposal.

The Committee also considered a suggestion that it amend Rule 32(e)(2), which it tabled. Rule 32(e)(2) requires the provision of the presentence report (PSR) to defendants as well as defense counsel. The concern is that direct provision of the PSR to individual defendants may contribute to the problem of threats and harm to cooperating defendants, since defendants can be pressured to provide their PSRs to third parties. The requirement that the PSR be provided to both the defendant and counsel was added to Rule 32 to increase the reliability of the PSRs. Defendants need time to review the PSR to identify errors or omissions, and often possess information not known to counsel. This information is critical during the preparation for sentencing. Accordingly, the Bureau of Prisons (BOP) permits inmates to have their PSRs before designation, but it treats PSRs as contraband after designation. Because the Cooperator

Task Force is recommending significant changes in BOP's procedures to protect cooperators, the Committee thought it best to table the Rule 32(e)(2) suggestion while that effort is underway.

The Committee also voted not to pursue several other proposed amendments. Two amendments clearly fell outside the scope of the Committee's authority under the Rules Enabling Act. The third was a suggestion that the Criminal Rules Committee (and other sister committees) undertake a comprehensive review of the work product doctrine. The Committee was not persuaded that it should undertake that task at the present time.

TAB 4B

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE**

**Rule 16.1. Pretrial Discovery Conference; Request
for Court Action**

- (a) **Discovery Conference.** No later than 14 days after the arraignment, the attorney for the government and the defendant’s attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.
- (b) **Request for Court Action.** After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically stored information (ESI) or other voluminous or complex discovery.

For practical reasons, the rule does not require attorneys for the government to confer with defendants who

2 FEDERAL RULES OF CRIMINAL PROCEDURE

are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address

modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

Changes Made After Publication and Comment

There were no substantive changes. The captions were revised to more accurately reflect the subject of subsection (b), which is a “Request for Court Action.” The phrase “timing, manner, or other aspects” was revised to “time, place, manner, or other aspects” to track Rule 16(d)(2)(A). Two changes were made in response to concerns about possible ambiguity in the text as published. First, subsection (a) was revised to require a conference between “the attorney for the government and the defendant’s attorney,” and the Committee Note was revised to state that for practical reasons the Rule does not require a discovery conference with a pro se defendant. Second, the Note was modified to include a statement that the Rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act.

Summary of Public Comment

CR-2017-0005. A Concerned Citizen. Because Rules 3 through 38 are generally “organized chronologically based on how a federal prosecution typically unfolds,” Citizen suggests placing the new rule between Rules 11 (“Pleas”) and Rule 12 (“Pleadings and Pretrial Motions”).”

CR-2017-0007. Daniel McConkie. Prof. McConkie supports the rule but recommends two changes: (1) the parties should be required to confer in good faith, and (2) the parties should, following their discovery conference, file a joint discovery report with the court.

CR-2017-0009. Federal Magistrate Judges Association (Linda R. Anderson). FMJA “support[s] the concept of directing counsel in criminal cases to confer on these matters.” But FMJA “suggest[s] that the Committee Note include a sentence or paragraph saying, in words or substance, that nothing in the amended rule is intended to delay times for producing discovery set forth in a local rule, or a Court order in a particular case, particularly when a local rule or Court order requires more prompt disclosure than the amended rule contemplates.”

CR-2017-0010. U.S. Department of Justice, Criminal Division (John P. Cronan, Acting Assistant Attorney General). DOJ “fully support[s] the rule’s primary requirement that prosecutors and defense lawyers in federal criminal cases confer about discovery soon after arraignment.” However, DOJ expresses two concerns: (1) the Rule will “be read by some . . . to provide *new* authorities to district courts to expand or contract discovery obligations or change discovery procedures . . . otherwise governed by existing law” (such as CIPA and the Jencks Act), and (2) it is not clear “how this rule will apply in cases where defendants exercise their constitutional right to represent themselves.” DOJ advocates clarification in the text or Committee Note to address these concerns.

CR-2017-0011. Aderant CompuLaw (Ellie Bertwell). To make it clear that the proposed rule allows the District

Courts to set a different deadline for the discovery conference, Aderant Compulaw recommends adding the prefatory phrase “Unless otherwise provided by local rule or court order.”

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.). NACDL praises the flexibility of the proposed rule, which requires the parties to address discovery issues “early and with resort to the court’s assistance.” NACDL opposes any attempt to limit the rule, which “rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case.” It urges that the Committee Note should “make[] the judge’s discretion and authority to manage discovery in each case in the interest of fairness and trial management unambiguously clear.” NACDL also opposes a “blanket exception” for *pro se* defendants.

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TAB 4C

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As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

Change Made After Publication and Comment

A sentence was added to the Committee Note drawing attention to the value of including the date for any reply in the order requiring the government to file an answer or other pleading.

**RULES GOVERNING SECTION 2255
PROCEEDINGS FOR
THE UNITED STATES DISTRICT COURTS¹**

Rule 5. The Answer and the Reply

* * * * *

- (d) **Reply.** The moving party may ~~submit~~file a reply to the respondent’s answer or other pleading ~~within a time fixed by the judge.~~ The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under § 2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent’s answer or pleading. It retains the word “may,” which is used throughout the federal rules to mean “is permitted to” or “has a right to.”

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

No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

Changes Made After Publication and Comment

A sentence was added to the Committee Note drawing attention to the value of including the date for any reply in the order requiring the government to file an answer or other pleading.

Summary of Public Comment

CR-2017-0003. Joseph Goodwin. Goodwin “do[es] not see the need for this amendment” because “[t]he District Court has discretion to deal with any scheduling issues.”

CR-2017-0004. Patrick Kite. Kite states “‘may’ should be replaced by ‘has a right to’ or ‘is entitled to,’” because “[c]asting doubt on the meaning of ‘may’ is inconsequential when it is already misunderstood.”

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.) NACDL expresses support for “the proposal to clarify that a habeas petitioner or § 2255 movant has an unambiguous right to file a reply to the respondents’ or government’s Response.”

However, because the proposed rules “do not advise the court when or how it is that the petitioner/movant should be advised of the right to reply and the time during which s/he may do so,” NACDL “suggests that the time and place for such notice is in the court’s Order under Rule 4 directing the filing of an Answer or Response.”

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TAB 4D

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 24, 2018, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met in Washington, D.C., on April 24, 2018. The following persons were in attendance:

Judge Donald W. Molloy, Chair
John P. Cronan, Esq.
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
James N. Hatten, Esq.
Judge Denise Page Hood
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Joan L. Larsen
Judge Bruce McGivern
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Professor Cathie Struve, Standing Committee Associate Reporter (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Rules Committee Staff
Patrick Tighe, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order. After congratulating several members on career developments, Judge Molloy recognized Professor Daniel Coquillette, who is leaving his position as Reporter to the Standing Committee, and the outgoing members of the Criminal Rules Committee, and invited them to make remarks.

Mr. Siffert recalled hearing outgoing members praise the Committee’s integrity and state how meaningful they found its work. He agreed that being able to watch and participate in this

process had been one of his most valuable professional experiences. He stressed his affection for the other members and the reporters, and his hope to stay in touch.

Judge Larsen said it had been a real pleasure to serve on the Committee, noting that her tenure was short because as a federal judge she could not continue to serve as the state court representative. She wished the members well and looked forward to seeing them again.

Professor Coquillette thanked the Committee, and said that his 34 years as a reporter had been an extraordinary privilege. He expressed his gratitude for so many dear friends among the reporters, commended Ms. Womeldorf in the Rules Office for her fantastic work, and praised Professor Struve who will be taking over as a terrific Reporter for the Standing Committee.

Judge Molloy thanked the outgoing members and Professor Coquillette for their many, many years of great service, and then introduced John Cronin, Acting Head of the Criminal Division at the Department of Justice. Mr. Cronin said it was an honor to attend and hoped that a permanent Assistant Attorney General would be available soon to work with the Committee.

Judge Molloy turned to the approval of the Minutes from the Fall 2017 Criminal Rules Committee Meeting.

Professor Beale noted receipt of several typographical corrections, indicated those corrections will be made, and invited members to let the reporters know of any other typographical corrections.

The minutes were approved unanimously on voice vote.

Judge Molloy asked Ms. Womeldorf to report on the Rules Office.

Ms. Womeldorf first drew attention to the minutes of the January meeting of the Standing Committee in the agenda book. At that meeting, the report from the Criminal Rules Committee consisted primarily of this Committee's long and thorough consideration of the cooperators issue, and the various rules provisions dealing with that issue. She noted that Judge Campbell had thanked the Reporters and members for their thorough and careful work on that issue. The Standing Committee was asked if it agreed with the Committee's recommendation not to go forward with any of those Rules amendments. Although there was no formal vote, the sense of the Standing Committee was agreement with this Committee's recommendation.

Ms. Womeldorf noted that the Report to the Judicial Conference in the agenda book included only information items, namely the complex criminal litigation manual, the cooperation material, and possible changes to Rule 32(e)(2).

Ms. Wilson drew the Committee's attention to the chart in the agenda book compiling relevant legislative activity and reviewed the legislation listed there. She informed the Committee of a communication from Senator Wyden's office, which had been active on the Rule 41 issues. They were contemplating suggesting an amendment to Rule 41 to require delayed notice to the target when the government obtains emails from an internet service provider. The

Rules Office provided the Senator's office with information on how to propose a rules change to the Committee, and we will have to see if anything develops.

Judge Molloy then asked Judge Kethledge, chair of the Rule 16 Subcommittee, to lead the discussion of the proposed amendment to Rule 16.1. Judge Kethledge noted that publication produced six comments, some suggesting changes. The Subcommittee met to discuss the comments and agreed on several changes to the proposed rule and note.

Two comments were concerned about districts where local rules have a shorter period of time for discovery than the rule provides for counsel's meeting. The Subcommittee had already included language in the Committee Note to address that concern: "The Rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure." Districts are able to tighten those timelines.

Judge Kethledge said the Department of Justice submitted a lengthy letter. The Department was concerned about a slight variation between the language in proposed subsection (b) and the language in Rule 16(d)(2)(A), because courts might read something into that variation. Seeing no substantive difference, the Subcommittee recommends that the language in proposed Rule 16.1 be modified to track the language in Rule 16.

The Department also suggested that the rule should say that the court must comply with Rule 16 and other applicable laws. The Subcommittee thought it was unnecessary to say that the court had to comply with some other law. If the premise of that change were correct, Judge Kethledge explained, it would be necessary to list all of the existing laws in every rule. The Department also wanted to revise the Committee Note adding fairly broad language to the effect that the rule does not change substantive discovery rules, the requirements of Jencks Act, or other acts. The Subcommittee modified the note in a more limited manner, stating that the rule "does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act." That seemed to assuage the Department's concerns.

Judge Kethledge noted that the Department was also concerned that the rule published for comment did not make it clear that the government's lawyer would not need to meet with a pro se defendant for these initial conferences. The style consultants proposed a very helpful clarification: "the attorney for the government and the defendant's attorney must confer."

Although the new rule would not require the government to meet with pro se defendants, the Subcommittee recognized the importance of the courts' obligation to ensure that pro se defendants get the discovery they are entitled to and the courts' power to regulate the process in cases with pro se defendants. To address this concern, the Subcommittee added the following language to the committee note: "However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure that such defendants have full access to discovery."

Other comments addressed issues the Subcommittee had already considered very carefully before the rule went out for comment. One suggested renumbering the rule, another adding that the parties have to confer in “good faith.” The Subcommittee decided not to revisit those decisions.

Judge Kethledge concluded that the changes made by the Subcommittee after publication were basically modest tweaks.

Mr. Cronin asked if the section titled “Changes After Publication” was published along with the rule. Professor Beale responded that publication of this section is required.

Professor Beale commented that the style consultants had been very helpful on this rule, especially in clearing up the ambiguity in the published rule, which stated “the attorneys for the government and the defendant must confer.” As the public comments noted, this could be read (though the Committee had not intended this) to require the government to confer with the defendant. Both the Department and the National Association of Criminal Defense Lawyers (NACDL) thought it was unclear. The government thought it should be clarified that there is no duty. NACDL thought it should be clarified, and that there should be an obligation to meet with pro se defendants. The Subcommittee discussed whether the government should meet with pro se defendants about discovery, and the consensus on the Subcommittee was that it would not be practical. Accordingly, the committee note says “For practical reasons,” the rule does not require this. We would not want anyone to think that pro se defendants are not as important as any other defendants or do not need as much assistance and preparation before trial and discovery. But the Subcommittee did not think the two-week window for these discussions was going to be practical as an across-the-board rule.

One member suggested that the Committee should feel good about this rule. If he could change anything about the federal process he would enhance discovery. The proposed rule first came to the Committee with a highly prescriptive draft, which met with very strong opposition. Judge Kethledge found a solution to this complex problem that all could accept. It is a small step but important.

Professor Beale and Judge Kethledge noted that Judge Campbell had suggested that we hold a mini-conference, and that is where the solution emerged. When the Committee started we didn’t have any idea that we would have a rule ready to be published in 2017, requiring only these minor tweaks after publication. The process worked really well. Thanks to the NACDL and New York Council of Defense Lawyers for getting this started.

Judge Molloy agreed that a great deal of this was based on an epiphany that arose from some very robust discussion at the mini-conference. It reflects how these Rules Committees work.

A motion to approve the Subcommittee’s amended Rule and Committee Note for transmittal to the Standing Committee passed unanimously on voice vote.

Judge Molloy asked Judge Dever, Chair of the Rule 5 Subcommittee, to address the Committee on the pending proposals to Rules 5 of the 2254 and 2255 Rules.

Judge Dever summarized the status of the proposed amendments, which are a response to decisions of several district courts that Rule 5 allowed a judge to deny the opportunity to file some kind of reply. The proposed amendments were intended to make clear that, assuming the court did not dismiss the petition, once the government files a response, the inmate has a right to file a reply. After publication, the Committee received a few comments, including one that argued that the word “may” caused the problem. The proposed amendment persists in its use of “may,” he said. The Subcommittee thought the proposed change makes clear the inmate has a right to file a reply. A number of courts have local rules that set deadlines for replies. Like the Rule 16.1 proposal, the amendment recognizes these existing local rules and seeks to avoid conflicts. It provides that the judge has to set the time to file, unless it is already set by local rule. The Subcommittee made one change in the committee note in response to a suggestion from NACDL. The new language states that if the court is setting a time for a reply, it can also provide notice of any other deadlines associated with that piece of the litigation. The Subcommittee unanimously supported this change to help clarify this very important issue. There are many pro se petitions under 2254 and 2255, and this takes into account the reality that many courts have local rules or standing orders that address these timing issues.

Professor Beale reminded the Committee that the proposal came from Judge Richard Wesley on the Standing Committee, who praised the Committee’s proposed amendments at the last Standing Committee meeting. He said when a law clerk came to him, they were outraged that the petitioner or moving party had not been allowed to file a reply. So he sent the issue to us. It was not possible to demonstrate how many cases there were, because many of them are not recorded. Although many (including the style consultants) said “the rule is clear,” demonstrably, it wasn’t, not to the people who needed to know, including the district courts. So we will see if the amendments solve the problem. If the Rule was clear and the courts weren’t reading it, perhaps this will provide more notice. She noted the style consultants had prohibited the use of “has a right to” or “is entitled to,” because (in their view) “may” is clear.

Judge Molloy asked whether the change of “submit” to “file” had been approved.

Professor Beale answered yes, that there is no change to the text as published. The only change to what was published was the last sentence added to the committee note. This was responsive to NADCL’s suggestion that there should be a change to Rule 4 adding that the court ought to give notice, and do it at a certain time. NACDL’s suggestion fell outside of what had been published, and the Subcommittee thought it was not necessary. The Subcommittee thought, however, it would make sense to nod in the direction of a reminder that there should be notice. There may be some concern about who knows about the deadlines in some places, such as courts that handle timing with a standing order. Without republication we could not amend Rule 4, as NACDL had suggested. Nor, she said, should we be saying what judges have to tell these pro se parties in writing, when there are lots of things they ought to also be telling. It is a slippery slope.

Judge Molloy confirmed that the changes to Rule 5(d) and Rule 5(e) are identical.

A member raised a question about the additional sentence for the note. He agreed an addition to the note, rather than a change in the rule, was the right approach. But the proposed sentence, he said, seemed to imply that the court's order giving the time to file the reply will necessarily come when the court orders the response. Perhaps it should. But in some cases, the court might set the time to reply after the government files a motion to dismiss the petition or answers the petition.

Professor King stated that the Subcommittee did recognize that there might be instances where the time to file the reply to the answer or response would need to be decided after that response or answer was received. The Subcommittee's proposal can accommodate such cases. In such a case, if the time to reply had been set earlier, it could be modified. Moreover, the new sentence was not a command that judges must add a reference to the time to file a reply in the order requiring the government to file an answer or other pleading. It states only that if the court does so, it provides notice. The original suggestion included the contingent language "would" provide notice, which the Subcommittee deleted. The sentence was not intended to require the judge to do that. Rather, it is just a statement that when the judge does so, it gives notice.

The member asked if the sentence implies that the court's order would have to be simply at that one time, but not other times. Professor Beale responded that the Subcommittee didn't think so, but asked if the member had a suggestion for different language.

The member responded that the sentence could just refer to any order, any order providing a time to file a reply provides notice to all the parties.

Professor King noted that that formulation does not really respond to the concern that motivated the addition of the sentence. The concern was the one raised by NACDL that the petitioner or movant receive notice early on. So substituting "any order" doesn't do much more than the text of the rule that says to "set." It does suggest that the "set" take the form of an order, which is perhaps the member's intent, but it doesn't reflect what the Subcommittee was doing. The Committee could amend the language to do that, but it would have a different meaning.

The member indicated that answered his concern.

Motions to transmit the proposed Rules 5(d) and 5(e), with the amended Committee Notes, to the Standing Committee passed unanimously on voice vote.

Judge Molloy then turned to Rule 32(e), and asked the Reporters to introduce that issue.

Professor Beale stated that Judge Kaplan, the Chair of the Cooperator Subcommittee was not able to attend the meeting. In his absence, she would put a few things on the table for discussion. This proposal came from Judge Molloy. Probation officers in his district expressed concern that the rule at present directed them to give a copy of the presentence report (PSR) not only to defense counsel but also to the defendant. The concern was that this was closely related to the issues being considered by the Cooperators Subcommittee. Having possession of the PSR

can enhance the potential for coercion to show one's "papers," leading to the inference that those who won't show their "papers" have cooperated. Possession of the PSR is part of this mix of threats and harm to cooperators. The issue was discussed briefly at the Criminal Rules Committee Meeting in the fall and then sent to the Cooperators Subcommittee, which held a call to discuss these issues.

Rule 32(e)(2) is quite unusual in that copies of the PSR must go to the attorney for the government, to the defendant, and to defense counsel. It is the only place in the rules that Professor Beale could think of that says you have to give something to the defendant. And as the materials in the agenda book demonstrate, that was very deliberate. The 1983 Committee Note has italics – "*both* defendant *and* his counsel." The Committee thought this was the best way to correct errors in the PSR. Defendants know a lot more about some of the information in their PSRs than defense attorneys, and they really need time to look this over. So on the one hand there is an accuracy concern, and the Bureau of Prisons (BOP) recognizes that when the defendant is preparing for sentencing, he needs to have the PSR, and it is not contraband. The Task Force on Protecting Cooperators is not suggesting any changes to that BOP policy. But there is a concern that possession of the PSR may create a situation where threats and harms can be exacerbated, and we have a general system where material for represented defendants is served on counsel.

The Subcommittee did not reach agreement on whether it would be a good idea to move ahead with an amendment to the rule. Members debated whether an amendment is warranted, whether it would solve the problem, and whether it would be a good idea to try to restrict the availability of PSR to a defendant in this period before a technological fix may come along. Eventually, kiosks could be available and defendants could have as much time as they want to review their own materials. Professor Beale noted that the defenders commented on how feasible it is to spend as much time as they would like going over the PSR face to face with their clients, and that practices seem to differ in various parts of the country.

The question before the Committee was whether a Subcommittee should be appointed to discuss whether and how to draft such an amendment.

Professor King added that those opposed to an amendment were convinced either that changing Rule 32 wouldn't make that much difference in the defendant's access to the PSR, or that it was very important to ensure access by the defendant to the PSR and it didn't make sense to impede all defendants' ability to check the accuracy of their PSRs for the sake of a small segment that might be cooperating. The conversation also emphasized the relationship between counsel and client. Defense attorneys indicated that they would have to give the PSR to a client if the client asked. Given ethical rules, an amendment wouldn't move the ball in terms of protecting against the possession of the PSR as it might be intended to do. On the other side, judges did not want to have to deal with requests from prisoners for their PSRs, or have their clerk's staff deal with these requests. If the rule was clear, prisoners would know they could not write to the court or the clerk's office demanding copies of their PSRs. There really was no consensus.

Judge Molloy noted that in working on the Task Force with Judge St. Eve and the BOP, he learned what prisoners are actually doing in demanding that new prisoners post their papers. Coincident with that work, a defendant in Judge Molloy's district demanded his copy of his PSR, and the Probation Officer brought this to Judge Molloy's attention. He said that for years he had been overlooking that the rule said the Probation Officer was required to give a copy of the report to the defendant. He noted that requirement is honored in the breach. He didn't think many districts give a copy of the PSR to the defendant. If the defendant has a right under the rule to have that PSR, he wondered, can the BOP make it contraband? His suggestion was to amend the rule to remove the requirement of giving the PSR directly to the defendant. After a good conversation, the Subcommittee rejected the idea. Professor Beale noted that the Subcommittee was split 50-50. If a consensus was needed, that wasn't enough.

Judge Molloy asked members to give their thoughts.

One member said she believed that defense attorneys have to be able to give the PSR to clients. One reason is that the client needs to be able to review it and think about it. If it is a long PSR and the member does not have four hours to sit down and go through it in person, she may give it to the defendant, have him look it over, and arrange for a phone call in a few days, or make a car trip back to see him. Ethics rules also affect this. Every jurisdiction in the country except Florida says that attorney files belong to the client, and the client has the right to see his file. Defense counsel have the PSR, she said, and we have to put it into our files, which belong to the client. There are many situations in which defense counsel needs to provide the PSR to the client. She has had clients who don't speak English, and has had to send an interpreter. Maybe she can't go because she is in trial. Certainly by the time you are doing pro se litigation in habeas, or 2255, you may want the PSR. All of these things make it really problematic if the client is not allowed to have the PSR. She liked the idea of a kiosk, a really smart idea for a lot of documentation. But a very small minority of her defendants are in federal detention centers. Most of them are in state jails. The ability of clients to access electronic evidence at a kiosk would be easy in federal detention centers but not in jails.

Judge St. Eve said she had been unable to join the Subcommittee's conference call as she was in trial. She said the Task Force's work with cooperators found that the threats to cooperators began once they were designated and sent to a designated facility, not during presentence detention. There may be some issues there, but what the Task Force found was that these threats occurred when cooperators were at the higher security facilities. She suggested that Rule 32(e)(2) is really just for the presentencing stage. BOP makes a PSR contraband once an inmate is designated, not at this prior presentencing stage. She urged the Committee to see what happens with the BOP recommendations before looking into this further. One of the BOP recommendations coming out of the Task Force is to make sure that once a defendant leaves a pretrial facility and is designated and sent to where he is going to serve his time, BOP staff will go through whatever that defendant will take with him, to make sure that he is not taking the PSR or other documents. Once he arrives, they will check whatever the inmate brings with him to make sure he is not bringing the PSR or other documents. The PSR will be considered

contraband at that point. The Task Force did not hear about problems at these pretrial facilities with cooperator status, or pressure on inmates to show the papers. She recommended tabling this until we know which of the Task Force recommendations go through, and then wait a little to see if there is any improvement. If there is still a problem maybe we can go back and look at this.

A member made a motion to table, following Judge St. Eve's suggestion.

Judge Molloy said his only concern is that the language in the rule is mandatory and we are not following that rule. He saw something that said 61% of the probation officers give PSRs to the defense lawyer, who in turn provide them to their clients. If the rule is honored only in the breach by most districts, then the Committee should address that issue.

Judge St. Eve stated she thought that was a separate concern from the cooperator issue. Whether defendants are getting their PSRs in the first instance is separate from whether they should, or should not, be getting them.

A member asked if the rule gives a time frame during which the defendant is entitled to keep the PSR. Professor Beale said the Rule states when he must receive it, but it does not specify how long he can keep it. He must receive it within 35 days.

A member asked if there is an implication in the rule that the defendant must be allowed to keep a copy of the report on his or her person. Professor King noted that years ago the rule said that the defense had to return the physical copy of the PSR. That was later deleted.

Professor Beale added that the rule does not prohibit BOP from having rules about what you can bring into prison after you have been designated. The focus of Rule 32 is to help people prepare for sentencing. There is no inconsistency with separate rules by the BOP specifying what you are allowed to bring with you after you have been designated.

The member said he could imagine the PSR being helpful to the defendant if the case was on appeal. Professor Beale agreed and mentioned that there is some discussion of that in the memo. Also, 2255 movants may also need PSRs, and they may make FOIA requests to get them. Courts have been asked to allow them when they are trying to do some kind of motion or on appeal. But Rule 32 doesn't really speak to those situations one way or the other. Courts are dealing with those issues, as the memo reports. However, you might conclude there would not be much point to limiting possession up front if courts say you have to be able to have it later.

Professor King stated that the rule is really about notice before sentencing.

The member asked if this issue about whether BOP would make this contraband remained on the Task Force agenda.

Judge St. Eve stated that PSRs are already contraband, after sentencing once a defendant has been designated. A defendant can still get *access* to his PSR at the BOP facility. It is just kept in the defendant's file. What he cannot do is take it back to his cell with him, or have copies. So defendants still have access to the PSR, for court purposes, though it is contraband in the cell. And that has been in place since the mid-1990s.

Judge Campbell noted that in his district, what typically happens is the probation officer sends the report to the defense attorney and the attorney sends it to the defendant. If we change this rule, the defendant could still get the PSR from the defense attorney. So it does not seem like a very efficient way to try to solve the problem of a defendant having the PSR in a facility. In addition, in his district (and he suspected in others), the PSR does not say anything about cooperation. It is deliberately left out of the PSR, and dealt with in a separate document. So you are not really tipping anybody off to cooperation by anything that is in the PSR. He is not sure amending Rule 32 is an efficient way to address the problem the Task Force is trying to solve.

Professor Beale stated that there is quite a bit of variation nationwide on how PSRs are provided to prisoners. There are district to district differences, and in some cases differences judge to judge. When the Task Force met with defense lawyers in January, she asked some of them what happens with this in their districts. Each had a different way of doing this. One said probation officers just ask us: “Do you want it sent directly to the defendant or do you want it to come to you?,” so they ask the client. This person also said the sex offenders do not want it to come to them, but a lot of others want it to come directly to them. It certainly is not being done exactly as written in all jurisdictions. But as Judge St. Eve said, that was not the question that prompted this initial review by the Subcommittee.

A member said that the motivation for this proposal was safety of cooperators, which is being looked at by the Task Force. He renewed the motion to table to see what the Task Force does.

Judge Molloy asked if there are other places in the rule where it says “must,” the Probation Officer “must” give, not may give, or should give.

Professor Beale said if the question was whether there are other places where the rules say must give to the defendant, it is the only one she knew of, and it was deliberate. There were italics on that in the Committee Note. The information in the PSR is something defendants know a lot about: their life and what they have done.

Professor Coquillette also said he could not think of any other situation where a rule said something must be provided to the defendant as well as the lawyer.

Professor King noted Rule 11 does provide the court must address the defendant personally, not just the lawyer, but that does not involve a document.

A member asked if the Task Force thinks that the current rule would preclude a procedure that would provide, for example, that the defendant must be given a copy of the PSR but that the defendant need not be allowed to retain a copy.

Judge St. Eve answered that the way the rule is written now, the defendant can retain that copy in detention in the pretrial facility. Once the defendant is designated after sentencing, the BOP rules kick in when he arrives at his designated facility, and the PSR becomes contraband. So the defendant cannot retain a copy of the PSR in his cell. But there is a file on the defendant,

and if he needs to see the PSR, he can go to the special room where his file is and look at the PSR.

Professor Beale asked Judge St. Eve if it was correct that under the BOP's rule, in the period before he is designated, he may have his paper copy in his own cell, and that the Task Force does not suggest that that should change.

Judge St. Eve answered that was correct, the harm to cooperators, based on what we investigated, is coming once the defendant is designated and arrives at the designated facility.

Professor Beale said this reflected that they have more need to have the PSR in that predesignation period, and there is less danger. Judge St. Eve agreed.

The member renewed his motion to table once more, and it was seconded.

The motion to table any change to Rule 32(e)(2) until the Committee learns how BOP responds to the recommendations of the Task Force on Protecting Cooperators passed unanimously by voice vote.

After a short break, the Committee turned to a report on the Task Force by Judge St. Eve. She reported that the Task Force is completing its work, and has divided its report into two parts: recommendations for the BOP and everything else. She said they wanted to get going on the BOP recommendations because it would take some time for them to work their way through the BOP. That report is complete and on Jim Duff's desk to go to the Director of the BOP. There are 18 separate recommendations for the BOP to put in place to help protect cooperators. The second part, the rest of the report, is still being completed. Judge St. Eve hoped that the report would be completed before the Committee's next meeting. It will likely come back to a Committee, possibly the Committee on Court Administration and Case Management (CACM), possibly Criminal Rules, for some implementation work. She thought changes to CM/ECF were among the recommendations likely to be approved, and that would have to go through some committee. She believed that part of the report would be finished before the Committee's next meeting.

Judge Molloy asked if anyone had any questions.

Professor Beale asked if the Task Force has accepted the idea that there will be no slate of rules proposed for the CACM guidance. Judge St. Eve answered that was correct.

Professor King asked if it was possible that the second part of the report will include something for this Committee to work on. Judge St. Eve said she was not sure, because she was not sure how things are divided jurisdictionally. One aspect that the Task Force is going to recommend is that the Federal Judicial Center (FJC) conduct education for judges on these issues. She was not sure whether that would come back through the Criminal Rules Committee, or go directly to the FJC, or to the Criminal Law Committee, or to the Standing Committee. But she did not expect it to come back for proposed rules.

Professor Beale asked if she was able to say whether there are going to be any proposed limitations on remote electronic access via CM/ECF. Judge St. Eve said that there is a proposal in this CM/ECF part that is not final. There is a proposal to put certain limitations on CM/ECF. The PSF (plea and sentence folder) approach has been rejected.

Judge Molloy then turned to the next item on the agenda. He noted the Committee received suggestions from both Judge Jed Rakoff and Judge Paul Grimm regarding the disclosure of expert opinions and how detailed it might be. He commented that it was very interesting to read the history of the discovery rules, and to learn that in 1992 or 93 when the both the Civil Rules and Criminal Rule 16 were amended the Committee originally planned to require the same kind of disclosure for experts in criminal cases and civil cases. But late in the process DOJ objected, and Rule 16 was scaled back after Judge Hodges, the chair of the Criminal Rules Committee, broke a tie vote. Judge Molloy asked Judge Kethledge to lead the discussion.

Judge Kethledge reported that the Rule 16 Subcommittee had a call, and there was a consensus in favor of having the Subcommittee consider the idea of making the expert disclosures under the criminal rules more like those under Civil Rule 26.

But there was a difference of opinion about timing of when to move forward. On the one hand, there was the sense that some innocent people might be convicted because of the inadequate disclosure the government makes particularly regarding forensic testimony. A forthcoming article by Professor McDiarmid details some of those cases, and some members felt that is an urgent problem on which we should move as quickly as we can. On the other hand, the Department has adopted a new policy recommended by the national forensic commission, which Judge Rakoff chaired, that more or less provides the information required by the civil rules, in cases involving forensic experts. Judge Kethledge understood from the call that the policy is rolling out right now, the AUSAs have been trained, and they are supposed to be making those disclosures in cases that involve experts in federal court. His sense was that the policy makes the situation less urgent. He thought the issue probably would require a mini-conference, because it is so fact intensive, and we need practitioners to tell us what the problems and needs are, and how best to address those. He thought that a mini-conference would probably be a lot more fruitful if it took place after the DOJ policy has been in place for some significant period of time, at the end of the year or the beginning of next year. Professor McDiarmid's article proposed something quite different from what was proposed by Judges Rakoff and Grimm. It is not just mirroring Rule 26, but instead calls for information more specific to criminal cases, such as chains of custody, bench memos, and more. He thought the Committee would only get one shot at a mini-conference, and would get the most out of it if members could see if the policy mimicking Rule 26 is working well, or is it pointed in the wrong direction.

A member of the Subcommittee stated that he had been in direct contact with the Innocence Project, and had spoken to the lead scientist and Peter Neufeld, one of the Project's founders. He had also had some conversations with Mr. Wroblewski. In his view, waiting to see whether the DOJ's protocols are properly used is not acceptable. It will result in innocent people

being convicted, bad science being tendered into evidence, and the admission of testimony that is not supported by scientific practices. He read that in at least one area of forensic evidence, something like 10% of science is mistaken, and none of it is discovered until after the defendant is convicted. That's not acceptable. It is complacent to say, "the DOJ is taking care of it." We may not be able to formulate a working rule until after we see the effect of DOJ policies, but there are other things we should do now. We should have a mini-conference to learn what defense lawyers say they need.

The member observed that many of the scientists who are giving the opinions are not federal scientists, they are not from the FBI, they are not from accredited labs, and there are no reports. These experts are from state labs, and from independent places. The result is that defendants do not know what the expert will testify to at trial. And defendants do not know what the basis of those reports are, notwithstanding Rule 16. He did not understand why there is that gap, because Rule 16 does say that on request, the government should give a written report. But he was told the gap is real, and indeed based on the McDiarmid article it is an unacceptable margin of error. He said the Subcommittee ought to canvas the legal aid, federal defender, and private practice lawyers who deal with expert testimony and get that done quickly. It ought to canvas the scientists to get an understanding of just what the labs do, whether they are federal, state, or private. We need to know whether a rule can solve the problem. The McDiarmid article identifies some issues that have to do with fraud. If a scientist is purposely lying about the evidence or conclusion reached, no rule is going to solve that problem. But in Peter Neufeld's view, the problem is primarily that scientists get on the witness stand and exaggerate what the science says in their testimony, and they make mistakes. Because there is no prior written statement of what the scientist will say, which would bind the scientist to that testimony, there is no cross examination available. Exaggerations lead the jury to conclude there is evidence when there isn't.

The member said that one of the issues the Committee will have to confront is when the rule kicks in. He said he understood from Jonathan Wroblewski that the current federal labs issue reports. The government does not want those labs to have to write a second report. Maybe the existing report is sufficient for *Brady* purposes and other purposes, prior to a plea if you get whatever there is in the open file. But maybe more is required before trial. But the member doesn't deal with this type of issue himself, and he wanted to know what the people who do deal with it need and when they need it. Another thing that has to be addressed in the mini-conferences and in drafting a rule is the form of discovery. And obviously we are going to have to get input from the DOJ before drafting any rule.

But it is only after we do all that work that we will see whether or not what is being done by the DOJ is sufficient. Otherwise it will be, "we're doing this and it's OK." But there has already been a change of the administration which has resulted in a change of policy affecting scientific evidence on a related issue concerning uniform language testimony and reports about what the scientist can say. That is not a discovery issue; it has to do more with can a scientist evaluate and say this is a match or can he only say this is a 95% chance that this fingerprint

might be similar to the one that is left at the scene. The need for uniform language arises from learning that for decades, the FBI was testifying that the hair sample identified the defendant. And for decades, the FBI was testifying that a bullet could be traced to a particular source, and it turns out that is not true. Hair follicles do not correspond adequately, and bullets cannot be traced properly to their sources. And these examples showed the need for some agreement on how far scientists could testify to things like fingerprints. Apparently, the way that process had been going under the prior administration is very different from the way that is going now. Peter Neufeld told him there had been a transparent process, and the scientific community had access to what the Department of Justice was doing in formulating these rules. But Neufeld said it no longer does. There does appear to have been a change in policy about how to formulate those rules. Any change in administration means that a policy of training prosecutors to do something that does not have the force of law. It can be changed. He did not think any of the judges in the room want to tolerate a situation where DOJ decides what the discovery rule will be. It ought to be the court, and you need a rule for that. We should not wait a substantial amount of time (whether it be one year or eighteen months) to get started on a problem this urgent, where there innocent people being convicted, where there is documented testimony that is incorrect being admitted at trial and being used.

Judge Kethledge noted that he was not advocating that the Committee limit its enquiry to whether the DOJ protocol by itself will be an adequate solution, but he did think the Committee ought to get the benefit of that policy empirically in crafting a rules based solution. He noted that the scandals that are described in the McDiarmid article are basically state scandals. The real five alarm fire problems that she is describing are happening in state courts, such as the Detroit and West Virginia labs. He was not aware of anything like that in federal court. The Committee's jurisdiction is federal. DOJ has told us that in cases involving forensic experts, they are going to mimic disclosure under Civil Rule 26 now going forward. That is a meaningful stop gap while potentially we get information about how that approach works.

The member responded that the problem is that state labs frequently offer evidence in federal court. And private labs frequently offer evidence in federal court. This requires some oversight.

Another member agreed, saying this really does need to be addressed. She applauded what DOJ is doing, and she was glad to hear the Subcommittee is looking at moving forward. The problem in relying on DOJ's proposed fix, is that it is subject to the DOJ's administration, and the effectiveness of implementation. She gave two examples. After Senator Ted Stevens' prosecution, all the DOJ lawyers were trained about giving *Brady*, but the prosecution was still withholding *Brady* in the Pulse nightclub shooting case. We saw this with the ESI protocol, too. Everyone was trained and taught to use it, but we are still hearing "What protocol?" So it's the effectiveness of implementing that concerned her. She liked the idea of having smaller meetings where we can get more information. In addition to tracking what is going on in DOJ and how effective it is, we should also consider a number of things that are not in the DOJ's policy. She applauded the idea of having another mini-conference or maybe two, and the idea of bringing in

the scientific community as well as the defense. It would be a good idea to bring in people from the labs to ask them whether they can you provide these reports, and how much trouble that would be. So it is important, and she hoped the Committee would go forward with it actively and promptly.

Professor Coquillette added that the Evidence Rules Committee sponsored a President's Council of Advisors on Science and Technology (PCAST) conference at Boston College involving the scientific community. If the Criminal Rules Committee goes ahead with a mini-conference, it would find that some of the fundamental work has already been done by the Evidence Rules Committee.

Mr. Cronin said the DOJ agrees this is an important issue that needs to be addressed. The guidance – which DOJ put out about a year ago, and trained prosecutors on through 2017 – will go a long way whether as a stop gap or permanent solution. The guidance on forensics covers DNA testing, chemists, and ballistics testing, and goes much farther than Rule 16. It provides very clear and explicit guidance to the AUSAs. Other sorts of guidance may have ambiguity that could confuse individual prosecutors, but there is really no ambiguity here. It is very explicit as to what prosecutors should disclose. The forensic expert's laboratory report explains the scope of the assignment, the evidence tested, the means and methodology, and conclusions drawn. It requires a written summary of what the testimony will be, and provides for an open case file for the expert and also disclosure of the expert's qualifications. In terms of clear and explicit guidance, and ensuring that the prosecutors are aware of that guidance, DOJ has moved considerably.

Mr. Cronin could not say how many state or private labs are involved in federal cases. As a prosecutor in New York for a decade he dealt only with federal labs, which were accredited. There may have been a different practice in other districts, but his sense was that the majority if not the overwhelming majority of labs you are dealing with here would be federal, accredited labs.

Mr. Cronin said DOJ welcomes anything it can do to ensure that we are putting defendants in a fair position to be able to address the expert testimony coming in. It is the most important testimony in many of these cases, which is why DOJ adopted the guidance.

Judge Molloy asked if there was any auditing of individual prosecutors to find out if they are following the guidance. It is one thing to say this is what you should do, it is another thing to find out if they are doing it. Mr. Cronin said he was not aware of any specific auditing, but could check. He thought the way it probably works out in practice is if a prosecutor is not providing what the guidance requires, that is going to be made known to the supervisor very quickly, and resolved very quickly. He was not aware of any nationwide audit. The guidance is now accessible on line, as part of the United States Attorney's Manual (USAM).

Professor Beale noted that the McDiarmid article has been updated, so when it comes out in the *Indiana Law Review* it will state that the Guidance is in the USAM.

Mr. Wroblewski acknowledged that members had made many very good points. He stressed that it is very important to distinguish between two related issues, one of which is very controversial. There is tremendous controversy about what only government experts can say. The PCAST report, which Professor Coquillette mentioned, suggests there should be no expert testimony unless a particular discipline has “validated” the statistical information that can clearly identify the likelihood of a match between a particular piece of evidence and a known piece of evidence. DOJ disagrees with that very, very strongly. There has been a lot of give and take about that at multiple conferences, and precisely what language our experts should be able to use when that statistical evidence is not available is very controversial. DOJ is undertaking an exercise called the “Uniform Language for Testimony and Reports” to try to address that controversy and ensure that that information is, first of all, peer reviewed, and that our experts testify only as far as the science permits. But there’s controversy about that. For example should there be any expert testimony in a case involving a shoe print. The PCAST report suggests there should be no expert testimony in such a case. The Department disagrees. Even though you cannot identify precisely how many Nike size nines are available in a particular area and therefore the likelihood that a particular shoe was associated with the print, we still think the experts can add something. The question is how far can they go, and that’s a controversial subject.

Mr. Wroblewski emphasized that is not what this Committee is dealing with, and it is not what Judge Grimm and Judge Rakoff are asking the Committee to address. They are asking the Committee about discovery. On that, the government can’t give you more than it has. The DOJ policy is open file, giving the defense everything that we have, and a summary of what the witnesses are going to say. And of course part of accreditation is to ensure that they have reports and that the reports indicate what they will say. Again what the language they can use in any particular discipline is very much up for debate. But in terms of discovery, there is no risk in delaying consideration for a year or two. And there is tremendous benefit. When we bring people in, we ask, “Is this the kind of discovery process that should be codified within the rules?” There is no way they’re going to be able to know yet. Government experts testify 100 or 200 times a year nationwide. Remember there are less than two thousand trials in any year, and experts are not testifying in most of them. So to get a read on how the DOJ policy is working is going to require some time. It is not going to be particularly useful to bring people in the few couple of months and ask them how this is going, because no one is going to have experience. On discovery in particular, it would benefit the Committee to delay a little bit.

This whole issue is going to be quite complicated, Mr. Wroblewski said, because there are forensic experts, for which one set of rules will apply, and then there are other kinds of experts, for which he believes a different set of rules should apply. For example, when an expert is brought in to testify to the amount of loss in a fraud on the market case, would you want the kind of report that is suggested and required by the Civil Rules? In that context, DOJ does not think that would be appropriate. There are other experts, such as doctors who treat victims of sexual assault, where there are different concerns, such as privacy. This will be a complicated

exercise. But in terms of discovery in forensic cases, he thought the Committee would benefit from just a little bit of time to see how the new guidance plays out

Another member noted he had a 2255 where the defendant disclosed the expert and the government asked for a Rule 26(a)(2)(B) report from the defendant. It is actually up in the air under 2255, because Rule 12 says both the civil and criminal rules apply unless the rules say otherwise. So sometimes the shoe will be on the other foot in terms of whether the defendant or the government wants more disclosure. He agreed with the comments from the government representatives. The Committee needs to distinguish between the Evidence Rule 702 issues with junk science and Criminal Rule 16 disclosure issues. He would be interested in hearing about how can we craft the criminal rules to allow the defendant or the government to make the case to the judge that whatever information is being disclosed does not satisfy the requirements of Evidence Rules 702, 703, or 704. He asked whether the defense has been challenging government disclosures under Rule 16(a)(1)(g) on the ground that the disclosure does not sufficiently provide the basis or reasons for the opinion. Maybe it would be sufficient if the government discloses an expert and does not provide sufficient information for the defendant to move to strike the expert under 16(a)(1)(g) on the ground that the government didn't provide sufficient explanation of bases and reasons for the opinion. Or maybe more is required, something along the lines of Civil Rule 26. A mini-conference would be in order, he said, and he was leaning in the direction of allowing the current DOJ policy to play out for several months or a year or so, because that will give us data points where the disclosure is more like Civil Rule 26, because right now our data will be primarily under Rule 16. So it would give us some data that would probably be helpful in deciding which disclosure regime would be more helpful to allow for challenge.

Another member also agreed a mini-conference is needed, but was also concerned about the timing. He thought probably be something less than a year, depending upon what information DOJ has about how frequently the policy has been used. Maybe a little more assurance about people using it and how that is monitored.

Judge St. Eve noted that the DOJ guideline covers forensic evidence only, and there are many more types of experts that come in these cases. She thought a mini-conference was a great idea, but it should not be limited to just forensic evidence, it should cover the gamut. She'd had a lot of issues with late disclosure. If the parties want to come in on a late *Daubert* challenge, it fouls up the trial date. Accordingly, she recommended putting the timing of disclosure on the agenda for the mini-conference.

Another member agreed with the need to distinguish between the discovery issue, including the timing, and the separate issue of how judges are applying Evidence Rules 702 to 704. Based on his experience in many trials, there is an important issue of the adequacy of discovery to provide sufficient notice for a *Daubert* motion that we can deal with before trial. This is critical to the defense, and also when the government seeks to exclude defense experts. It would be helpful to put off a mini-conference until the end of the year, if DOJ could gather information about how many cases are getting forensic testimony admitted, and how many other

experts are testifying, like an agent who interprets wiretaps and says this is drug code language and gets qualified. It would provide much better sense about crafting a discovery related rule and seeing how that is being implemented. And then there is a whole separate issue under the evidence rule. There are some egregious errors, a lot of them on 2254s where the state court judge lets somebody testify to 100% certainty this bite mark matches, and the science is just doesn't support that at all. Discovery rules will help attorneys bring a timely *Daubert* motions, saying this is junk science, don't let it in. Even if they don't keep it out, it would be more akin to civil cases where *Daubert* is where the bulk of time is spent, and then a lot of trials go away because of that. But again gathering that information over some period of time would help us.

Another member noted that the question is fundamentally a discovery question. State labs are a problem, but that does not seem that that is the issue on the table. A mini-conference is a good idea but having the DOJ's experience, even though it is just the forensic evidence, would be helpful.

Another member agreed it is an important issue, which is not going away, and stated that he supported one or more mini-conferences. If there is any disagreement, he thought it was about when rather than what we should be looking at. There are a lot of pieces to this large and complicated puzzle. He would like to start as soon as possible and do what can be done now, realizing that important ingredients may be informed by the DOJ guidance. Are there some discrete issues, or some ground work that an initial mini-conference could identify, that we could get started on? The Justice Department guidance is limited to forensics, but that is only part of the universe. Can we get started on the other part of the universe?

Another member indicated his preference to try a mini-conference sooner rather than later. This has the feel of a complicated problem, and after mini-conferences in the past we have usually emerged with a much better sense of the scope of the problem and what the options are.

A member noted the general agreement on the desirability of having a mini-conference, and suggested there might also be other sources of information, such as an FJC judicial survey to help define the issue to address, allowing the Committee to learn what judges who are hearing these cases consider to be the scope of the problem. A survey might also provide some information about the timing of mini-conference. It would also give a point of reference of where things are versus where they might be under the new policies. It might show that there is real progress or that there is no progress, that AUSAs are not getting the information.

Judge Molloy asked about the interaction between the Speedy Trial Act (STA) and any change in the Rule 16 that would require disclosure like the Civil Rules. He noted a study that revealed every continuance causes the cost of paying out CJA lawyer to go up. When you get four continuances, you almost double the cost of the defense. It seems like you have the obligation to disclose, but then the defense is put in the position where it needs to get an expert. He wanted to know if the government had given any thought to the interplay between the STA and what might come down in terms of the change in discovery rule.

Mr. Cronin answered that DOJ had not thought much about the implication of the STA in this context. He noted the application of the Act varies considerably from district to district. It is now very important from the prosecution side that the obligation be reciprocal. It may have the impact of moving a lot of this much farther up. It would probably depend on the district how much impact it would have under the STA.

Mr. Cronin thought DOJ would be able to get statistics as to number of times forensic expert testimony has been received since its guidance came out. They have been keeping track of that. A complication will be there is no one size fits all for experts. The government and the defense offer a large number and variety of experts, everything from a drug agent testifying about the movement of cocaine from Colombia, to experts in organized crime gangs talking about their operations, to interpreters providing translations. So being asked to deal with the different varieties of expert testimony will be an added complication.

In response to the earlier question about motions challenging disclosure under Rule 16, in his last job before coming to Main Justice Mr. Cronin supervised a terrorism case in SDNY and saw a lot of motions saying the discovery had not provided enough information to allow the defense to cross examine the expert. If the motion was made well enough in advance of trial, the judges generally granted the motion and ordered more disclosure or denied the motion. But on the eve of trial, if more discovery would delay the trial, the judge would not allow the expert to testify because the disclosure was not enough and would prejudice the relevant party.

Judge Campbell followed up on the idea about a survey and asked if there a way to survey the federal public defenders in advance of the mini-conference, and maybe go to U.S. Attorneys' offices around the country to try to collect some information about what kind of experiences people are having with disclosures.

A member responded that a survey of defenders is possible, they are all on listservs and might be good to try to do that to get some information. It would also be helpful to survey panel lawyers in every district.

Judge Campbell emphasized it is important to keep in mind the different kinds of expert disclosures that are in Rule 26 of the Civil Rules. Under Rule 26(a) there are three kinds of expert disclosures. Rule 26(a)(2)(A) just requires disclosure of the expert's identity. Two different regimes govern what the party has to disclose about what the party's expert will say. For specially retained experts, there is 26(a)(2)(B) report; he thought that was what Judges Grimm and Rakoff are talking about. But if experts are not specially retained to testify, Rule 26(a)(2)(C) requires only what Criminal Rule 16 requires: disclosure of the subjects and the substance of the testimony. And that's what applies to in-house people testifying, treating physicians, or police officers, people who weren't retained but have some expertise to bring to the case. That's nothing like the report requirement that is being spoken of. If the Committee is going to pursue a Rule 26(a)(2)(B) type report, it is important to recognize how extensive it is in the civil rules. In the 1993 amendments when that was adopted, the Committee made clear in the note what exactly was required. The expert must prepare a detailed and complete written report

stating the testimony the witness is expected to present during direct examination together with the reasons therefore. It is supposed to be almost a recitation of the expert's testimony. The note goes on to say, if the experts do this you don't even need to depose them. Because you know everything they will say at trial. There are a lot of trial judges who will have the report with them during the testimony, and if there is an objection they will ask the lawyer to show them where that is in the report. If it is not in the report, the expert will not be permitted to testify to it. You even have to disclose the exhibits the expert will use ahead of time. He didn't know if Judge Grimm and Judge Rakoff are suggesting that level of detail be adopted for experts in criminal cases, or whether they are just asking for a more robust report. That is a distinction to keep in mind. And Civil Rule 37 says if you don't disclose what you are required to disclose under Rule 26(a), you can't use it at trial. So the consequence of failing to put a subtopic in the report is the expert cannot testify about that subtopic at trial. It is not clear if we are talking about getting to that level of detail for retained and non-retained experts in criminal cases, or whether we are just talking about something more robust.

Mr. Wroblewski said that was precisely what was discussed when the National Commission on Forensic Science issued its recommendation. DOJ's guidance based on the Commission's recommendations does not track Civil Rule 26 precisely because of the federal forensic lab administrators' fear that it would not be good enough to have the forensic report required by any accredited lab, and not good enough to open the file. Writing a report that is the equivalent of a deposition would be immensely burdensome. It is not 100% clear whether our forensic experts would fall into that category or the other category with the summary. So if you look at DOJ's guidance, it does not precisely track Civil Rule 26. It goes beyond it in allowing an examination of everything in the file. And it cuts a little bit short by requiring the summary that is in Criminal Rule 16, rather than the kind of very, very detailed report that is required in at least one category of Civil Rule 26. This is precisely the concern that DOJ has about a rule that would tremendously burden an already overwhelmed forensic lab system.

Professor Coquillette said that when the scientists saw this recommendation in Civil Rule 26, they commented that the word "complete," looked like an unnecessary word we should omit. They did not understand the whole thrust of the committee note, that the complete report is supposed to be almost a verbatim statement of testimony. He also noted that because of these detailed expert reports, the civil rules adopted a revised work product approach to what a party has to disclose in terms of the lawyers' communications with the experts and draft reports. They were trying to eliminate a lot of unnecessary discovery. The amendment is now in Rule 26(b)(4). This was an outgrowth of the complete disclosure requirement of Rule 26(a). He urged the Committee to keep in mind some of the details in Rule 26 and consider whether we should incorporate that level of detail into the criminal rules.

Professor Beale added that when the parallel amendments were originally proposed in the 1990s, there were some negative comments from the defense bar focusing on the reciprocal nature of the obligations, saying the defense could not afford to and did not want to have to make these disclosures. The further you go, the more it is going to cut both ways. On a potential

survey, she asked Ms. Hooper if FJC could help write the questions and Ms. Hooper said absolutely.

Another member suggested reaching out to NACDL as well.

Judge Kethledge expressed the view that there should only be one mini-conference rather than several, to avoid compartmentalizing different experts and to allow the Committee to talk to people on both sides.

Judge Molloy expressed support for a mini-conference and said he would work with Judge Kethledge and reporters and lay out a plan of attack. Timing is a question. Some members felt this was an important issue the Committee should begin work on immediately, but others wanted to know how the DOJ memo is being implemented and if there are any problems. He also noted the concern that Rule 26 is not just a blanket rule, there are different types of experts.

Judge Molloy then asked Professor Beale to present the new rules suggestions.

Professor Beale drew the Committee's attention to the brief descriptions in the agenda book and the email submissions. Ms. Albanese wants a uniform set of national procedural rules. Even if this was a good idea that is not within our Committee's authority. Mr. Ahern also is asking for some things that we cannot really provide. He wants a procedure that would allow small businesses to collect restitution. That does not appear to fall within the jurisdiction of our Committee. We were consulted by the Rules Committee Staff on whether to list these as suggestions. And we did because it is respectful to do that, whether or not on their face they appeared to fall within our jurisdiction.

Judge Molloy asked if anyone on the Committee was interested in pursuing either of these suggestions, and no one was. He asked Professor Beale to turn to the next proposal on work product.

Professor Beale stated that Mr. Blasi wrote to suggest that the relationship between *Hickman v. Taylor* and rules is very unclear, and he suggested that the rules should clearly codify all aspects of work product production. The civil and criminal rules should be reconsidered together, he argued, and a very comprehensive review undertaken. He set out his views at some length in a law review article. Because he is seeking a comprehensive review, Professor Beale reached out to the reporters for the Civil and Evidence Rules Committees. They were not enthusiastic, and did not favor gearing up for a major cross-committee project on this topic. Professors Beale and King agreed.

No member responded to Judge Molloy's invitation to discuss or pursue this further.

A motion was made to remove all three suggestions from the Committee's agenda. It was seconded and passed unanimously by voice vote.

Judge Molloy then turned to the report from the Rules Committee Staff.

Ms. Womeldorf noted that Rules 12.4, 45, and 49 are pending before the Supreme Court. If they are sent to Congress and Congress takes no action, they will become law as of December 1 of this year.

Judge Molloy reminded the Committee that the October 2018 Committee meeting will be held in Nashville, at Vanderbilt. He thanked the departing members and Reporter Daniel Coquillette for their service.

The meeting was adjourned.

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TAB 5A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 11, 2018

Introduction

1
2 The Civil Rules Advisory Committee met in Philadelphia, Pennsylvania, on April 10, 2018.
3 Draft Minutes of this meeting are attached.

4 Part I of this Report submits a recommendation to publish for comment a proposal to
5 improve the procedure for taking depositions of an organization under Rule 30(b)(6). A
6 Subcommittee has been working on this subject for two years.

7 Part II describes the ongoing work of two Subcommittees, the Multidistrict Litigation
8 Subcommittee and the Social Security Review Subcommittee. Each Subcommittee is gathering
9 information to address whether it is desirable to go beyond the information-gathering stage to
10 begin developing possible rules proposals. There is a real prospect that each Subcommittee will
11 recommend that new rules provisions are not warranted.

12 Part II also describes two new agenda items. The first, focusing on the aspect of the
13 CM/ECF system that jeopardizes the anonymity of refusals to consent to assign a case to a
14 magistrate judge, will be actively developed for consideration next fall. The other arises from
15 suggestions to extend personal jurisdiction by allowing federal courts to further expand the
16 circumstances for relying on a “national contacts” test of Fifth Amendment due process. That item

17 remains on the agenda, but will require a heavy investment of Committee resources if it is to be
18 developed. Further consideration has been postponed.

19 Part III describes one item that has been removed from the agenda — selection of the
20 newspaper for publishing notice in a condemnation proceeding. It briefly notes three other items
21 that have also been removed from the agenda.

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I. Action Item

Rule 30(b)(6): Duty to Confer

The Advisory Committee on Civil Rules proposes that the preliminary draft of an amendment to Rule 30(b)(6), with accompanying Committee Note, be published for public comment. The proposed amendment and Note are presented below.

The preliminary draft was developed by the Advisory Committee’s Rule 30(b)(6) Subcommittee, which was formed in April 2016 in response to a number of submissions proposing consideration of a variety of changes to the rule. Initially, the Subcommittee considered several specific changes that were introduced to the Standing Committee during its January 2017 meeting. After further consideration, that list of possible rule changes was pared back to six specific possible amendment ideas.

The Subcommittee then invited comment on these items. Over 100 comments were submitted, many of them very detailed and thoughtful. At the Standing Committee’s June 2017 meeting, an interim report on the invitation for comment was made. The agenda book for the Standing Committee’s January 2018 meeting included a detailed summary of those comments.

The Subcommittee then resumed discussion of ways to deal with Rule 30(b)(6) issues. Eventually it concluded that the most productive method of improving practice under the rule would be to require the parties to confer in good faith about the matters for examination. Much of the commentary it had received indicated that such conferences often provide a method for avoiding and resolving problems. Requiring the parties to confer therefore holds promise as a way to address the difficulties cited by those who urged amending the rule.

At its November 2017 meeting, the Advisory Committee discussed this proposal. That discussion suggested that the rule should make it clear that the requirement to confer in good faith is bilateral — it applies to the responding organization as well as to the noticing party — and also raised the possibility that the rule require that the parties confer about the identity of the witnesses to testify. The Subcommittee met by conference call after that meeting to address concerns raised by the Advisory Committee.

At the Standing Committee’s January 2018 meeting, there was discussion of the evolving Rule 30(b)(6) proposal to require the parties to confer, including the possibility (raised during the Advisory Committee meeting) that the identity of the witnesses be added to the list of topics for discussion. There was also discussion of the possibility of providing in the rule that additional matters be mandatory topics for discussion.

After the Standing Committee’s meeting, the Subcommittee again met by conference call. Notes of this conference call are included in this agenda book. The Subcommittee worried that adding topics to the mandatory list for discussion might generate disputes rather than avoid them. Another concern was that adding to the list of mandatory topics could build in delay. The eventual

58 resolution was not to expand the list of mandatory topics beyond the number and description of
59 the matters for examination and the identity of the designated witnesses.

60 The Subcommittee also considered adding a reference to Rule 30(b)(6) in the Rule 26(f)
61 conference list of topics. There was considerable sentiment on the Subcommittee not to introduce
62 this topic at the early point when the Rule 26(f) conference is to occur because, in most cases, it is
63 too early for the parties to be specific about such depositions. Nonetheless, the consensus was to
64 present the possibility of publishing a possible change to Rule 26(f) to the full Advisory
65 Committee, in case that seemed desirable should public comment strongly favor such a change.
66 The Subcommittee would not recommend that course, however.

67 At its April 2018 meeting, the Advisory Committee considered the Subcommittee's
68 recommendation that a Rule 30(b)(6) preliminary draft be published for comment. The discussion
69 considered the addition of the identity of the witness or witnesses to the list of topics for conferring
70 and the risk that some might interpret that as requiring that the organization obtain the noticing
71 party's approval of the organization's selection of its witness. The proposed amendment, however,
72 carries forward the present rule text stating that the named organization must designate the persons
73 to testify on its behalf. The Committee Note affirms that the choice of the designees is ultimately
74 the choice of the organization. The Advisory Committee resolved to retain the identity of the
75 witness as a topic for discussion.

76 A different concern voiced at the Advisory Committee's meeting was that the draft, as then
77 written, might be interpreted to suggest that a single conference would satisfy the requirement to
78 confer, which could prove particularly problematical with the addition of the identity of the witness
79 as a required topic. Instead, it is likely that the process of conferring will be iterative. To reflect
80 that reality, the rule text was amended to add the phrase "and continuing as necessary" to the rule.
81 This addition recognizes that often a single interaction will not suffice to satisfy the obligation to
82 confer in good faith. With that change, the Advisory Committee voted to recommend publication
83 of the preliminary draft rule presented below for public comment.

84 Regarding the possibility of publishing a draft amendment to Rule 26(f), there was no
85 support on the Advisory Committee for doing so, and accordingly that idea is not part of this
86 recommendation to the Standing Committee.

87 After the Advisory Committee's meeting, a revised Committee Note reflecting the addition
88 the Advisory Committee made to the rule was circulated to the Advisory Committee, which voted
89 on it by email. With refinements to that Note, the Advisory Committee brings forward the
90 following preliminary draft with the proposal that it be published for public comment.

91 * * * * *

92 **Rule 30. Depositions by Oral Examination**

93 * * * * *

94 **(b) Notice of the Deposition; Other Formal Requirements.**

95 * * * * *

96 **(6) *Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party
97 may name as the deponent a public or private corporation, a partnership, an
98 association, a governmental agency, or other entity and must describe with
99 reasonable particularity the matters for examination. The named organization must
100 then designate one or more officers, directors, or managing agents, or designate
101 other persons who consent to testify on its behalf; and it may set out the matters on
102 which each person designated will testify. Before or promptly after the notice or
103 subpoena is served, and continuing as necessary, the serving party and the
104 organization must confer in good faith about the number and description of the
105 matters for examination and the identity of each person who will testify. A subpoena
106 must advise a nonparty organization of its duty to make this designation and to
107 confer with the serving party. The persons designated must testify about information
108 known or reasonably available to the organization. This paragraph (6) does not
109 preclude a deposition by any other procedure allowed by these rules.

110 * * * * *

111 **Draft Committee Note**

112 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
113 Particular concerns have included overlong or ambiguously worded lists of matters for
114 examination and inadequately prepared witnesses. This amendment directs the serving party and
115 the named organization to confer before or promptly after the notice or subpoena is served, and to
116 continue conferring as necessary, regarding the number and description of matters for examination
117 and the identity of persons who will testify. At the same time, it may be productive to discuss
118 other matters, such as having the serving party identify in advance of the deposition at least some
119 of the documents it intends to use during the deposition, thereby facilitating deposition preparation.
120 The amendment also requires that a subpoena notify a nonparty organization of its duty to confer
121 and to designate one or more witnesses to testify. It facilitates collaborative efforts to achieve the
122 proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

123 Candid exchanges about discovery goals and organizational information structure may
124 reduce the difficulty of identifying the right person to testify and the materials needed to prepare
125 that person. Discussion of the number and description of topics may avoid unnecessary burdens.
126 Although the named organization ultimately has the right to select its designee, discussion about

127 the identity of persons to be designated to testify may avoid later disputes. It may be productive
128 also to discuss “process” issues, such as the timing and location of the deposition.

129 The amended rule directs that the parties confer either before or promptly after the notice
130 or subpoena is served. If they begin to confer before service, the discussion may be more
131 productive if the serving party provides a draft of the proposed list of matters for examination,
132 which may then be refined as the parties confer. The rule recognizes that the process of conferring
133 will often be iterative, and that a single conference may not suffice. For example, the organization
134 may be in a position to discuss the identity of the person or persons to testify only after the matters
135 for examination have been delineated. The obligation is to confer in good faith, consistent with
136 Rule 1, and the amendment does not require the parties to reach agreement. The duty to confer as
137 necessary is to continue as long as needed to fulfill the requirement of good faith. But the
138 conference process must be completed a reasonable time before the deposition is scheduled to
139 occur.

140 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
141 conference may provide an occasion for beginning discussion of these topics. In appropriate cases,
142 it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan
143 submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference
144 under Rule 16.

145

II: Information Items

146

A. Rules for Multidistrict Litigation

147 MDL dockets have become more prominent in recent years. Presently, over a third of all
148 pending civil cases in federal court are subject to an MDL transfer order. If one excludes the large
149 number of prisoner petitions and actions seeking review of denials of Social Security disability
150 benefits, MDL cases constitute well over 40% of pending federal civil cases.

151 At least with regard to mass tort litigation, there has been increased scrutiny of MDL
152 litigation. A prominent example is provided by the Fairness in Class Action Litigation Act,
153 H.R. 985, passed by the House in March 2017 and now pending in the Senate. Section 5 of that
154 bill, entitled “Multidistrict Litigation Proceedings Procedures,” includes provisions noted at three
155 points below.

156 Looking back a half century to the birth of 28 U.S.C. § 1407, the MDL transfer statute,
157 recent scholarship reports that the judicial drafters and proponents of the statute “believed that
158 their creation would reshape federal litigation and become the primary mechanism for processing
159 the wave of nationwide mass-tort litigation they predicted was headed the federal courts’ way.”
160 Bradt, “A Radical Proposal”: The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831,
161 839 (2017). As a consequence, the author says that “MDL is now working essentially as its
162 creators intended.” *Id.* at 841.

163 But MDL may not be working just as Congress intended in 1968. Some history indicates
164 that the basic purpose of § 1407 was to coordinate discovery, not to decide or settle transferred
165 cases. Indeed, the expansion of the transferee judge’s statutory authority from ruling only on
166 discovery disputes to ruling on all pretrial matters was justified partly on the ground that a judge
167 who could not rule on Rule 12(b) motions or Rule 56 motions really was hobbled in managing
168 discovery. H.R. 985 might be said to show that some members of the current Congress are
169 concerned about how the current MDL process is working.

170 The members of Congress who adopted § 1407 probably did not appreciate how much the
171 pretrial functions of federal judges would expand. Since 1968 the judicial attitude toward judicial
172 case management and settlement promotion has undergone something of a metamorphosis. As
173 amended in 1983, Fed. R. Civ. P. 16 has generally authorized judicial attention to a wide variety
174 of matters that were formerly left to the lawyers, including possible settlement. So one could say
175 that MDL transferee judges who attend to settlement possibilities (and take a pro-active role
176 regarding other pretrial developments) are handling those cases the same way they are handling
177 all their other cases. *See, e.g., Matter of Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 138 F.3d
178 695 (7th Cir. 1998) (upholding transferee court’s order limiting number of proposed expert
179 witnesses defendants could use after the cases were remanded to transferor courts, and observing
180 that “it is inevitable that pretrial proceedings will affect the conduct of the trial itself”).

181 As reported to the Standing Committee during its January 2018 meeting, the Advisory
182 Committee on Civil Rules has received three formal submissions urging that it consider
183 rulemaking to address issues particular to MDL proceedings. In addition, it has received a renewed
184 proposal (first advanced in 2014) that initial disclosure be expanded to include what are called
185 third-party funding arrangements. These funding arrangements may sometimes play an important
186 role in connection with MDL litigation. It seems fair to comment that these proposals more
187 generally seek to change the current reality of how MDL is working.

188 At its November 2017 meeting, the Advisory Committee established a Subcommittee to
189 consider this collection of issues. The Subcommittee has begun the process of gaining familiarity
190 with the issues, and has sketched out a series of questions and topics on which it is seeking input.
191 Those topics were discussed during the Advisory Committee's April 2018 meeting, and the
192 Subcommittee hopes to receive further insights from the Standing Committee about those topics
193 and whether any other topics should be added to the list.

194 As part of its self-education effort, the Subcommittee has begun having representatives
195 attend events that promise to shed light on the underlying issues. The events presently
196 contemplated include the following:

197 Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs,
198 April 26-27, Atlanta, GA.

199 Emory Law School Institute for Complex Litigation and Mass Claims Litigation Finance
200 & State/Federal Coordination Roundtable and Conference, June 4-5, Berkeley, CA.

201 American Association for Justice Annual Convention, July 7-10, Denver, CO.

202 Emory Law School Institute for Complex Litigation and Mass Claims Conference, Aug. 8-
203 10, Atlanta, GA.

204 Lawyers for Civil Justice event, Sept. 14, 2018, Washington D.C.

205 George Washington Law School Roundtable on Third Party Legal Funding: Nov. 2018,
206 Washington, D.C.

207 The Subcommittee has begun gathering information and identifying issues on which rule
208 changes might focus. The MDL Panel has been extremely helpful, providing what some
209 Subcommittee members have described as a "treasure trove" of information about pending MDL
210 matters. Outreach to the Panel will continue in various ways. Two of the members of the
211 Subcommittee are transferee judges in MDL proceedings, and representatives of the Subcommittee
212 have attended and will be attending events organized by the Panel.

213 Despite this preliminary activity, the Subcommittee's work remains at a very early stage.
214 The ultimate result may be that no rules are proposed, or that rule proposals are made only on a
215 few of the many topics presently under preliminary study. Thus, the introduction of the issues

216 below is strewn with questions that probably will arise should the Subcommittee focus on a given
217 topic for extended study.

218 The Subcommittee’s basic objective at present is to receive guidance on which issues
219 initially seem most worthy of study, and also whether there are methods for generating information
220 about these topics beyond what the Subcommittee is already contemplating. In pursuing this
221 objective, the Subcommittee seeks to draw on the experience of Standing Committee members.
222 Below is a listing of issues that the Subcommittee has identified to date, along with some of the
223 questions already raised about them. Are there topics that should be added? Is there an initial
224 sense among Standing Committee members about which seem promising topics for rulemaking?

225 (1) Importance of judicial discretion in MDL proceedings: The transferee judge has
226 broad discretion in an MDL proceeding. Is preserving that discretion an important goal? Some
227 who discuss specific rule provisions governing the handling of these cases worry about a “judicial
228 straitjacket.” In a sense, this concern reflects a debate that has occurred at least since the 1983
229 amendments to Rule 16 expanded judicial authority to engage in case management, and (in
230 Rule 16(b)) required judges to do at least some case management in most of their cases. Judicial
231 latitude in individual cases may be less troubling than in MDL centralized actions, but latitude
232 may be more important in at least some MDL proceedings. This consideration reappears in relation
233 to the question whether access to interlocutory review should be expanded in MDL litigation.

234 (2) Scope: The scope for any rule amendments probably can’t be fully explored until
235 it is determined what those amendments might be. But it is worth introducing this question at the
236 outset. The rules could apply only to those matters centralized by the Judicial Panel (or only some
237 of them based on number of claimants or some other criterion), or only to actions of a certain type
238 (e.g., “mass” personal injury). But it may be that actions with no MDL activity could also benefit
239 from procedures developed for MDL proceedings. *See, e.g., Avila v. Willits Environmental*
240 *Remediation Trust*, 633 F.3d 828 (9th Cir. 2011) (enforcement of *Lone Pine* order in three
241 consolidated actions involving some 1,000 plaintiffs making claims for toxic soil contamination).
242 What criteria should define the scope of application for any rule amendments?

243 The selection of criteria might bear on when it could be determined whether these rules
244 apply. For example, if these rules apply only after the Panel has granted a petition to centralize,
245 that event will often occur long after many individual actions have been filed. And there might
246 also be a question whether the rules become inapplicable after remand by the Panel (though remand
247 presently happens only in a small proportion — 3% to 5% — of cases transferred pursuant to an
248 MDL transfer order).

249 (3) Master complaints and answers: Submissions have urged that the Civil Rules
250 explicitly address these filings. In some MDL proceedings, “master” pleadings may lack any
251 specifics about individual plaintiffs or defendants, and thus not provide any significant notice
252 about the grounds for claims or defenses raised in the pleadings. Semi-automatic adoption of these
253 generic documents for all cases in the MDL litigation may prevent any challenge to the claims or
254 defenses of individual parties.

255 Rule provisions about master complaints or answers might specify standards for evaluating
256 their adequacy. If these are pleadings in the Rule 7 sense, they are presumably subject to Rule
257 12(b) motions to dismiss, Rule 12(c) motions for judgment on the pleadings, and Rule 12(f)
258 motions to strike. They also presumably serve as guideposts for the scope of discovery and
259 summary-judgment motions.

260 These possibilities raise a number of questions on which input from Committee members
261 would be helpful. Are “master” pleadings used only in MDL proceedings? When they are
262 employed, are they treated as superseding the pleadings in individual actions? Would addressing
263 them separately in the Civil Rules provide benefits, or raise risks?

264 (4) Unsupported claims, and more particularized pleading/“fact sheets”: An abiding
265 concern with some MDL litigation — at least for mass torts — might be called the “Field of
266 Dreams” concern that “if you build it they will come.” The “it” for these purposes is an MDL
267 centralization order. And allegedly a lot of plaintiffs who file actions after MDL centralization
268 don’t really have valid claims. But that sort of failing may be obscured in the mass of MDL filings
269 and discovery staging, which may impede efforts to “weed” out these claims. One reaction in
270 some cases is to enter a *Lone Pine* order or to require all claimants to fill out “fact sheets”
271 (sometimes quite extensive). For judges, trying to evaluate hundreds or thousands of such
272 submissions could be extremely onerous.

273 The question whether this problem is a serious one can be debated. Even accepting that
274 30% of claims may often turn out to be unsubstantiated, one response has been: “But why focus
275 on those? We should focus on the other 70%.” To some, the main issue is whether the product in
276 question is harmful, not whether every single claimant before the court can present basic
277 information about his or her use of the product at the start of the case. From this perspective, the
278 consequence of the “fact sheet” approach is to impose “massive” discovery obligations on
279 plaintiffs before defendants even face fundamental discovery about the product involved.

280 A reaction to this view is that having to spend time and resources on the 30% (or so) of
281 claims that should never have been filed is wasteful. In addition, the pendency of an inflated
282 number of claims may trigger some reporting obligations for defendants (to the FDA, accounting
283 firms, the SEC, etc.) with greater adverse consequences than if the litigation were slimmed down
284 to the supportable claims. It could also be that including the “excess” claims may distort the value
285 of the cases in the settlement context.

286 One approach to this set of questions might be to make initial disclosure under
287 Rule 26(a)(1) more robust, at least in some cases. Besides addressing the scope issues mentioned
288 above, an empowered disclosure provision might require that each claimant provide detailed
289 specifics about harms suffered and experience with the product that allegedly caused those harms.
290 Reports indicate that “Plaintiff Fact Sheets,” for example, tend to be extremely detailed and need
291 to be keyed to the specific issues pertinent to a given set of cases.

292 Is the “fact sheet” approach useful? Would a Civil Rules provision foster the use of such
293 methods in a helpful way? Have the current provisions of the rules interfered with use of such
294 methods in cases where they might be useful? Would something like the pleading requirements
295 for fraud cases under Rule 9(b) provide useful guidance for district judges considering this route?
296 Could a new rule provide a template for a useful fact sheet?

297 H.R. 985 contains a requirement that, within 45 days of transfer to an MDL docket, or
298 direct filing in it, any plaintiff asserting a claim for personal injury must “make a submission
299 sufficient to demonstrate that there is evidentiary support” for the complaint’s allegations. The
300 court would be required within 30 days to determine whether each plaintiff’s submission is
301 sufficient. If the court determines that a submission is not sufficient, it must then dismiss without
302 prejudice to plaintiff promptly filing a sufficient submission, failing which the court must dismiss
303 with prejudice.

304 Another possible reaction, using the current rules, is to invoke Rule 11 and suggest that the
305 sort of specifics a “fact sheet” would require are exactly what any attorney screening possible
306 claims should gather before filing suit.

307 Is more vigorous use of Rule 11 a promising way of dealing with this set of problems? In
308 considering this question, it is important to appreciate that plaintiff lawyers may sometimes have
309 limited time for background investigation before expiration of the statute of limitations, and that
310 the fact that a claim eventually fails on the merits does not mean that the lawyer who brought the
311 claim violated Rule 11. A possible solution to this limitations problem has been party agreement
312 to toll the running of limitations pending a background investigation. Could a rule provide such
313 tolling? (Note that in the 1990s some district courts presented with large numbers of asbestos
314 personal injury claims by plaintiffs not alleging current harmful impact set up “pleural registries”
315 on which claims by such plaintiffs could be “stored” and revived if they developed symptoms
316 later.)

317 (5) Rule 20 joinder and filing fees: To the extent that some attorneys (perhaps with the
318 assistance of “lead generators” — see topic (7) below) file actions without sufficiently scrutinizing
319 the validity of the claims asserted, it might be that requiring payment of a filing fee for each
320 plaintiff could be a practical answer to the problem. It seems that 28 U.S.C. § 1914(a) presently
321 requires one filing fee for a “civil action,” no matter how many parties there are.

322 Rule 20 is broadly permissive regarding joinder of parties, so in conjunction with § 1914
323 it permits the filing of a single case on behalf of a large number of plaintiffs (and against a large
324 number of defendants). *See, e.g., Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828
325 (9th Cir. 2011) (three consolidated actions for environmental contamination brought on behalf of
326 some 1,000 individual plaintiffs).

327 A defendant can move to divide a single multi-plaintiff action into separate actions, but to
328 do that seemingly requires a finding that the claims do not involve a common question — a
329 standard similar to the MDL §1407(a) transfer standard — or arise out of the same “transaction or

330 occurrence, or series of transactions or occurrences.” It is not clear what advantage separation
331 would have for the MDL proceeding, nor on the eventual remand, apart from augmenting filing
332 fees (and thereby perhaps dissuading the filing of marginal cases).

333 Arguably, requiring every plaintiff properly joined under Rule 20(a) to pay a separate filing
334 fee in every civil action would overreach. Do Committee members regard the problem of
335 “phantom” claims to be a serious one? If so, is that true only in MDL proceedings? Is a response
336 that focuses on filing fees promising? It seems that electronic filing would alleviate possibly
337 burdensome aspects of such a rule for the Clerk’s office, which would have to calculate the filing
338 fee for a civil action based on the number of plaintiffs named in the complaint.

339 It may be that the principal focus of this concern is “direct filing,” a practice by which
340 plaintiffs file directly in the MDL transferee district rather than in their “home” district (in the
341 latter event they would be tag-along cases sent to the transferee district). Ordinarily such direct
342 filing results from a consensual order under which defendants agree not to raise venue or other
343 objections to the initial filing in the transferee district, providing that once all pretrial proceedings
344 are completed in that district the case would be “remanded” to the “home” district. Would a rule
345 governing “direct filing” be a desirable possibility to consider? If so, what should it provide about
346 filing fees, venue, personal jurisdiction, “remand” and other issues?

347 (6) Sequencing discovery: In general, complex litigation often benefits from
348 sequenced discovery. One could say that a “fact sheet” approach is a version of that — presumably
349 plaintiffs normally have to satisfy this requirement before they are allowed to proceed with
350 discovery in their cases. As a matter of rulemaking, would a prescribed sequence of discovery be
351 more promising than a rule requiring plaintiffs in certain actions always to submit such detailed
352 support for their claims? If there is to be a master complaint, should that be completed before
353 detailed discovery or disclosure is required from plaintiffs?

354 Is discovery sequencing helpful in general? In MDL proceedings? Would rulemaking
355 improve current practices? One possible concern with sequenced discovery in MDL proceedings
356 is that it may tend to delay or impede attention to claims involving “outlier” defendants who may
357 be restricted in their ability to explore grounds for summary judgment.

358 (7) Third Party Litigation Funding and “lead generators”: These topics may not
359 intrinsically be linked, but linking them may generate useful discussion. Preliminary research by
360 Patrick Tighe, Rules Law Clerk, shows that about half the courts of appeals and about a quarter of
361 the district courts have local rules requiring disclosure of some information about third-party
362 funding. These local rules seem designed principally to focus on recusal issues.

363 It appears that the amount and dollar volume of TPLF activity has expanded rapidly in
364 recent years. Some of this activity has caught the attention of the popular press. Patrick Tighe has
365 also found that several states have adopted statutes regulating this activity. None of these states
366 required automatic disclosure of the identity of litigation funders in connection with civil litigation
367 (though the Wisconsin legislature very recently adopted a disclosure requirement similar to the

368 Rule 26(a)(1) proposal before the Advisory Committee). But state court decisions and some state
369 statutes have imposed registration requirements on litigation funders and required that certain
370 disclosures be made to borrowers, such as the annual percentage rate charged.

371 Besides recusal concerns, a variety of other concerns have been urged as justifying
372 disclosure or some other response to the growing use of TPLF. Many of these could be
373 characterized as raising “ethical” issues or conflict of interest problems that seemingly lie behind
374 the call for inquiry into “lead generators.” Questions have been raised about whether third-party
375 funders acquire control over litigation decisions. In particular, their role in regard to possible
376 settlement has troubled some judges, who may worry that there is a third-party funder outside the
377 settlement conference room who is actually controlling the behavior of the people in that room.

378 Are “lead generators” or third party funding the source of significant settlement problems?
379 Do they often raise “ethical” issues that should concern judges? Would disclosure be a positive
380 response to those issues? In class actions, in particular (often included in mass tort MDL
381 proceedings), Rule 23(g) directs the court to consider the resources counsel will commit to the
382 case in appointing class counsel. Outside Rule 23, should the court seek such information in
383 designating lead counsel? If disclosure would be a positive response, what should the court do
384 with the information disclosed? Will disclosure lead to further discovery and motions? If there is
385 a role for such disclosure, is it important outside the “mass tort” area?

386 (8) Bellwether trials: To begin with, at least some seem to resist the entire notion of
387 bellwether trials on the ground that they are not truly “representative” and therefore provide no
388 real guidance on claim values even though their outcomes may magnify settlement pressure.
389 H.R. 985 addresses similar issues by directing that the MDL transferee judge may conduct a trial
390 in a civil action transferred to or directly filed in the MDL court only upon consent of all parties.

391 Whether rulemaking on this subject would be useful is unclear. Are such trials held only
392 in MDL proceedings? Is it sufficiently clear what a “bellwether” trial is to permit a rule to
393 prescribe regulations for them? Though it is true that such a trial is intended as a guide to
394 settlement value and non-trial resolution, does that not happen without the “bellwether”
395 designation?

396 Perhaps a more general inquiry would be whether MDL transferee judges try too hard to
397 resolve the transferred cases without the need for a remand (a concern suggested by H.R. 985).
398 Certainly the remand rate of around 3% to 5% is rather low, but so is the trial rate for ordinary
399 cases. Should the Subcommittee be concerned about undue pro-settlement pressure in MDL
400 proceedings? If so, is that a matter to be addressed in a Civil Rule? Note that Rule 16(c) now
401 authorizes the court to raise settlement issues in all cases. Should that invitation exclude MDL
402 proceedings?

403 Perhaps relatedly, it has also been suggested that, when the time to try cases arrives,
404 additional judges should be recruited to preside over those trials. The Panel did once make such a
405 suggestion. See *In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415 (J.P.M.L.

406 1991) (suggesting creation of “a nationwide roster of senior district or other judges available to
407 follow actions remanded back to heavily impacted districts”). Would that approach hold promise
408 for the concerns raised here?

409 (9) Facilitating appellate review: Submissions have urged measures to facilitate
410 interlocutory review. A starting point is to recognize that there already exist methods of obtaining
411 such review. *See, e.g.*, Rule 23(f) and 28 U.S.C. § 1292(b). Neither of those provides an absolute
412 right to such review, however.

413 It is likely that a Civil Rule could expand the circumstances for such review and, perhaps,
414 mandate it under some circumstances. (If serious attention focuses on these issues, it will be
415 important to involve the Appellate Rules Committee.) H.R. 985 would require review of
416 interlocutory orders whenever review “may materially advance the ultimate determination of one
417 or more civil actions in the proceedings.” That seems a very broad standard, particularly if the
418 court of appeals is to apply it without initial certification by the district court, as under §1292(b).

419 But becoming more specific about the trigger for immediate appeal may itself be a
420 challenge. Some who favor immediate review for some interlocutory orders suggest that examples
421 include decisions about admissibility of expert opinion evidence under the *Daubert* “gatekeeper”
422 standard, choice of law rulings, “general causation” issues, and rulings on preemption, all issues
423 which they contend have cross-cutting importance in MDL litigation. But those who do not favor
424 expanding such review urge that even these decisions may depend on individual circumstances of
425 specific cases rather than having a global impact on all cases. Moreover, expanding access to
426 interlocutory appeal may significantly delay MDL proceedings and burden the courts of appeals.

427 Are the existing methods inadequate for appropriate access to interlocutory review in MDL
428 proceedings? It seems that certain rulings that in individual litigation might be regarded as
429 “ordinary” could assume much greater importance in MDL or other multiparty litigation. How
430 would a rule identify such orders? Could a court of appeals meaningfully discern whether a given
431 order was of that variety? Would broadening interlocutory appellate review unduly delay MDL
432 cases?

433 (10) Coordination between “parallel” federal- and state-court actions: There have been
434 instances of highly productive cooperation and collaboration between federal and state judges
435 handling related matters. Indeed, some states (e.g., California and New Jersey) have centralization
436 mechanisms similar to the Panel for related actions pending in their courts. Such collaboration has
437 been around for a generation. *See, e.g.*, Schwarzer, Weiss & Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992).

439 Is such collaboration between state and federal judges productive? Have the Civil Rules
440 impeded such collaboration? Would revisions to the Civil Rules provide a helpful impetus or
441 mechanism for such activity? It may be that this is another aspect of individualized case
442 management that cannot effectively be governed by rule.

443 The independent actions of state courts handling “parallel” cases might be seen as
444 complicating the federal court’s management of the MDL proceeding. Assuming that the federal
445 court has inaugurated a program of sequenced or staged discovery pointing toward a set of
446 bellwether trials, it might view a state court’s decision to proceed to an early trial as potentially
447 disrupting the federal court’s management of its MDL docket. In at least some situations, federal
448 judges have reacted negatively to such developments. See *Retirement Systems of Alabama v.*
449 *J.P. Morgan Chase & Co.*, 386 F.3d 419 (2d Cir. 2004) (holding that MDL transferee judge who
450 had certified a class action for trial could not, due to the Anti-Injunction Act, enjoin an Alabama
451 state-court judge from proceeding with a trial even though the federal defendants’ need to prepare
452 for the state-court trial might interfere with the federal court’s trial schedule).

453 On the other hand, it may be that a Panel order transferring all federal cases to a specific
454 judge makes that judge a natural leader. See Hermann, *To MDL or Not to MDL? A Defense*
455 *Perspective*, 24 *Litigation* 43, 46 (1998) (“Without an MDL proceeding, there is no obvious leader
456 among the federal judges handling federal cases. It can thus be very difficult to convince state
457 court judges to follow the lead of any one particular federal judge.”).

458 As Judge Schwarzer’s article cited above suggests, informal coordination between federal
459 judges and state judges may be the best way to handle potential tensions, in both MDL litigation
460 and other litigation. That sort of cooperation has certainly occurred. See, e.g., *In re New Motor*
461 *Vehicles Canadian Export Antitrust Litigation*, 229 F.R.D. 35 (D. Me. 2005) (referring to a Joint
462 Coordination Order designed for use in both the MDL proceedings and parallel state proceedings,
463 and conferences of the federal and state judges).

464 (11) Plaintiff Steering Committee formation and common fund directives: There is no
465 rule directive for MDLs like Rule 23(g) about appointment of lead or liaison counsel or the
466 members of the PSC. Common fund contribution orders (particularly when combined with fee
467 caps) may generate hostility among some counsel. In addition, there has been concern about the
468 diversity of membership on such committees, which some judges have mentioned. See, e.g., *JP*
469 *Morgan Chase Cash Balance Litigation*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (describing “this
470 court’s diversity requirement”); compare *Martin v. Blessing*, 134 S. Ct. 402 (2013) (Alito, J.,
471 regarding denial of certiorari) (raising question about a judge who “insists that class counsel
472 ‘ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant
473 race and gender metrics’”).

474 Do these issues of appointment of the PSC create problems? Would rules improve
475 practice? Manual for Complex Litigation (4th) § 10.244 offers guidance to judges. Would
476 something more detailed or prescriptive be helpful?

477 (12) Other issues: As noted at the outset, besides seeking guidance about the issues it
478 has already identified, the Subcommittee also would appreciate suggestions about additional issues
479 that could be added to this list.

480 * * * *

481 Whatever the level of concern with the issues identified above, it seems worth invoking
482 again the history of the statute. As Professor Bradt presents the history, early drafts of the statute
483 contained a provision for rulemaking by the Supreme Court. But “[Judge] Becker and [Dean] Neal
484 . . . eliminated the provision for implementing rules governing procedure in multidistrict litigation
485 enacted through the Enabling Act process altogether.” 165 U.Pa. L. Rev. at 880. In part, the
486 concern was that formal rulemaking “would require lengthy consideration and review by the
487 Standing Committee on Federal Rules of Procedure and its Sub-Committee on Federal Rules of
488 Civil Procedure, to be followed frequently by further consideration and/or review in the Supreme
489 Court and the Congress.” *Id.* at 881, quoting memorandum on file in Judge Becker’s papers. This
490 concern, however, arose from a sense of urgency in launching the MDL procedure. Much has
491 happened in the 50 years of MDL practice to justify consideration of possible new rules.

492 This inquiry is at a very early stage. The series of questions above is presented only to
493 prompt commentary, and should not be taken to indicate what the Subcommittee will ultimately
494 recommend to the Advisory Committee. It remains a real possibility that no rule changes will be
495 pursued. But such a recommendation (or a recommendation of some specific rule changes) must
496 await the careful educational and analytical process that is just beginning. Therefore, the Advisory
497 Committee invites Standing Committee members to provide their thoughts.

498

B. Social Security Disability Review

499 A recommendation of the Administrative Conference of the United States, firmly
500 supported by the Social Security Administration, urges that the Judicial Conference of the United
501 States develop uniform procedural rules “for cases under the Social Security Act in which an
502 individual seeks district court review of a final administrative decision of the Commissioner of
503 Social Security pursuant to 42 U.S.C. § 405(g).” The question whether this project should be
504 undertaken has been assigned for development to the Social Security Review Subcommittee. The
505 Subcommittee is gathering information from as many as possible of the individuals and
506 organizations that have detailed information and deep experience in these review proceedings. The
507 inquiry is not yet designed to frame specific rules proposals. Instead, the purpose is to determine
508 whether the project should progress to the point of framing specific rule proposals.

509 Section 405(g) provides for review “by a civil action” in a district court. That framework
510 supports the tentative conclusion that new rules should be developed in the ordinary Rules
511 Enabling Act process. It also suggests that initial work be undertaken by the Civil Rules Advisory
512 Committee.

513 The motive for adopting uniform national rules arises from widespread disuniformity in
514 the local practices used in different districts for reviewing social security claims. Many review
515 actions are filed every year, currently running between 17,000 and 18,000 annually. The Social
516 Security Administration is represented by United States Attorneys, but its own lawyers commonly
517 bear much or most of the work. Social Security Administration lawyers may be assigned to cases
518 in different districts, imposing significant costs in learning and conforming to local practices. It
519 seems likely that the major gain from adopting uniform national rules would be to enable
520 government lawyers to focus more of their severely limited time on the merits of the review
521 actions. There is no great hope that uniform rules would do much to reduce either the high rate of
522 remands to the administrative process or the wide differences among districts in remand rates. Nor
523 is there any great hope that uniform rules would do much to reduce delay in awarding benefits to
524 those who deserve them. The primary source of delay lies in the administrative process. District
525 courts seem to be deciding these cases with reasonable dispatch.

526 Three alternative rules structures have been considered: (1) A self-contained set of rules
527 that do not borrow from the Civil Rules. (2) A set of “supplemental rules” that govern some
528 specific aspects of a § 405(g) review action but depend on the Civil Rules for many matters.
529 (3) Specific new rules that are incorporated directly in the body of the current Civil Rules. The
530 draft currently sketched by the Subcommittee is shaped as supplemental rules, but the draft is
531 designed only to stimulate further discussion. No conclusion has been reached as to the form that
532 may be most appropriate if work progresses to the point of developing rules intended for eventual
533 recommendation and adoption.

534 The scope of possible rules is closely related to the form. The simplest rules would address
535 the simplest cases in which a single claimant sues only the Commissioner and seeks only review
536 on the administrative record. Such rules would cover most — probably virtually all — actions for

537 review. But occasional cases seem to arise that involve additional claims or even parties. When a
538 case departs from the simple model, one approach would be to oust the new rules entirely, leaving
539 the action to be governed by the present Civil Rules alone, as happens now. A different approach
540 would be to continue to apply the new rules to the parts of the action that seek review on the record
541 of one claimant’s claims, employing the full sweep of the present rules for the other parts. The
542 draft rules that have been sketched for the purpose of provoking comment assume this second
543 approach, albeit only for the time being.

544 The Subcommittee met last November with representatives of the Administrative
545 Conference, the Social Security Administration, the Department of Justice, the National
546 Organization of Social Security Claimants’ Representatives, and the American Association for
547 Justice. The insights provided at that meeting, and a draft of review rules prepared by the Social
548 Security Administration, were used to solicit a second round of input by the Administration, the
549 Department, and the lawyers’ groups. Their responses — including a lengthy summary of a survey
550 conducted by NOSSCR — paved the way for preparation and discussion of a rules sketch.

551 The sketch is a “bare bones” set of three supplemental rules. Rule 1 defines the scope and
552 supplemental character of the rules. Rule 2 addresses initiation of the action; sets out minimal
553 pleading requirements for the complaint; provides for electronic service by the court on the
554 Commissioner of Social Security and the local United States Attorney; and addresses the
555 Commissioner’s answer and motions. (The provision for electronic service of process has met
556 widespread enthusiasm, and reflects actual experience in some courts where the government
557 lawyers have consented to sidestep the ordinary Civil Rule 4 service requirements.) Rule 3
558 establishes the means of bringing the action on for decision — the plaintiff files a motion for the
559 relief requested in the complaint, with a supporting brief; the Commissioner files a response brief;
560 and the plaintiff may file a reply brief. The sketch omits several parts of the Administration’s draft
561 rules such as detailed provisions governing the length of briefs and separate provisions for
562 claiming attorney fees.

563 As noted earlier, the purpose of the rules sketch is to provoke discussion with interested
564 people. It will prove a good target if it draws detailed and well-informed criticism. The
565 Subcommittee believes that the focus provided by this target will stimulate helpful exchanges that
566 might not emerge from more diffuse questions and examples.

567 The rules sketches are set out below in two forms. The first is a clean draft of the rules and
568 illustrative Committee Notes. The second is the rules alone, with multiple footnotes pointing to
569 many of the questions raised by the assumptions made for purposes of illustration. The
570 Subcommittee hopes that the footnotes will help to spur discussion, and that many more questions
571 will emerge as the inquiry proceeds.

572 No action is requested, but discussion will be welcome.

573 **SUPPLEMENTAL RULES GOVERNING ACTIONS UNDER 42 U.S.C. § 405(G)**

574 **Rule 1. Scope**

575 (a) **Section 405(g).** These Supplemental Rules apply to an action brought by an individual or
576 personal representative to obtain review of a final decision of the Commissioner of Social
577 Security under 42 U.S.C. § 405(g).

578 (b) **Federal Rules of Civil Procedure.** The Federal Rules of Civil Procedure also apply to a
579 proceeding under these Supplemental Rules, except to the extent that they are inconsistent
580 with these Supplemental Rules.

581 **Committee Note**

582 These Supplemental Rules establish a simplified procedure that recognizes the essentially
583 appellate character of claims to review a final decision of the Commissioner of Social Security
584 under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought
585 under another statute that explicitly provides for review under § 405(g).

586 Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as
587 the sole defendant and seek only review on the administrative record as provided by § 405(g). All
588 aspects of such cases are governed directly by these Supplemental Rules and the compatible
589 general provisions of the Civil Rules.

590 Some actions, however, may join more than one plaintiff, or more than one claim for review
591 on the administrative record, or more than one defendant. The Civil Rules apply directly to the
592 parts of such actions that seek relief not provided by § 405(g). These Supplemental Rules apply
593 to the § 405(g) parts of the action.

594 **Rule 2. Initiating the Action; Complaint; Service; Answer**

595 (a) **Commencing the Action.** An action for review under [42 U.S.C.] § 405(g) is commenced
596 by filing a complaint with the court.

597 (b) **The Complaint.** The complaint in an action for review under § 405(g) must:

598 (1) Identify the plaintiff by name, address, and the last four digits of the social security
599 numbers of the plaintiff and the person on whose behalf — or on whose wage record
600 — the plaintiff brings the action;

601 (2) Identify the titles of the Social Security Act under which the claims are brought;

602 (3) Name the Commissioner of Social Security as the defendant;

- 603 (4) State that the plaintiff [has exhausted all administrative remedies,] that the
604 Commissioner has reached a final decision, and that the action is timely filed;
- 605 (5) State [generally {and without reference to the record}] that the final administrative
606 decision is not supported by substantial evidence or [rests on] [must be reversed
607 for] errors of [substantive or procedural] law;
- 608 (6) State any other ground for relief; and
- 609 (7) State the relief requested.
- 610 (c) **Serving the Complaint.** The court must notify the Commissioner [of Social Security] of
611 the commencement of the action by [electronic transmission of]{electronically
612 transmitting} the complaint to the Commissioner at [the]{an} address established by the
613 Commissioner for this purpose and to the United States Attorney for the district [where the
614 court is located]. [No other service is required.]
- 615 (d) **The Answer; Motion; Voluntary Remand; Time.** The time for the Commissioner [of
616 Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules
617 of Civil Procedure], or a motion to remand is as follows:
- 618 (1) An answer must be served on the plaintiff within 60 days after notice of the action
619 is given under Supplemental Rule 2(c) unless a later time is provided by
620 [Supplemental Rule 2] (d)(4). The answer must include a certified copy of the
621 [complete] administrative record.
- 622 (2) A motion under [Civil] Rule 12 must be made within 60 days after notice of the
623 action is given under Supplemental Rule 2(c).
- 624 (3) A motion to voluntarily remand the case to the Commissioner may be made at any
625 time.
- 626 (4) Unless the court sets a different time or a later time is provided by [Supplemental
627 Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters
628 the time to answer as provided by [Civil] Rule 12(a)(4).

Committee Note

630 Section 405(g) provides for review of a final decision “by a civil action.” Civil Rule 3
631 directs that a civil action is commenced by filing a complaint. In an action that seeks only review
632 on the administrative record, however, the complaint can closely resemble a notice of appeal. The
633 elements specified in Supplemental Rule 2(b) plead the grounds for the court’s jurisdiction under
634 § 405(g) and the grounds that bring the action within § 405(g), including the provisions of the
635 Social Security Act underlying the claim. Paragraph (7) provides for pleading the nature of relief
636 sought from review on the administrative record. In an action that seeks relief outside the limits of

637 § 405(g), Supplemental Rules 2(b)(6) and (7) support pleading the claim under the Civil Rules —
638 including, if appropriate, the grounds for subject-matter jurisdiction — and pleading the relief
639 requested.

640 When the complaint names only the Commissioner as defendant, Supplemental Rule 2(c)
641 provides a means for serving the complaint that supersedes Civil Rule 4(i)(2). The Commissioner
642 must establish an address for electronic service by the court. The address might, in the
643 Commissioner’s discretion, include only the Commissioner, the Commissioner and the regional
644 [X] office for the district where the action is filed, or only the regional office. Notice must also be
645 served on the United States Attorney for the district. Any defendant other than the Commissioner
646 should be served with the complaint and a summons under Civil Rule 4.

647 Supplemental Rule 2(d) incorporates the general provisions of Civil Rules 8 and 12 for
648 answers, including affirmative defenses, and motions. It also reflects this part of § 405(g): “As
649 part of the Commissioner’s answer the Commissioner of Social Security shall file a certified copy
650 of the transcript of the record including the evidence upon which the findings and decision
651 complained of are made.”

652 The Commissioner at times seeks a voluntary remand for further administrative
653 proceedings before the action is framed for resolution by the court on the administrative record.
654 Supplemental Rule 2(d) recognizes that the Commissioner may move to remand before or after
655 filing and serving the record.

656 **Rule 3. Plaintiff’s Motion for Relief; Briefs**

657 (a) **Plaintiff’s Motion for Relief and Brief.** The plaintiff must file and serve on the
658 Commissioner a motion for the relief requested in the complaint and a [supporting] brief[,
659 with references to the record], within [30] days after the record is filed or 30 days after the
660 court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever
661 is later. [The accompanying brief must support arguments [assertions? statements?] of fact
662 by references to the record.]

663 (b) **Defendant’s [Response] Brief.** The defendant must file and serve on the plaintiff, within
664 [30] days of service of the plaintiff’s motion and brief, a response brief[, supported by
665 references to the record]. [The brief must support arguments [assertions? statements?] of
666 fact by references to the record.]

667 (c) **Reply Briefs.** The plaintiff may, within 15 days of service of the defendant’s brief, file a
668 reply brief and serve it on the defendant.

669 **Committee Note**

670 Supplemental Rule 3 addresses the procedure for bringing on for decision a § 405(g) review
671 action that has not been remanded to the Commissioner before review on the record. The plaintiff
672 files a motion for the relief requested in the complaint or any amended complaint. The motion sets

673 out the grounds of fact and law that require relief from the Commissioner's decision. The motion
674 is supported by a brief that is similar to a brief supporting a motion for summary judgment, pointing
675 to the parts of the administrative record that underlie the argument that the final decision is not
676 supported by substantial evidence in the administrative record. The Commissioner responds. A
677 reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

678 **SUPPLEMENTAL¹ RULES GOVERNING ACTIONS UNDER 42 U.S.C. § 405(G)**

679 **Rule 1. Scope**

680 (a) **Section 405(g).** These Supplemental Rules apply to an action brought by an individual²
681 or personal representative to obtain review of a final decision of the Commissioner of
682 Social Security³ under 42 U.S.C. § 405(g).⁴

¹ “Supplemental” follows the model of the admiralty rules, and emphasizes that the Civil Rules apply to all matters not specifically addressed by these rules.

Identifying the proper scope for a set of Supplemental Rules remains a difficult question. At least two distinctive sets of questions make it so.

One set of questions asks how far the full sweep of the Civil Rules should be available in actions under § 405(g). The information now available suggests that most of these actions do not involve, and do not need, the pretrial rules so important in other civil actions. When review is confined to examination of the administrative record, there are few occasions for Rule 16 conferences and discovery. Some courts rely on summary judgment as the vehicle for focusing on the parts of the record that show whether the Commissioner’s decision is supported by substantial evidence, and that may be needed to decide questions of law. Much of Rule 56 is irrelevant to review on an administrative record, however, including the standard for decision. Summary judgment must be denied if the case could go either way. The administrative decision must be affirmed if the case could go either way.

Pure § 405(g) review actions may nonetheless provide some occasions for discovery, pretrial management, and other general procedures. [Discovery, for example, may be appropriate if the decision is challenged for bias of the administrative law judge, or ex parte communications, or pressure from the administration to reduce the frequency of benefit awards, or omissions from the record.] And a great many more formal rules cannot be disregarded. [Examples begin at least with Rule 5 filing, Rule 6 time computation, Rule 7 on motions, and on through such matters as voluntary dismissal, entry of a partial final judgment, formal entry of judgment on a separate document, references to or trial with a magistrate judge, responsibilities of the clerk’s office, and so on.]

The other set of questions arise when a plaintiff seeks to join additional claims or parties in an action that includes § 405(g) review. These questions include whether two or more plaintiffs may join in a single petition — for example if both raise the same question of law? Apparently some plaintiffs have attempted to combine class-action claims with individual § 405(g) review — without deciding whether that combination should be allowed in a single action, what happens if a separate class action raising the same issues is filed on a different jurisdictional foundation and consolidated with the § 405(g) action? Variations on these questions are likely to depend on deep knowledge of the underlying substantive law. A claimant, for example, may seek to advance a claim that a Social Security Administration rule is invalid under the Administrative Procedure Act on substantive or procedural grounds. Are such claims properly part of the § 405(g) review itself? If they are, they may well call for reliance on the general Civil Rules. So too, may there be circumstances in which it is proper to join a defendant in addition to the Commissioner?

683 (b) **Federal Rules of Civil Procedure.** The Federal Rules of Civil Procedure also apply to a
684 proceeding under these Supplemental Rules, except to the extent that they are inconsistent
685 with these Supplemental Rules.

The need to avoid confusing or even conflicting procedural requirements puts a pragmatic twist on these questions. There should be no room for doubt, for example, about the application of Civil Rule 8 to any claim for relief that goes beyond the proper scope of an action that seeks no more than § 405(g) review. The same holds true for the times allowed for subsequent pleadings and motions. The court’s overriding authority to manage the action cannot be left in doubt.

These difficulties do not obviously defeat the quest for uniform national rules for § 405(g) cases. But they do demand careful consideration.

² “[A]n individual” is the statutory term. Emphasis could be added to reflect the SSA’s concern that the rule should explicitly exclude actions with multiple plaintiffs and class actions: “brought by only one plaintiff”; “no more than one plaintiff”; “a single plaintiff”; or something else. So too, rule text could add “only to obtain review” But this seems better left for the Committee Note.

There may be smaller technical issues, bound up with substantive law. Suppose a claimant dies somewhere along the line: can the claim survive if disability is found before death? Presumably a representative would be an individual plaintiff, even if two people function jointly as representative. (It seems likely that survivor benefits are not influenced by disability before death, although it would be good to be sure of that.)

³ The SSA draft explicitly excludes actions that include defendants “other than” the Commissioner. There is no need to use more words if the idea is to exclude actions that do not name the Commissioner as defendant. If the idea is to prohibit adding any defendant in addition to the Commissioner, the statute cannot be relied on — the negative implication from providing for review of the Commissioner’s final decision is not sturdy enough.

As with the question of multiple plaintiffs, we would need to learn more to address multiple defendants. There might be good reason to invoke the provisions for review on the record for all claims under § 405(g), particularly if the rules recognize case management under Civil Rule 16.

⁴ Two questions arise from the statutory reference. Other social security statutes invoke § 405(g): need they be listed? The three examples cited by SSA directly provide for review under § 405(g). If there are no others, or all directly invoke § 405(g), they might be listed in the Committee Note. But it may be better to make only a generic reference to other statutes that expressly incorporate § 405(g).

And how about actions that include both a § 405(g) claim for review on the record and some other claim? The SSA rules draft excludes them. But there may be advantages in invoking these rules for the part of the action that invokes § 405(g) review. See note 1 above.

686 **Rule 2. Initiating the Action; Complaint; Service; Answer**

687 (a) **Commencing the Action.** An action for review under [42 U.S.C. § 405(g) is commenced
688 by filing a complaint⁵ with the court.⁶

689 (b) **The Complaint.** The complaint in an action for review under § 405(g) must:

690 (1) Identify the plaintiff by name, address, and the last four digits of the social security
691 numbers of the plaintiff and the person on whose behalf⁷ — or on whose wage
692 record⁸ — the plaintiff brings the action;

693 (2) Identify the titles of the Social Security Act under which the claims are brought;

694 (3) Name the Commissioner of Social Security as the defendant;

695 (4) State that the plaintiff [has exhausted all administrative remedies,] that the
696 Commissioner has reached a final decision, and that the action is timely filed;⁹

697 (5) State [generally {and without reference to the record}]¹⁰ that the administrative
698 decision is not supported by substantial evidence or [rests on] [must be reversed
699 for] errors of [substantive or procedural] law;

⁵ The SSA model rule calls it a petition for review. That is consistent with the terminology used by Appellate Rule 15(a)(1). “Complaint,” however, is consistent with the § 405(g) provision for review by commencing a civil action, and avoids the need to amend Rule 7(a) to define a petition for review as a pleading.

⁶ This does not address the time for filing, set by § 405(g) as “within sixty days after the mailing to [the plaintiff] of notice of such [final] decision or within such further time as the Commissioner of Social Security may allow.” Appellate Rule 15(a)(1) provides for filing “within the time prescribed by law.” That is better than copying the statute into the rule, but perhaps not necessary because this rule applies only to this single statutory provision. The Commissioner can raise the question by a motion to dismiss.

⁷ The “on whose behalf” phrase is drawn directly from the form in the SSA rule appendix.

⁸ Is this an appropriate term?

⁹ Some of the NOSSCR responses suggested that timeliness can be an issue that calls for explanation.

¹⁰ The SSA does not want anything beyond these bare bones. Its draft Rule 2(b) says that the petition “must not include any attachments or evidence, nor may it include argument or allegations as to the substance of the administrative decision that is the subject of the petition.” This position may reflect

700 (6) State any other ground for relief;¹¹ and

701 (7) State the relief requested.¹²

702 (c) **Serving the Complaint.** The court must notify the Commissioner [of Social Security] of
703 the commencement of the action by [electronic transmission of]{electronically
704 transmitting} the complaint to the Commissioner at [the]{an} address established by the
705 Commissioner for this purpose and to the United States Attorney for the district [where the
706 court is located]. [No other service is required.]¹³

the belief that scarce government attorney resources are best used by preparing a single response to a single statement of the plaintiff’s arguments of fact and law.

The incentive to provide an elaborate statement in the complaint may be limited if the plaintiff anticipates that the answer will be limited to filing the administrative record. But even then there may be some value in omitting any explicit limits of the sort proposed in the SSA draft — a cogent statement in the complaint might lead to voluntary remand. Draft Rule 2(d), as § 405(g) itself, contemplates an answer that goes beyond filing the administrative record. The occasion for answering with more than the administrative record is likely to be a complaint that includes claims that extend beyond review on the record. This draft applies the ordinary Civil Rules both to that part of the complaint and the corresponding part of the answer.

¹¹ This paragraph could be eliminated if the foundation in the opening of Supplemental Rule 2(a) were changed to something like this: “A plaintiff pleading a claim for review [on the record] under § 405(g) must plead only * * *.”

¹² These elements abbreviate the more elaborate provisions in the draft SSA rule. Any can be expanded.

¹³ Rule 4(i)(2) directs that when an officer of the United States is sued in an official capacity service be made on the United States, with a copy mailed to the officer. The bracketed provision that “no other service is required” is designed to exclude separate service on the United States. That approach might be offset by adding to this Supplemental Rule one part of Rule 4(i)(1)(A)(i) for serving the United States, directing that a copy of the complaint be delivered “to the United States Attorney for the district where the action is brought.” Whether or not the rule should direct service on the United States Attorney, service on the Attorney General seems unnecessary.

There are great advantages in establishing a single electronic mailbox to receive notice of every § 405(g) action. Surely the established CM/ECF system, now or “next gen,” should be able to accomplish this easily when the complaint is e-filed. More work will be required with a paper complaint, scanning into an e-record, but the court will do that anyway.

It would be possible to add a paragraph to the Committee Note to provide comfort for district clerks when the system falters.

- 707 **(d) The Answer; Motion; Voluntary Remand; Time.** The time for the Commissioner [of
708 Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules
709 of Civil Procedure], or a motion to remand is as follows:
- 710 **(1)** An answer must be served on the plaintiff within 60 days after notice of the action
711 is given under Supplemental Rule 2(c) unless a later time is provided by
712 [Supplemental Rule 2] (d)(4). The answer must include a certified copy¹⁴ of the
713 [complete]¹⁵ administrative record.
- 714 **(2)** A motion under [Civil] Rule 12 must be made within 60 days after notice of the
715 action is given under Supplemental Rule 2(c).

¹⁴ The SSA draft rules provide that the transcript and all other filings are exempt from any redaction requirements. Rule 5.2(b) exempts the record of an administrative or agency proceeding from its redaction requirements. That does not reach “all other filings.” The SSA model complaint requires only the last four digits of the social security number. It is not clear what other redaction requirements may trouble the SSA, nor whether the rule should defeat the court’s authority to order redaction in specific circumstances. Consider, for example, the address of a plaintiff who has a fictitious address to protect against harassment.

A C.D.Wash. local rule requires that the administrative record be filed under seal. That seems flatly inconsistent with Rule 5.2(c)(2), which provides that “any other person may have electronic access to the full record at the courthouse.”

¹⁵ The record should include both hearing transcripts and what comments describe as “case documents.” “Complete” addresses complaints that the Commissioner does not always file a complete record. One example appears to be a rule that allows the Administrative Law Judge to exclude evidence not proffered five days before the hearing. Apparently the excluded evidence is not made part of the record. Perhaps it is better to avoid rule text that undertakes to define the contents of the administrative record. Section 405(g) says only that the Commissioner must “file a certified copy of the transcript of the record including the evidence on which the findings and decision complained of are based.” There may be administrative regulations that refine this definition. “Transcript” is omitted from the rule text for now because it may be read too narrowly. Adding “complete” is an open-ended attempt to compromise. More might be added. *See* Appellate Rule 16, an all-agencies review provision that does define the record, and that authorizes the court to direct that a supplemental record be prepared and filed.

- 716 (3) A motion to voluntarily remand the case to the Commissioner may be made at any
717 time.^{16 17}
- 718 (4) Unless the court sets a different time or a later time is provided by [Supplemental
719 Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters
720 the time to answer as provided by [Civil] Rule 12(a)(4).¹⁸

¹⁶ The sixth sentence of § 405(g) begins like this: “The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner’s answer, remand the case to the Commissioner of Social Security for further action by the Commissioner * * *.” “Before” clearly belongs in rule text. But the motion for voluntary remand often should be supported by the transcript, in part so the plaintiff can respond. Adding “after” seems useful; see note 17 below. Perhaps the rule text should also provide for a motion to defer filing the transcript [for no more than X days] to allow time to decide whether to move for voluntary remand.

¹⁷ There was some discussion of timing in the comments. The view that the Commissioner may not have an idea of the grounds for voluntary remand before filing the record seems cogent. Adding “after” seems useful. But one horrified look at the record may persuade the Commissioner to seek a voluntary remand before preparing a complete record.

¹⁸ Rule 2 does not address Rule 16 pretrial procedures. It has been urged that § 405(g) actions should be exempted from pretrial procedures. But there may be occasions when Rule 16 is useful. One example arises in the relatively rare situations in which discovery is requested. It does not seem necessary to have a draft rule that confirms the role of Rule 16 — Supplemental Rule 1 does that. But if there is a risk that the question will be disputed, a rule provision might look like this:

~~Rule 3 Case Management~~

~~The [special][appellate] character of review on an administrative record should guide management of the action under Rule 16.~~

COMMITTEE NOTE

~~Supplemental Rule 3 serves to remind the parties and the court that review on the administrative record under § 405(g) is essentially an appeal. It does not support inferences for the procedure in actions for review on an administrative record outside § 405(g). There may be circumstances in which management under Civil Rule 16 is useful, but it seems unlikely that extensive management will often be needed.~~

721 **Rule 3. Plaintiff’s Motion for Relief; Briefs**

722 (a) **Plaintiff’s Motion for Relief and Brief.** The plaintiff must file and serve on the
723 Commissioner a motion for the relief requested in the complaint and a [supporting] brief,¹⁹
724 [with references to the record,] within [30] days after the record is filed or 30 days after the
725 court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever
726 is later. [The accompanying brief must support arguments [assertions? statements?] of
727 fact²⁰ by references to the record.^{21 22}]

728 (b) **Defendant’s [Response] Brief.**²³ The defendant must file and serve on the plaintiff, within
729 [30] days of service of the plaintiff’s motion and brief, a response brief[, supported by

¹⁹ Filing a motion may provide reassurance that the CM/ECF system notices about the progress of the action are more effective.

The analogy to appellate review, however, may suggest that a brief alone suffices:

(a) **Plaintiff’s [Merits] Brief.** The plaintiff must file and serve on the Commissioner a brief supporting the complaint, with references to the record, within 30 days after the record is filed or within [X] days after the court disposes of all motions filed under [Supplemental] Rule 2(d)(2) or (d)(3), whichever is later.

²⁰ Is it useful to require references to the transcript to support arguments of law? To show that they were made in the agency?

²¹ The plaintiff’s motion for relief and the supporting brief function in ways similar to the summary-judgment procedure now used by some courts in § 405(g) cases. The motion identifies the evidentiary or legal failures that justify setting aside the Commissioner’s decision. The brief points to the parts of the record that support the arguments. But the analogy to summary judgment is imperfect because summary judgment cannot be granted if a case could be decided either way, while the Commissioner’s decision must be affirmed if the case could be decided either way.

²² The SSA draft rules include this: “all page references to the transcript shall be to the transcript page number and not to the docket page number created by the CM/ECF system upon filing the transcript.” It seems better to avoid this sort of system-dependent provision.

²³ This draft does not provide for a motion by the Commissioner to affirm. The plaintiff is in the better position to identify the ways in which the Commissioner’s decision is not supported by substantial evidence on the record or errs on questions of law. A motion by the Commissioner before the plaintiff has identified the plaintiff’s claims may impose on the plaintiff unnecessary burdens to respond.

It would be possible to reverse the sequence of the briefs, so that the first brief is filed by the Commissioner with citations to the record showing the substantial evidence that supports the decision. But

730 references to the record]. [The brief must support arguments [assertions? statements?] of
731 fact by references to the record.]

732 (c) **Reply Brief.** The plaintiff may, within 15 days of service of the defendant’s brief, file a
733 reply brief and serve it on the defendant.²⁴

it may be difficult to anticipate the arguments that will be made to show the decision is not supported by substantial evidence.

²⁴ The SSA draft rule directs that the reply brief “must be limited to responding to Defendant’s brief and shall not raise new issues.” This limit may be so well understood in practice that it can be omitted. Compare Appellate Rule 28(c). (There has not been any discussion of cross-appeals by the Commissioner.)

734 **C. Anonymous Consent to Assigning a Magistrate Judge**

735 Under 28 U.S.C. § 636(c)(1) and (2), a magistrate judge may be designated to exercise civil
736 jurisdiction in a case with the consent of the parties and the clerk shall notify the parties of the
737 availability of a magistrate judge. “The decision of the parties shall be communicated to the clerk
738 of court. * * * Rules of court for the reference of civil matters to magistrate judges shall include
739 procedures to protect the voluntariness of the parties’ consent.”

740 Civil Rule 73(b)(1) seeks to protect voluntary consent by anonymity:

741 To signify their consent, the parties must jointly or separately file a statement
742 consenting to the referral. A district judge or magistrate judge may be informed of
743 a party’s response to the clerk’s notice only if all parties have consented to the
744 referral.

745 The problem that calls for study arises from the apparently incurable design of the CM/ECF
746 system that refuses to sequester a separate consent statement filed by any one party. The system
747 automatically sends the statement to the judge assigned to the case. Judges may contrive to create
748 their own strategies to bypass this notice, but failures seem inevitable.

749 One strategy to bypass this quirk of the CM/ECF system is suggested by the language of
750 § 636(c)(2) itself: the parties could individually “communicate” their consents to the clerk, who
751 would file them only if all parties consent. There is strong reason, however, to fear that attempts
752 to impose this new burden on the clerk’s office would fail too often for comfort.

753 The approach that has come first to mind is to establish a procedure that puts on the parties
754 the burden of seeking a joint consent statement signed by all parties before filing. This procedure
755 has worked successfully in at least some courts. One model is to issue a consent form to the
756 plaintiff when the action is filed. If the plaintiff is amenable to referring the action to a magistrate
757 judge, the plaintiff takes the lead in soliciting consents from the other parties. If all consent, the
758 form is filed.

759 Drafting an amendment of Rule 73(b)(1) must take account of the fact that some districts
760 include magistrate judges in the pool for initial random assignment as cases are filed. That
761 phenomenon should not create any problems beyond the need for careful attention in drafting.

762 Other issues may well be omitted from this task. One familiar problem arises when the
763 original parties consent to referral, the magistrate judge assumes jurisdiction, and then another
764 party is joined. This and perhaps some other issues will be considered, but the conclusion may be
765 that the present task should be limited to the specific CM/ECF problem that stirred the
766 Committee’s interest.

767 It may be that in the end no need will be found to amend Rule 73(b)(1). Local adaptations
768 may prove equal to the task. But unless unexpected complications emerge, a straight-forward
769 amendment may well be proposed for publication after further examination.

770

D. Expanding Personal Jurisdiction

771 Two proposals, sketched below, would expand the personal jurisdiction of federal courts
772 beyond present limits. One is narrowly focused. The other is very broad. Each relies on the
773 proposition that Fifth Amendment due process allows federal courts to base jurisdiction on
774 contacts with the United States as a whole, no matter whether there are sufficient contacts with
775 any particular state to satisfy Fourteenth Amendment due process.

776 These proposals hold a place on the docket, but will not come on for sustained attention in
777 the immediate future. They present substantial conceptual challenges. Working through the
778 challenges will require much time and further effort. Determining the actual importance of
779 expanding plaintiffs' access to broader personal jurisdiction in federal courts will be the first order
780 of business when it appears that adequate resources may become available for the task.

781 Rule 4 addresses the means for serving the summons and complaint, or for waiving service.
782 Rule 4(k) confirms that serving a summons or a waiver of service “establishes personal jurisdiction
783 over a defendant” in three alternative provisions.

784 Rule 4(k)(1)(A) directs that personal jurisdiction is established over a defendant “who is
785 subject to the jurisdiction of a court of general jurisdiction in the state where the district court is
786 located.” This provision enables a federal court to acquire personal jurisdiction over a defendant
787 outside the state where the court is located by using the state’s longarm statute. Reliance on the
788 state court’s jurisdiction entails the Fourteenth Amendment due process limits on state-court
789 jurisdiction.

790 Rule 4(k)(1)(B) establishes a narrowly limited opportunity to extend personal jurisdiction
791 beyond state-court limits. Service establishes personal jurisdiction over a defendant “who is a
792 party joined under Rule 14 or 19 and is served within a judicial district of the United States and
793 not more than 100 miles from where the summons was issued.”

794 Rule 4(k)(2), prescribed in 1993, reacted to a Supreme Court decision ruling that although
795 a defendant in London might well have such contacts with the United States as a whole as to be
796 subject to personal jurisdiction as limited by Fifth Amendment due process, jurisdiction failed for
797 want of a rule making the defendant amenable to service. The Court suggested that perhaps
798 provision for jurisdiction could be made by statute or court rule. Rule 4(k)(2), like Rule 4(k)(1)(B),
799 is very narrow. Service establishes personal jurisdiction over a defendant “for a claim that arises
800 under federal law” if: “(A) the defendant is not subject to jurisdiction in any state’s courts of
801 general jurisdiction; and (B) exercising jurisdiction is consistent with the United States
802 Constitution and laws.”

803 The narrower proposal, advanced by Professor Borchers, would expand present
804 Rule 4(k)(2) to include actions based on 28 U.S.C. § 1332 diversity and alienage jurisdiction, but
805 — as with the present federal-question provision — only if the defendant is not subject to
806 jurisdiction in any state’s courts of general jurisdiction. The purpose is to provide a forum in the

807 United States for plaintiffs such as the one in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873
808 (2011). *Nicastro* was injured in New Jersey while working with a machine made by a firm in
809 England and sold to an independent distributor in Ohio. Although the manufacturer hoped the
810 distributor would sell its machines throughout the United States, and many states were in fact
811 reached, no more than four — and possibly only the one that injured the plaintiff — reached New
812 Jersey. The Court reversed New Jersey’s assertion of specific personal jurisdiction. Justice
813 Kennedy’s plurality opinion suggests that perhaps Fifth Amendment due process would support
814 jurisdiction in a federal court based on sufficient contacts with the United States as a whole.

815 The broader proposal, first advanced by Professor Spencer before he became a member of
816 the Civil Rules Advisory Committee, is much different. It would erase the limits in present Rule
817 4(k) and, for any action within federal subject-matter jurisdiction, authorize personal jurisdiction
818 over any defendant up to the limits of Fifth Amendment due process. The location of litigation
819 within the federal court system would be governed by the venue statutes. Professor Spencer
820 continues to believe that this system should be adopted, but has come to believe that the Rules
821 Enabling Act does not authorize the Supreme Court to prescribe rules of personal jurisdiction.
822 “Jurisdiction” on this view is not a general rule of practice and procedure. He also recognizes that
823 the expansion of personal jurisdiction he advocates should be effected by Congress only with
824 substantial revisions of present venue statutes.

825 Multiple advantages might be gained by the broad proposal. It would establish uniform
826 personal jurisdiction rules for all federal courts, free from the variability that arises from such state
827 statutes as do not extend to the limits allowed by the Fourteenth Amendment. It would release the
828 inherent Article III judicial power to reach all defendants, subject only to Fifth Amendment due
829 process limits. It would enable federal diversity courts to shape convenient, comprehensive, and
830 efficient litigation packages that might lie outside the reach of any state court. The advantages for
831 domestic plaintiffs suing internationally foreign defendants, as in the *Nicastro* case, are apparent.
832 It also would substantially reduce preliminary wrangling over personal jurisdiction — in most
833 actions, all defendants would plainly have sufficient contacts with the United States, even if not
834 with any particular state. And while defendants would often resent the jurisdiction, defendants
835 also could be helped to join additional defendants and third-party defendants.

836 These proposals are intriguing, but there is no purpose in pursuing them if indeed they
837 would not be authorized under the Enabling Act. The formal argument that rules of “jurisdiction”
838 are not rules of “practice and procedure” for purposes of § 2072 cannot be dismissed out of hand.
839 But support can be found for interpreting “practice and procedure” in light of the purposes and
840 structure of § 2072. Congress retains final authority over rules prescribed by the Supreme Court
841 under § 2072. That role supports a functional interpretation. The question then would be whether
842 rules of personal jurisdiction are suitable for development and adoption through this process.

843 A working answer may be found in the present rules that directly provide for personal
844 jurisdiction. At least since 1963, and arguably since 1938, successive Committees and the
845 Supreme Court have acted in the belief that these rules are authorized by § 2072. The question of

846 authority was explicitly identified during the process that led to adoption of Rule 4(k)(2) in 1993.
847 This history provides persuasive support for rules that define personal jurisdiction.

848 If the conclusion is that § 2072 includes authority to adopt rules that expand personal
849 jurisdiction, it remains important to ensure that the authority is exercised with wisdom. Courts are
850 properly reticent about adopting rules that expand their own power to compel submission by a
851 resisting defendant. In addition, the broad proposal to expand to the limits of Fifth Amendment
852 due process would require revisions of the venue statutes that clearly require action by Congress.
853 The difficulty of coordinating judicial rulemaking with action by Congress provides a cogent
854 reason to leave the field to Congress.

855 Any development of a broad proposal must encounter serious conceptual difficulties.
856 There are substantial reasons to anticipate that as broad as national sovereign power may be, the
857 Fifth Amendment may include as well some theories of fairness that at times operate as
858 constitutional limits akin to venue limits. Questions of pendent personal jurisdiction could arise if
859 anything less than maximum Fifth Amendment limits were adopted in a new rule, and might arise
860 even if maximum limits were adopted. Several present statutes authorize “nationwide” personal
861 jurisdiction; if a new rule went further than current interpretations of these statutes, supersession
862 issues might arise. If diversity cases are included, attention should be directed to the choice-of-
863 law consequences. And one consequence easily could be significant contraction, for federal
864 courts, of the current distinctions between “general” and “specific” personal jurisdiction. Given
865 minimum contacts with the United States as a whole, a domestic defendant would be subject to
866 jurisdiction in any federal court, not only a particular state where the contacts are centralized. The
867 defendant need not be “at home.”

868 These proposals raise questions that fascinate the academic interests of all lawyers.
869 Exploring the questions and framing rules around the answers would be a great adventure. Before
870 embarking on that adventure, however, it will be important to assess the real-world need for
871 expanding the personal jurisdiction reach of the federal courts. Are there cases that support the
872 need for expanded personal jurisdiction, and if so, how many? Discussion of the need will be
873 helpful. But for now, the Advisory Committee does not plan to pursue this item actively.

874 **III: Items Removed from Agenda**

875 **A. Newspaper Notice in Condemnation Proceedings**

876 The Advisory Committee has voted to remove from its agenda the question discussed with
877 the Standing Committee in January about selecting the newspaper for publishing notice of a
878 condemnation proceeding. The potential advantages and disadvantages of amending
879 Rule 71.1(d)(3)(B)(i) depend on empirical information that would be difficult, if not impossible,
880 to obtain. There has been only one suggestion to amend. The Department of Justice, the litigant
881 with far more experience than any other, is neutral about the proposed amendment. In these
882 circumstances it seems better to let this proposal go by.

883 Rule 71.1(d)(3)(A) provides for personal service “in accordance with Rule 4” on a
884 defendant who resides in the United States and whose address is known. When a defendant is
885 beyond the territorial limits of personal service but has a “place of residence * * * then known,”
886 Rule 71.1(d)(3)(B)(i) directs notice both by publication and by mail. Notice by publication is the
887 sole means of notice only if the defendant has no known address or place of residence.

888 Rule 71.1(d)(3)(B)(i) directs publication of notice, when required:

889 in a newspaper published in the county where the property is located or, if
890 there is no such newspaper, in a newspaper with general circulation where
891 the property is located.

892 The proposal is to eliminate the preference for a newspaper published in the county where
893 the property is located. Publication could be made in any newspaper with general circulation
894 where the property is located.

895 The central question is what medium of publication is most likely — or least unlikely —
896 to reach a property owner who cannot be reached by personal service or by mail. A newspaper
897 published in the county may have limited distribution; a newspaper published outside the county,
898 but having general circulation “where the property is located,” may have broader readership. But
899 the question is where a property owner will look when concerned that the property may become
900 subject to legal proceedings. Intuition may suggest that a truly local paper will be the most likely
901 resource, particularly as compared to regional or national newspapers that have general circulation
902 in the place. Would the owner of a farm in Sanilac County, Michigan, look first to the New York
903 Times, the Wall Street Journal, or USA Today? Intuition, however, is a faulty guide — an owner
904 far from Sanilac County may not even know of a newspaper published there. Finding information
905 to supply an empirically accurate answer to this question lies beyond Committee competence —
906 devising a sufficiently comprehensive survey is the best that could be hoped for, and even that may
907 be little better than intuition.

908 Leaving the rule with the intuitions or wisdom it now embodies seems the better course.
909 An added benefit of inaction is that action would require at least consideration of, if not action on,

910 questions of the sort that have been deliberately bypassed in recent years. What counts as a
911 “newspaper” now? How safe is it to identify a place where it is “published”? What counts as
912 general circulation when remote electronic access is widely available? For that matter, as the realm
913 of newspapers enjoying general circulation expands, should a court rule attempt to refine the
914 principles for choosing among them?

915 **B. Other Removed Agenda Items**

916 Three other items were removed from the agenda. They involve suggestions to require a
917 return receipt when notice is served by mail under Rule 5(b)(2)(C); to add language to Rule 55(a)
918 to duplicate and emphasize the direction that the clerk “must enter a party’s default” in the
919 circumstances described; and to prescribe tight limits on what goes into a complaint, inspired by
920 the perception that “New Age complaints are totally out of control.”

921 None of these items seemed to merit additional work. Service under Rule 5 has been
922 considered extensively in recent work, with a focus on electronic service, without any thought that
923 the longstanding provision for service by mail need be reexamined. The protest that at least one
924 court forbids its clerk to enter defaults may involve some cases where judicial discretion is
925 desirable, and in any event it is not a wise use of committee resources to attempt to find out about,
926 and then to cure, every arguable mistaken use of the rules. Pleading has been studied extensively
927 in recent years without showing any useful opportunities to revise the rules.

TAB 5B

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TAB B1

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2 FEDERAL RULES OF CIVIL PROCEDURE

15 consent to testify on its behalf; and it may set out
16 the matters on which each person designated will
17 testify. Before or promptly after the notice or
18 subpoena is served, and continuing as necessary,
19 the serving party and the organization must
20 confer in good faith about the number and
21 description of the matters for examination and
22 the identity of each person who will testify. A
23 subpoena must advise a nonparty organization of
24 its duty to make this designation and to confer
25 with the serving party. The persons designated
26 must testify about information known or
27 reasonably available to the organization. This
28 paragraph (6) does not preclude a deposition by
29 any other procedure allowed by these rules.

30 * * * * *

Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served, and to continue conferring as necessary, regarding the number and description of matters for examination and the identity of persons who will testify. At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition at least some of the documents it intends to use during the deposition, thereby facilitating deposition preparation. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate one or more witnesses to testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designee, discussion about the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss “process” issues, such as the timing and location of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The rule recognizes that the process of conferring will often be iterative, and that a single conference may not suffice. For example, the organization may be in a position to discuss the identity of the person or persons to testify only after the matters for examination have been delineated. The obligation is to confer in good faith, consistent with Rule 1, and the amendment does not require the parties to reach agreement. The duty to confer as necessary is to continue as long as needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

TAB B2

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Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference call, Jan. 19, 2018

On Jan. 19, 2018, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Subcommittee).

The call began with a report on the Standing Committee meeting. There was discussion at that meeting of the evolution of the Rule 30(b)(6) proposal from the original ideas discussed with the Standing Committee during its Jan., 2017, meeting, when this Subcommittee had begun considering a large number of very specific provisions for possible inclusion in the rule.

Since January 2017 the Subcommittee's focus and ambition had narrowed, and accordingly the list of possible amendment ideas in its May 1, 2017, request for comments was narrower than the one presented to the Standing Committee in January 2017. The many responses to that invitation for comment further emphasized the difficulties that could attend adopting specifics to govern the wide variety of situations and cases in which the rule now plays a central role. Accordingly, the Standing Committee was presented with a less ambitious current proposal this year.

The Standing Committee reaction was generally supportive. In particular, the idea of explicitly making the obligation to confer in good faith bilateral in the rule received support, and adding the identify of the persons to be designated to testify also received support.

At the same time, some members of the Standing Committee suggested that making this rule change would not really change practice much in some districts. In at least one district, the parties must certify that they have met and conferred about any matter that might be the subject of a motion before bringing a motion before the court. That means that when Rule 30(b)(6) depositions produce disagreement that might lead to a motion there already is an obligation to meet and confer.

Other comments favored adding items to the mandatory topics listed in the rule. Possible specifics suggested included judicial admissions, the problem of questioning on topics not on the list for the deposition, and using interrogatories instead of depositions in some instances.

In addition, the Subcommittee had before it recent submissions from the Lawyers for Civil Justice and the American Association for Justice concerning the desirability to adding some specifics to the rule.

The Subcommittee discussed the question whether to add specifics to the list of required topics contained in the draft rule circulated after the Nov. 28 conference call. There was concern that injecting more specifics into the rule could actually generate disputes rather than avoid them. In addition, it was noted that during the Nov. 28 conference call there was concern that parties might argue that the specific discussion topics in the rule really were implicit commands about how those specifics should be handled, or at least that the parties must resolve them by agreement, not only commands to discuss those specifics.

A different approach emerged: Perhaps there would be a way to require that the parties discuss what might be called the "logistics" of the deposition. This category of issues might include the timing and location of the deposition. One reaction was that those types of issues seem likely to be pertinent to many other depositions, not only 30(b)(6) depositions. Indeed, since the organization has fairly complete latitude in selecting the person to testify it would probably be in a better position to select a person able to testify at a given time and place than in a situation when the witness is selected by the party seeking discovery.

One reaction to this idea was that, although this kind of deposition does not seem terribly different from other kinds of depositions in regard to such matters, there nonetheless might be a value to trying to make such a point. There is some reason to think that magistrate judges see such disputes fairly frequently. but concern was expressed that, if a capacious word like "logistics" were a mandatory topic of discussion in the rule it would open the door to many disputes. "That seems contrary to the direction in which we're going."

Discussion focused on whether something like "the process for the deposition" could usefully be added to the draft rule language before the Subcommittee. But that raised the concern about a somewhat ambiguous word being part of a command in the rule. Instead, it was suggested, the best approach would probably be to introduce the idea in the Committee Note. That received support. Discussion will often naturally lead to such matters even if it begins focused on the specifics now included in the draft amendment.

That comment prompted a reaction to the Committee Note draft before the group. One sentence jumped out: "If the conference occurs before service of the notice or subpoena, the noticing party should ordinarily provide a draft of the proposed list of matters for examination, making it clear that the list is subject to refinement during the required conference." That sounds a lot like a command. Can a Committee Note issue such a command? Another participant had a similar reaction: "I highlighted that sentence when I got to it."

There followed a discussion of the proper balance between what's in the rule and what's in the Note. We have been admonished not to engage in "rulemaking by Note." On the one hand, the Note is meant to be read to explain the rule, so very specific directives in the Note may be given effect though not in the rule. On the other hand, some courts may regard the Note as akin to legislative history and very separate from the rule language, which is what was really adopted. So a strong specific might need to be put into the rule to ensure that it received appropriate attention. And it does appear that a considerable proportion of the lawyers rarely or never look at the Note.

One idea was that this particular sentence probably should be softened. It could instead say something like "It is often a good idea" to provide a list in advance, that "The conference is likely to be more productive if" a list is provided in advance. That gets out the idea but seems less of a command. Could an organization now say, for example, that its duty to confer in good faith does not apply until the list is supplied? That might well be counterproductive.

The same sort of treatment could be used for raising other specifics. For example: "Parties may well wish to discuss . . ." As to some things, however, that might seem odd. For example, how would one deal with post-deposition supplementation at that point? Why should the parties presume, before the deposition, that there will be a need to supplement?

Concerns were reiterated about being too prescriptive in either the rule or the Note. Prescriptions can be used as weapons in the negotiation. Putting in too many specifics, or pressing them too forcefully, could reinforce the sort of confrontational behavior that now frustrates discovery in general and sometimes 30(b)(6) depositions in particular.

The discussion shifted to efforts to emphasize the importance of the 2015 amendments in the Note. The changes to Rule 1 and Rule 26(b)(1), stressing both cooperation and proportionality, should appear at the outset. That could tie in with urging the parties to resolve "process issues" in a cooperative manner.

One more point was raised: At least one member of the Subcommittee has heard recently of frustration about the application of the Committee Note to the 2000 amendment to Rule 30 imposing a one day of seven hours limit on depositions, as applied to 30(b)(6) depositions. That Note says that the time limit for each person designated should be a full seven hours. At least in one case, that worked as something of an added burden on an organization that designated two persons. On the other hand, if an organization designates six people that may present real challenges for the party seeking discovery in deciding how much time to spend with the first or the second person so designated. That might be particularly difficult if there is no

advance disclosure which witness will address which topic, and more so if some of the people designated possess information about relevant issues not on the topic list for the 30(b)(6) deposition.

A reaction was that this kind of timing issue is not at all unusual. But usually the parties work these matters out. Another reaction was that this experience illustrates the role of the Committee Note. The specific from 2000 was in the Note, not in the rule, but the judge said that would be treated as being the meaning of the rule.

Another possible topic to mention in the Note was raised -- should the Note tell lawyers when they should go to the judge? We don't want to encourage them to reach impasse and require judicial mediation, but we also don't want them to persist too long in confrontational behavior before seeking judicial guidance. The reaction was that such advice is not needed. The lawyers know that the judge is the ultimate arbiter and also that they are expected to work out things on their own. Moreover, the question is likely to vary from case to case, and perhaps from judge to judge.

A reaction was that the 2015 Committee Note to Rule 26(b)(1) addresses fairly specifically the issue when the parties should go to the judge. But that discussion emerged in large measure from objections during the public comment period that the rule amendment commanded the party seeking discovery to demonstrate that the discovery sought was not a disproportionate burden on the responding party. So that discussion is not so much about the question of timing as it is about what one might call the burden of proof.

More generally, a caution was added: The more detailed we make the rule, the more we may build in delay. If there's a long list of mandatory or semi-mandatory topics for discussion, that can be a recipe for delay.

On the other hand, it was noted, there is a different risk if things are left to fester -- there may be a need to reopen the deposition once those details are resolved, perhaps by the court. "It is a lot more effective to get them resolved at the front end."

The reality seems to be that lawyers sometimes think it is tactically better to go to the judge only after what one might call a "failed deposition," rather than going before the deposition when concerns may seem overblown.

There was agreement about frequent lawyer attention to such tactics, but a caution that generalizing is almost impossible. One thing that is almost certainly true almost all the time is that a meet and confer session will make the trip to court more productive. But it is not particularly productive to make a trip

to court when one really is not needed. That is also a major purpose of meet and confer requirements -- to avoid judicial intervention unless it is really needed.

The consensus emerged that the current draft rule amendment should remain as in the draft for this call, and that Prof. Marcus should attempt to work up revised Note language to address the concerns discussed during this call. To facilitate that effort, it would be very useful for Subcommittee members to send in suggestions about ways the current draft could be improved. That could be done by email, with copies to all involved. At present, it does not seem that a further conference call will be needed before the April full Committee meeting. If it is needed, it should occur well in advance of the date on which agenda materials must be submitted for the April meeting.

One point was made about the revision of the Note: The Note refers to the "noticing party," but the rule speaks of the "serving party." It would be good to use the term from the rule in the Note.

One more topic came up: During the Nov. 28 call, the possibility of making a parallel change to Rule 45 was mentioned, and the Reporter was to look into that. That review leads to the conclusion that no change to Rule 45 is needed. Our amendment does propose adding a requirement that the subpoena inform the nonparty of the duty to confer about the things listed in the amendment to the rule. The clearly bilateral rule language we have drafted makes that clear.

But adding that requirement for the subpoena does not mean that there need be a change to Rule 45. Rule 30(b)(6) already requires that the subpoena alert the nonparty organization that it is required to select a person to testify on its behalf. That required notice in the subpoena is nowhere mentioned in Rule 45, but the failure to mention it in Rule 45 has not produced any difficulties. So there is no need to worry about adding something to Rule 45 about what we are adding to Rule 30(b)(6).

Rule 26(f)

Discussion shifted to the question whether to bring to the Advisory Committee the possibility of a change to Rule 26(f) in addition to the change just discussed to Rule 30(b)(6).

Based on the discussion on Nov. 28, Prof. Marcus had presented four alternatives for such a Rule 26(f) change. Among those four alternatives, the consensus was that if a change were brought before the Advisory Committee it should be Alternative 1.

But the policy question was "Do we have to do this?" Several members of the Subcommittee are unconvinced that making a change to Rule 26(f) would be productive. The Rule 26(f) conference is usually much too early to delve into any details of

a 30(b)(6) deposition. Any change should make clear, at least in the Note, that early arrangements about such depositions are subject to revision later in light of developments in discovery in the case. Although there may be a few categories of cases in which one can state with confidence (perhaps near certainty) at the outset that 30(b)(6) depositions will occur, and perhaps also speak with some confidence about what issues they should cover, that will not be true in most cases.

The argument in favor of bringing the 26(f) idea forward is that unless it is included in a published package it will almost surely not be possible to add it afterwards even if public comment shows that it would be a valuable addition. On the other hand, it would not be difficult to include this idea as an invitation for comment on the 30(b)(6) proposal while making it clear that the Advisory Committee is not urging the adoption of such a change to Rule 26(f) but only inviting comment on whether it should be adopted along with the 30(b)(6) change if that goes forward after public comment. Such an invitation could even note that there is concern that in many cases such discussion would be premature at the 26(f) stage.

For the present, the question is only whether to bring this issue to the Advisory Committee. If we do, we should frame the possibility in the best possible way. We need not tell the full Advisory Committee that the Subcommittee strongly favors amending Rule 26(f) or, perhaps, even that it strongly favors including the possibility in the package put out for public comment.

The consensus was to carry forward the 26(f) idea for the Advisory Committee meeting.

A question was raised about leaving in the word "contemplated" in the draft. It is in brackets now. Retaining that word may be a way to emphasize awareness that 26(f) conferences occur early enough in the case that often the idea of a 30(b)(6) deposition arises only later. On the other hand, including it may invite everyone to say "Oh, I hadn't thought about it yet, so it was not contemplated." Surely we do want people to consider this issue if it's in the cards from the outset.

The resolution was to leave "contemplated" in the draft, but also to leave it in brackets.

Prof. Marcus should try to draft a brief Committee Note for the 26(f) change, which should explain that this change somewhat parallels the change to Rule 30(b)(6) and (perhaps in brackets) that it is intended only to urge discussion of such depositions when they are reasonably contemplated at the time the conference occurs.

TAB B3

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18-CV-M

**COMMENT
to the**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**THE PROPOSED RULE 30(b)(6) AMENDMENT SHOULD NOT BE PUBLISHED
WITH THE RADICAL MANDATE THAT AN ORGANIZATION “MUST CONFER”
ABOUT THE IDENTITY OF WITNESSES WHO WILL TESTIFY ON ITS BEHALF**

May 18, 2018

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Comment to the Committee on Rules of Practice and Procedure (“Standing Committee”).

INTRODUCTION

The Civil Rules Advisory Committee (“Advisory Committee”) proposes to amend Rule 30(b)(6) for the principal purpose of assisting counsel in resolving the frequent back-and-forth disputes²

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ’s corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

² Such disputes frequently manifest themselves in motions in which the noticing party claims the witness was unprepared to address the topics set forth in the notice, while the responding party asserts that the questions raised during the deposition exceeded the scope of the announced topics. Such disputes suggest a lack of mutual understanding of the topics. For examples of cases addressing such disputes arising from the parties’ inconsistent expectations about Rule 30(b)(6) topics, compare *New Jersey Mfrs. Insurance Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at *3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is “limited to information called for by the deposition notice”); *State Farm*, 250 F.R.D. at 216 (“If a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question.”); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party’s problem) with *Clapper v. Am. Realty Inv’rs, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company’s expense, where the deponent was unfamiliar with several areas of inquiry); *Wausau*

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concerning “overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.”³ After considering a number of ideas for reforming practice under the rule,⁴ the Advisory Committee settled on a meet-and-confer approach that requires a good-faith conference about “the number and description of the matters for examination.”⁵ This approach holds some promise of promoting cooperation and helping lawyers gain a mutual understanding about a deposition’s intended subject matters, and, therefore, the appropriate scope of witness preparation. Unfortunately, however, the Advisory Committee has also added a novel and problematic provision directing that organizations “must confer” regarding “the identity of each person who will testify.”⁶ Such a requirement would radically and inappropriately depart from the well-settled principle that it is the organization’s sole prerogative to name the witness who will speak on its behalf. Even if it is not the Advisory Committee’s intent to provide noticing parties input in selecting the witnesses, the proposal suggests otherwise and would result in more discovery disputes, not fewer.⁷ Including this provision in the proposed amendment for public comment would elicit an overwhelming reaction from the bar, defeating the Advisory Committee’s goal of obtaining useful input on the broader question of whether Rule 30(b)(6) should include a mandatory conference about “the number and description of the matters for examination.” The Standing Committee should remove “the identity of each person who will testify” from the proposed amendment prior to any decision on publication.

Underwriters Ins. Co. 310 F.R.D. 683, 687 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company’s selected deponent had been unable or unwilling to testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. 08-93-ART, 2010 WL 4629761, at *12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was “unprepared”); *State Farm*, 250 F.R.D. at 217 (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition).

³ Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, Report of the Rule 30(b)(6) Subcommittee, at 117, [hereinafter *Agenda Materials*] available at <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf>.

⁴ For a discussion of ways to improve Rule 30(b)(6), see Lawyers for Civil Justice, “*Advantageous to Both Sides*”: *Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b_6_7-5-17.pdf; Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b_6_12-21-2016.pdf, and Lawyers for Civil Justice, “*Give Them Something to Talk About: Drafting a Rule 30(b)(6) Consultation Requirement with Sufficient Parameters to Ensure Meaningful Results*” 2-3 (December 15, 2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_30_b_6_consultation_requirement_final_12-15-17.pdf.

⁵ *Agenda Materials* at 116-17.

⁶ *Agenda Materials* at 117.

⁷ An Advisory Committee member made a similar observation prior to the Advisory Committee’s non-unanimous vote to recommend the proposal for consideration by the Standing Committee.

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I. MANDATING THAT ORGANIZATIONS “MUST CONFER” ABOUT THEIR CHOICE OF RULE 30(b)(6) WITNESSES WOULD CREATE A NEW DISCOVERY REQUIREMENT THAT IS ANTI-ETHICAL TO EXISTING CASE LAW AND THE PRINCIPLE OF THE RULE.

Rule 30(b)(6) requires “the named organization” to designate one or more persons “to testify on its behalf.”⁸ Because the Rule 30(b)(6) deponent speaks for the organization, the organization has complete discretion and responsibility for determining the identity of its representatives.⁹ The ABA Section of Litigation Federal Practice Task Force agrees: “Since the organization will be bound by the witness’s testimony, it should retain maximum flexibility as to who it may choose to designate.”¹⁰ The party serving the Rule 30(b)(6) deposition notice has no basis for demanding any role in the selection of witnesses.¹¹ As one court put it, Rule 30(b)(6) “does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff’s attempt to do so is not appropriate.”¹² The organization’s choice “will not be disturbed as long as the witness can testify competently.”¹³ In fact, courts have widely held that, because the witness is not speaking to his or her personal knowledge, the organization need not disclose the name of the witness in advance of a Rule 30(b)(6) deposition¹⁴ because the identity

⁸ FED. R. CIV. P. 30(b)(6); *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (“[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation”).

⁹ See, e.g., *Quilez-Velar v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) (“the noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice.”); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008) (“Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. “); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007) (“Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness.”).

¹⁰ ABA Section of Litigation Federal Practice Task Force Report on Rule 30(b)(6) Depositions of Organizations 4 (Nov. 23, 2015) (*attached to* Letter from Koji Fukumura et al. to the Hon. Judge D. Bates (Oct. 13, 2017) available at http://www.uscourts.gov/sites/default/files/17-CV-DDDDDD-Suggestion_Koji_Fukumura_0.pdf).

¹¹ See 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) (“[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]”); 7 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 30.25[3](3d ed.2013) (“It is ultimately up to the organization to choose the Rule 30(b)(6) deponent, and the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter.”).

¹² *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007). See also *Cleveland v. Palmby*, 75 F.R.D. 654, 657 (W.D. Okla. 1977) (“[Rule 30(b)(6)] does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization”).

¹³ See, e.g., *Thermolife Int’l, LLC v. Vital Pharm., Inc.*, No. 14-61864-CIV-ZLOCH, 2015 WL 11197783, at *1 (S.D. Fla. Oct. 5, 2015); see also *Poseidon Oil Pipeline Co., v. Transocean Sedco Forex, Inc.*, No. 00-2154, 2002 WL 1919797, at *3 (E.D. La. Aug. 20, 2002) (“[organization] is correct that [noticing party] cannot compel it to name a specific person”).

¹⁴ *Id.* See also *Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating “the identity of Defendants’ corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition.”); *Klorczyk v. Sears, Roebuck & Co.*, Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D.Conn. Apr. 9, 2015) (“the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness.”);

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of the witness is “irrelevant.”¹⁵ A party who wants to depose a particular individual already has separate mechanisms for seeking such a deposition.¹⁶

The Advisory Committee’s proposed amendment mandating conferral about “the identity of each person who will testify”¹⁷ will upend these well-settled principles by seeming to provide noticing parties standing to participate in the decision about who will testify, and to resist the organization’s decision if the noticing party would prefer a different witness. The language will exacerbate, not remedy, the contentious nature of many Rule 30(b)(6) depositions. Moreover, if not removed from the proposed amendment prior to publication, this provision is sure to draw such overwhelming attention from the bar that it will compromise the Advisory Committee’s ability to get useful reaction to the more salient question of whether a good-faith conference about “the number and description of the matters for examination” would assist counsel in avoiding or resolving disputes about “overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.” The Standing Committee should remove this provision from the proposed amendment.

II. DEFINING THE CONFERENCE AS “CONTINUING IF NECESSARY” DOES NOT REMEDY THE COMPLICATIONS CAUSED BY CREATING AN OBLIGATION TO CONFER ABOUT THE IDENTITY OF WITNESSES.

During its April meeting, the Advisory Committee added timing language to the draft Rule 30(b)(6) amendment defining the obligation to confer as “continuing if necessary.” This timing language was intended to facilitate the mandate to confer about witness identity because, without it, the proposal would give rise to an expectation that conferral about witness identity would occur during the same meet-and-confer session in which the “number and description of the matters for examination” are discussed. Obviously, the organization cannot provide witness names on the spot, immediately upon learning the description of the topics. A responding organization often needs time to determine appropriate and available witnesses, and identifying such witnesses well in advance of an upcoming deposition can be difficult or even impossible. To address this issue, the Advisory Committee entertained several ideas of language that would define the obligation to confer as ongoing, and quickly adopted to the “continuing if necessary” construction. But that language does not solve the many problems that would follow from a mandate to confer about “the identity of each person who will testify,” as discussed above.

¹⁵ See, e.g., *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014) (“the Rule 30(b)(6) deponent’s name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. See FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz’s motion to compel with regard to the identify of Wabash’s Rule 30(b)(6) deponent because it seeks irrelevant information.”).

¹⁶ FED. R. CIV. P. 30(a) & 30(b)(1); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMTP, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010).

¹⁷ Agenda Materials at 116-17.

This submission was received on May 18, 2018, and posted by the Rules Committee Staff as a suggestion at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-suggestions>. Because the submission was made after the Civil Rules Advisory Committee's April 2018 meeting, it has not followed the usual path of consideration, in the first instance, by the Advisory Committee.

CONCLUSION

Although the Advisory Committee's proposed meet-and-confer amendment to Rule 30(b)(6) holds some promise to help lawyers reach common understanding about "the number and description of the matters for examination," requiring the conference to include "the identity of each person who will testify" would instead exacerbate an already acrimonious process by upending well-established law. The Standing Committee should not publish the proposal as-is because doing so will thwart rather than facilitate the Advisory Committee's goal of obtaining useful input from the bar as to whether Rule 30(b)(6) should require a conference about the substance of the deposition. Instead, the Standing Committee should remove the mandate to confer about "the identity of each person who will testify" from the proposed amendment prior to any decision about publication for public comment.

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TAB B4

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This submission was received on May 24, 2018, and posted by the Rules Committee Staff as a suggestion at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-suggestions>. Because the submission was made after the Civil Rules Advisory Committee's April 2018 meeting, it has not followed the usual path of consideration, in the first instance, by the Advisory Committee.



18-CV-N

Koji F. Fukumura
+1 858 550 6008
kfukumura@cooley.com

VIA EMAIL AND US MAIL

May 24, 2018

Honorable David G. Campbell
U.S. District Court, District of Arizona
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, SPC 58
Phoenix, AZ 85003

Re: Rule 30(b)(6)

Dear Judge Campbell:

We write to you in your capacity as Chair of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference to address changes to Fed. R. Civ. P. 30(b)(6) proposed by the Advisory Committee on Court Rules.

As an initial matter, we greatly appreciate the fact that the Advisory Committee decided to review Rule 30(b)(6) at the request of the ABA Section of Litigation's Federal Practice Task Force based upon the Task Force's Report of November 23, 2015, as well as other requests noted by the Committee. While we are disappointed that the proposals emanating from the Advisory Committee did not address more of the issues we highlighted in the Task Force Report, we will reserve additional comments for the formal comment period after publication of a specific proposed amended rule. We write now, however, to raise two modest proposals we hope the Standing Committee will incorporate prior to publication of the Advisory Committee's proposed amended rule.

First, we focus on the following language that we understand is being proposed regarding requiring parties to meet and confer before taking a Rule 30(b)(6) deposition:

Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify.

We suggest that the following, in words or substance, be added:

If the parties cannot resolve material disagreements, they are encouraged to request a conference with the court to obtain an early resolution of the matters.



Honorable David G. Campbell
May 24, 2018
Page Two

At present, if issues emanating from the service of notices or subpoenas for Rule 30(b)(6) depositions of organizations cannot be resolved prior to the deposition, the only recognized course is for the responding organization to move for a protective order, or for the noticing party to move to compel additional testimony after an inadequate deposition, both of which are often expensive for the parties and time-consuming for all, including the Court. Consistent with rule changes encouraging more informal practices for resolving discovery disputes, we believe a more efficient mechanism for resolving these disputes should be available. We endorse early court conferences on discovery disputes, and Rule 30(b)(6) disputes are no different. It will of course be up to the individual judge or magistrate judge to decide how to handle requests for conferences. Some may have a short call or brief in-person conference, preceded by, or in lieu of, short letters, or handle the requests in a different manner.

Moreover, the availability of early court intervention without the need for formal motion practice is likely salutary in resolving, or at least narrowing, the disputes. Lawyers are plainly more reasonable when they understand they will need to defend their positions orally, face-to-face to the court. Pre-deposition involvement of a court to address issues, such as the number of topics that may be requested, selection of particular witnesses, or the number of witnesses to offer, not only is consistent with the objectives of Rule 1, but also better enables lawyers to push back on possible unreasonable demands of both adversaries and even clients. This informal approach is far superior to formal motions for protection or enforcement, with the attendant expense and delay.

Second, we seek the resolution of what we perceive as an inconsistency in the Rule Notes. We previously identified this point in the Task Force Report, dated November 23, 2015, at 7, but the point may not have been addressed due to the volume of comments received by the Committee. The Note states a Rule 30(b)(6) deposition counts as a single deposition but, if multiple witnesses are identified, each witness may be deposed for seven hours. We urge that this approach carries unintended consequences. An organization is disincentivized to produce more than one witness, even when multiple witnesses with knowledge in different areas might be more appropriate. By designating multiple witnesses, organizations subject themselves to multiple days of depositions, when the organization could limit the deposition to a single day by educating a person without any independent knowledge on all subjects. We submit a person with second-hand information is often less knowledgeable than more than one witness with first-hand knowledge.

Instead, we propose a practical approach based upon the time actually expended. If multiple witnesses can cover the subjects identified in a single seven-hour day, the deposition should count as one deposition. If, on the other hand, it is necessary to exceed seven hours in a single day to complete the number of subjects identified, regardless of the number of witnesses, each seven hours should be treated as a separate deposition for purposes of the ten-deposition limit, or any other limits as may be set by the Court.

This submission was received on May 24, 2018, and posted by the Rules Committee Staff as a suggestion at <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-suggestions>. Because the submission was made after the Civil Rules Advisory Committee's April 2018 meeting, it has not followed the usual path of consideration, in the first instance, by the Advisory Committee.



Honorable David G. Campbell
May 24, 2018
Page Three

We hope the Standing Committee will find these two modest suggestions persuasive for the rule revision process.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Koki Furumura".

KOKI FURUMURA*
PALMER G. VANCE II*
BARBARA J. DAWSON*
JAMES A. REEDER, JR.*
LAURENCE F. PULGRAM*
STEVEN A. WEISS*
JEFFREY J. GREENBAUM*
GREGORY R. HANTHORN*
IRWIN H. WARREN*
WILLIAM T. HANGLEY*
MICHELE D. HANGLEY*
GEORGE KRYDER*
TRACEY SALMON SMITH*

* The signers are present, past and upcoming Chairs of the ABA Section of Litigation, the current co-chairs and members of the ABA Section of Litigation Federal Practice Task Force, and the Section Liaison to the Advisory Committee on Civil Rules. As required by ABA protocol, we offer these comments only in our individual capacities. Additionally, the views expressed in this letter are solely our own and may not reflect the views of our respective law firms.

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 10, 2018

1 The Civil Rules Advisory Committee met in Philadelphia,
2 Pennsylvania,, on April 10, 2018. Participants included Judge John
3 D. Bates, Committee Chair, and Committee members John M. Barkett,
4 Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker
5 C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by
6 telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad
7 Readler; Virginia A. Seitz, Esq. (by telephone); Judge Craig B.
8 Shaffer; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.
9 Professor Edward H. Cooper participated as Reporter, and Professor
10 Richard L. Marcus participated as Associate Reporter. Judge David
11 G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter (by
12 telephone), Professor Catherine T. Struve, Associate Reporter, and
13 Peter D. Keisler, Esq., represented the Standing Committee. Judge
14 A. Benjamin Goldgar participated as liaison from the Bankruptcy
15 Rules Committee. Laura A. Briggs, Esq., the court-clerk
16 representative, also participated. The Department of Justice was
17 further represented by Joshua Gardner, Esq. Rebecca A. Womeldorf,
18 Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the
19 Administrative Office. Dr. Emery G. Lee attended for the Federal
20 Judicial Center. Observers included Alexander Dahl, Esq. (Lawyers
21 for Civil Justice); Brittany Kauffman, Esq. (IAALS); William T.
22 Hangle, Esq. (ABA Litigation Section liaison); Fred B. Buck, Esq.
23 (American College of Trial Lawyers); Benjamin Robinson, Esq.
24 (Federal Bar Association); Joseph Garrison, Esq. (NELA); Susan H.
25 Steinman, Esq. (AAJ); Amy Brogioli (AAJ); Melissa Whitney, Esq.,
26 (FJC); Naomi Mendelsohn, Esq. (Social Security Admn.); Francis
27 Massaro, Esq. (Admn. Conf. of U.S.); Jerome Scanlan, Esq. (EEOC);
28 Professor Jordan Singer; Leah Nicholls, Esq.; Robert Levy, Esq.;
29 Brittany Schultz, Esq.; David Kerstein; Julia Sutherland; Bob
30 Chlopak; Kristina Seseck; John Beisner, Esq.; Robert Owen, Esq.;
31 Malini Moorthy, Esq.; Andrew Cohen, Esq.; and Andrew Strickler,
32 Esq.

33 Judge Bates welcomed the Committee and observers to the
34 meeting. He noted that four members – Barkett, Folse, Matheson, and
35 Nahmias – were finishing six years of service, the maximum two
36 terms in standard practice. Judge Shaffer is retiring from federal
37 service, and a replacement must be found. And no successor has yet
38 been appointed for former member Judge Oliver. As many as six new
39 members may have been appointed by the time of the next meeting in
40 November. This will be more change than usual in the Committee's
41 membership.

42 Judge Bates reported that the Standing Committee meeting in
43 January provided valuable input on the Rule 30(b)(6), MDL, and
44 social security review projects. The subcommittees have taken this

45 input into account in the ongoing work that they report today.
46 Nothing in the work of the Judicial Conference last March bears on
47 the Committee's ongoing work. Finally, he noted that the Supreme
48 Court continues to deliberate the Civil Rules proposals that were
49 transmitted by the Judicial Conference last fall.

50 *November 2017 Minutes*

51 The draft Minutes of the November 7, 2017 Committee meeting
52 were approved without dissent, subject to correction of
53 typographical and similar errors.

54 *Legislative Report*

55 Julie Wilson presented the Legislative Report. She noted that
56 in November the Senate Judiciary Committee held a hearing on the
57 impact of lawsuit abuse on American small businesses and job
58 creators. The subject is connected to the Lawsuit Abuse Reduction
59 Act of 2017, which passed the House in March 2017 and remains
60 pending in the Senate. Another House Bill addresses nationwide
61 injunctions, a topic that was recently on the Committee agenda. It
62 has a provision that would limit an injunction so that it reaches
63 only parties to the case, and a provision that would limit
64 injunctions to the district where issued.

65 *Rule 30(b)(6)*

66 Judge Bates introduced the three primary items on the agenda
67 as the Reports of the Subcommittees on Rule 30(b)(6), MDL
68 practices, and Social Security review. Skeptics have questioned the
69 need for rules amendments in each of these areas. Each will provoke
70 significant discussion, particularly Rule 30(b)(6) if it leads to
71 a recommendation to publish a proposal for comment.

72 Judge Ericksen introduced the Report of the Rule 30(b)(6)
73 Subcommittee. The November Committee meeting provided useful
74 discussion of ways to improve the November draft. The Subcommittee
75 conferred and made improvements following that meeting. The
76 Subcommittee conferred again after learning of the January
77 discussion in the Standing Committee.

78 The Rule 30(b)(6) amendment proposed by the Subcommittee
79 appears at pp. 116-117 of the agenda materials. Several features
80 deserve notice. It directs the person serving the notice or
81 subpoena and the entity named as deponent to confer before or
82 promptly after the notice or subpoena. "or promptly after" has been
83 confirmed following earlier discussion. The question whether to say
84 the parties "should" or "must" confer has been resolved in favor of
85 "must," as a more appropriate direction for rule text. On the other
86 hand, the possibility of adding "or attempt to confer" has been

May 8 version

87 rejected. Those words make sense in Rule 37, where they ensure that
88 a recalcitrant party cannot thwart an attempt to compel proper
89 discovery behavior by refusing to confer. They do not fit in Rule
90 30(b)(6), which should not be satisfied by a perfunctory attempt.

91 The Subcommittee discussed the proposed Committee Note at
92 length. It chose a "less is more" approach. The Note does not
93 prescribe topics to be discussed, for fear of prompting litigation
94 about the adequacy of the conferring.

95 The Subcommittee also presents for consideration a possible
96 amendment of Rule 26(f), which appears at p. 119 of the agenda
97 materials. This proposal would add a suggestion that the parties
98 "may consider issues regarding [contemplated] depositions under
99 Rule 30(b)(6)" in the Rule 26(f) conference. The Subcommittee
100 believes the Committee should consider this topic, but recommends
101 that the amendment not be advanced for publication. Although the
102 parties may be in a position to think about Rule 30(b)(6)
103 depositions at the Rule 26(f) conference in some cases, in most
104 cases the need to depose an entity and the matters to be covered
105 will develop only as discovery progresses through other means. The
106 possible Rule 26(f) proposal is described in a bracketed sentence
107 in the Committee Note, p. 118 lines 237-239. The sentence that
108 follows, also in brackets, observes that in some cases discussion
109 at a Rule 26(f) conference may satisfy the Rule 30(b)(6) obligation
110 to confer. This sentence makes sense whether or not the Rule 26(f)
111 amendment is proposed, but it is not clear that it should be
112 retained. It may be that it will simply invite disputes about the
113 sufficiency of preliminary discussion in a Rule 26(f) conference to
114 satisfy the Rule 30(b)(6) requirement.

115 Judge Bates thanked the Subcommittee for this report, and
116 suggested that it be reviewed from the perspective of experience.
117 From the outset, the Committee has been advised that most Rule
118 30(b)(6) problems are handled by the parties. If that fails, the
119 court can resolve them without much ado. Judges, especially
120 magistrate judges, say they seldom encounter Rule 30(b)(6)
121 problems. So it is argued there is no need for any amendment. What
122 is the Subcommittee view on this?

123 Judge Ericksen responded that anxiety about amending Rule
124 30(b)(6) has been substantially reduced when lawyers see the
125 conservative amendment actually proposed. The question whether to
126 go ahead with the proposal was the subject of back-and-forth
127 discussion in November. The Subcommittee concluded that the
128 proposal will bring into rule text the good practices in some
129 courts and spread them to courts where the rule is not working so
130 well. The need is real. "There is a disconnect between what lawyers
131 see – frustration, and a wish to do something – and what judges
132 see."

May 8 version

133 Professor Marcus observed that about 12 years ago, the
134 Committee went through Rule 30(b)(6) very carefully. Since then the
135 Committee has repeatedly heard of problems with it. A lot can be
136 learned from public comment, just as the Subcommittee learned a lot
137 from the hundred or so comments offered in response to the
138 Subcommittee's invitation.

139 A Subcommittee member added that the Subcommittee also
140 recognizes that the 2015 amendments are working their way through
141 the system. And reading all the Rule 1 cases shows that judges are
142 invoking Rule 1 "to tell lawyers to behave better." Help also will
143 be found in the new Rule 26(b)(1) definition of the scope of
144 discovery. Not that progress is as uniform as might be hoped.
145 References to the stricken phrase "reasonably calculated to lead to
146 the discovery of admissible evidence," for example, have appeared
147 in 99 cases in the weeks since this February 1, either in
148 describing arguments of counsel or in the court's own statements.
149 "Rule 30(b)(6) is a lightning rod." It generates disputes about the
150 number and lack of clarity of matters for examination, what
151 documents to prepare for, and lack of preparation. These seem to be
152 case-management problems. If the proposed amendment encourages
153 judges to become more involved, it will do good work.

154 Another Subcommittee member noted that he had been a fairly
155 strong advocate for amending Rule 30(b)(6) based on his own
156 experience. "Over the years, the process keeps getting reinvented
157 case-by-case." But some proposals to solve problems directly would
158 spawn their own problems. The Subcommittee proposal looks fairly
159 modest. "It is what happens when good lawyers work together." Yet
160 not all lawyers do that. Putting it into the rule can make it
161 happen more often. And the Committee Note highlights added issues
162 the lawyers should talk about. Some proponents of change will be
163 upset that the proposal does not go far enough. But it is so modest
164 that it is hard to imagine being upset with what it does.

165 Still another Subcommittee member echoed these thoughts.
166 "Putting in more detailed commands will lead to more fights."
167 Limiting the amendment to a requirement to confer is a sound
168 approach. It is better at this point in the rule's evolution.

169 A different Subcommittee member observed that "The grandiose
170 ideas gave way to a 'little nudge.'" The proposal is a good first
171 step to prod the parties to confer and work it out.

172 Three Committee members turned to the draft Rule 26(f)
173 amendment, agreeing that they would not recommend it for
174 publication. It is likely to stir fights in the Rule 26(f)
175 conference.

176 That issue prompted a suggestion that if the Rule 26(f) draft

May 8 version

177 does not go forward, thought should be given to deleting the final
178 sentence from the proposed Committee Note, p. 118, lines 242-245:
179 "In appropriate cases, it may also be helpful to include reference
180 to Rule 30(b)(6) depositions in the discovery plan submitted to the
181 court under Rule 26(f)(3) and in the matters considered at a
182 pretrial conference under Rule 16." Discussion suggested that if
183 the Rule 26(f) proposal does not go forward, the bracketed sentence
184 referring to it at lines 237 to 239 will be deleted. The next
185 bracketed sentence, suggesting that discussion at a Rule 26(f)
186 conference might at times satisfy the Rule 30(b)(6) mandate to
187 confer, might also be deleted for fear of generating new disputes.
188 But why not keep the suggestion that the parties might, without
189 prompting by new rule text, find it helpful in some cases to
190 include provisions for Rule 30(b)(6) in their discovery plan and
191 perhaps seek to work out Rule 30(b)(6) issues at a scheduling
192 conference? These questions will be framed more directly once the
193 fate of the Rule 26(f) draft is decided, but the suggestion at
194 lines 242-245 seems useful. "Let's not tinker too much with the
195 Note."

196 It was noted that the Department of Justice would oppose going
197 forward with the Rule 26(f) draft. As to Rule 30(b)(6), experience
198 has been that it is not a concern. Still, it can be a difficult
199 area for litigants given the breadth of the matters that may be
200 described for examination. On the other hand, why does it matter
201 who will be the persons designated by an entity deponent to provide
202 testimony? Requiring discussion of who might be a witness may be
203 difficult when the entity is not in a position to commit, and there
204 is a risk that it will be difficult to change witnesses later. The
205 entity may not yet know who can best testify, or how many.

206 The first response was that "there is a bit of reciprocity."
207 The deposing party has to discuss the number and description of
208 matters for examination. The deposed entity can think about the
209 designation of witnesses only when the descriptions of the matters
210 for examination are worked out. The party taking the deposition, on
211 the other hand, needs to know whether the designated witness is
212 also a fact witness. That can support discussion of ways to avoid
213 duplicating depositions. The entity "is not required to put its
214 feet in concrete. This is discussion, not a binding commitment."

215 A counterpoint was that over the last 25 years of reviewing
216 discovery decisions, the most litigated issue arises from arguments
217 that Rule 30(b)(6) designated witnesses are not adequately
218 prepared.

219 The first response found a parallel. The proposal only
220 requires that the parties confer in good faith. "They need not
221 resolve every problem, but they can reduce the number of problems."

May 8 version

222 The doubt about discussing the identity of witnesses was
223 repeated. It will help to confer about the matters for examination
224 to learn whether they are needed, and how clearly they are defined.
225 But why does the deposing party care whether the witness is John
226 Smith or Joan Smith?

227 The next response was that the entity can say that the witness
228 will be John Smith or Mary Jones. Then they can confer about
229 whether one of them also will be a fact witness, and perhaps should
230 be designated as the entity's witness for that reason.

231 A Subcommittee member said that in his cases, the deposing
232 party always asks who the witness will be. And, at some point, the
233 entity always says who it will be. A similar comment was that the
234 entity can, in conferring, say that "I can't tell you now. I will
235 tell you later."

236 The doubter agreed that "parties do tend to share names." But
237 requiring discussion may lead to problems. One response was that
238 the entity can say that it is too early to be sure who will be
239 designated, even that the choice may depend on who can be made
240 available on the day the deposing party wants to take the
241 deposition.

242 Another response agreed that witnesses are named in advance.
243 "There are cases where the witness is obvious." On the other hand,
244 there are cases where it may take weeks or even months to prepare
245 the witness to testify. If the witness is not obvious because of
246 his role in the underlying events, what value is there in
247 conferring about identity?

248 Judge Ericksen noted that the direction to confer about the
249 identity of the witnesses could be stripped from the proposal,
250 leaving the rest to go ahead.

251 Professor Marcus pointed out that the Committee Note,
252 reflecting the present rule text that will remain unchanged, says
253 that the entity has the right to designate its witness. The
254 proposal does not compel it to identify them before the deposition.
255 But getting the topic on the table at the conference seems like a
256 good idea. If conferring about witness identity remains in the
257 proposal for publication, we will get comments and learn from them.

258 Another Committee member suggested that discussion of witness
259 identity should be left in the proposal to elicit comments. Perhaps
260 some way might be found to stimulate comments, such as placing this
261 part in brackets, adding a question in a footnote, or specifically
262 inviting comments in the message transmitting the proposal for
263 publication. It was agreed that any of those tactics can be used.
264 But even without them, there is enough interest to guarantee

May 8 version

265 comments.

266 Judge Ericksen asked whether it would help to place brackets
267 around “[and the identity of each person who will testify].” The
268 Subcommittee got a lot of comments in response to its invitation.
269 But it continues to be important to get comments about all aspects
270 of the proposal. Emphasizing one part might be a distraction.

271 The opportunity to begin to confer “promptly after” the notice
272 or subpoena was pointed out as a feature that should reduce the
273 problem with discussing witness identity. That may justify leaving
274 this subject in the published proposal. But it would be better to
275 take it out. It will stir claims by deposing parties that they are
276 entitled to know the identity of the witnesses before the
277 deposition is taken.

278 This concern was echoed. Focusing on “the identity of each
279 person who will testify” “seems definitive.” A different Committee
280 member suggested that the text might be revised to require
281 discussion of who “might be” testifying as witnesses.

282 The duty to confer “in good faith” came back into the
283 discussion. The duty is not satisfied by one phone call. There will
284 be a continuing exchange. Perhaps the Committee Note can identify
285 the iterative nature of the process. Agreement was expressed. One
286 phone call is not good-faith conferring. The first step must be to
287 identify with some clarity the matters for examination. Then the
288 conference can move on to discuss who might be witnesses. Later
289 discussion added further support for the view that it is important
290 to emphasize the iterative nature of the process.

291 This view of the continuing duty to confer was questioned
292 under the rule text. It might be argued that a duty to confer
293 “before or promptly after” the notice or subpoena is satisfied by
294 a single, one-off conference. One way to address this concern may
295 be by elaboration in the Committee Note without changing the rule
296 text. The Note could say that beginning no later than “promptly
297 after” does not mean that prompt beginning should always be a
298 prompt conclusion. In some – perhaps many – cases the discussion
299 will have to continue through successive exchanges.

300 Judge Ericksen said that the proposal should carry forward
301 with the duty to confer about the identity of the witnesses. But it
302 could be useful to expand the Committee Note to say that although
303 the conference must be initiated promptly, it will often be an
304 iterative process that requires more than one direct discussion.

305 Another participant observed that the problem is that the
306 entity may not know the identity of its witnesses when the notice
307 or subpoena is served. Perhaps the rule should instead direct

May 8 version

308 discussion of "the manner in which the organization will respond,"
309 or "the steps the organization will take to respond." A Committee
310 member suggested that perhaps one of these phrases, with or without
311 some revision, might be published as a bracketed alternative.
312 Professor Marcus expressed concern that publishing several
313 bracketed alternatives might make the product seem less finished,
314 less carefully considered. It is more forceful to include
315 discussion of witness identity in rule text, without leaving it to
316 Committee Note elaboration on "steps to respond." Another
317 participant expressed a different concern: "manner" or "steps to"
318 respond seem to impose a very broad obligation to discuss such
319 things as the manner of searching electronic files, steps to learn
320 from internal sources who may be good witnesses because of personal
321 knowledge, the ability to learn added information, and the skill to
322 communicate information accurately under deposition questioning.

323 Discussion returned to a renewed observation that a lot of
324 people have said that it is a problem to begin a deposition without
325 knowing before that moment who the witness will be. This was met
326 with a question: would it be enough to resolve the problems for
327 both sides by directing discussion of not who "will," but who "may"
328 testify? One response was that "in good faith" properly identifies
329 the process of conferring, but "may" seems to reduce the quality of
330 the process.

331 A different suggestion was to add a few words to the rule
332 text: "must confer in good faith about the number and description
333 of the matters for examination, and in due course the identity of
334 each person who will testify." Or: "the matters for examination.
335 This discussion must include the identity of each person * * *."

336 Another possibility was suggested: "and begin to confer about
337 * * *."

338 A still different possibility was proposed: within a
339 reasonable time after determining the matters for examination, the
340 entity could be required to identify the persons "who likely will
341 testify." This met a widespread response: "likely" is not enough.
342 It also elicited a response that it would create problems to
343 require actual identification in rule text, but the issue could be
344 discussed in the Committee Note.

345 Committee discussion of Rule 30(b)(6) was suspended at this
346 point to enable the Subcommittee to confer over the lunch break.
347 The way was left open for recommendation of alternative rule texts.

348 After lunch, the Subcommittee returned with a proposal to
349 revise the Rule 30(b)(6) amendment by adding two words: "Before or
350 promptly after the notice or subpoena is served, the serving party
351 and the organization must begin to confer about * * *." These words

May 8 version

352 would give a meaningful time to work out the steps that will make
353 the deposition as useful as possible. They will support Committee
354 Note language elaborating the iterative nature of the process and
355 the interdependence of defining the matters for examination with
356 designating the witnesses.

357 Professor Marcus noted that adopting this change would require
358 revising the Committee Note in ways that cannot be accomplished by
359 drafting on the Committee floor. It will be better to draft after
360 the meeting, and to circulate the Subcommittee's recommendation for
361 electronic review and voting by the Committee. Enough time remains
362 for that to be done before the Report to the Standing Committee
363 must be submitted.

364 A Subcommittee member said that the Note will emphasize that
365 the conference is an ongoing process. It should emphasize the
366 connection between defining the matters for examination and
367 identifying the witnesses. The time for identifying witnesses
368 depends on this. The Note also should continue to make it clear
369 that the entity determines who the witnesses will be, and is
370 responsible for making sure that they are prepared.

371 The "begin to" words raised a new concern. Are they too soft?
372 Can a recalcitrant party say that it has no duty beyond beginning
373 to confer, and can quit once it has begun? One response was that
374 the Note can emphasize that "a voice-mail message is not good
375 faith." But another Committee member "would rather not change rule
376 text. 'Begin to' may soften the command." The Note can discuss the
377 iterative nature of the conferring process without adding these
378 words.

379 Judge Ericksen asked about a slight variation: "Beginning
380 before or promptly after * * *." It was agreed that this change
381 would not soften the command as much as "begin to confer." A
382 further change was suggested to make it firmer still: "Beginning
383 before or promptly after the notice or subpoena is served, and
384 continuing as necessary, the serving party and the organization
385 must confer * * *." That suggestion met the continuing fear that
386 any added rule language will provoke new fights, this time about
387 what is "necessary." But it was responded that "necessary" is
388 clear, and rejoined that "I can't tell you what I don't know" – it
389 should not be necessary to go on conferring forever to force a
390 designation at some indeterminate time before the deposition
391 begins. Still, three other members expressed support for the
392 "continuing as necessary" language.

393 These suggestions led to a renewed suggestion that the
394 Subcommittee's original proposal should be recommended for
395 publication without changing the rule text. The Committee Note can
396 explain the ongoing, iterative nature of the conferring process.

May 8 version

397 All agreed that the "begin to confer" alternative should be
398 dropped.

399 An observer suggested that all of this effort could be spared
400 by simply omitting "and the identity of each person who will
401 testify." There is no obligation to identify the person, so why
402 require discussion of identity? The organization needs to know the
403 matters for examination so it can prepare its witnesses, but the
404 conference should not go further. This view was supported by a
405 Committee member who did not want to encounter objections to the
406 organization's choice of witnesses, nor to require discussion of
407 who they will be. Professor Marcus replied that ultimately the
408 organization must choose someone to testify. The witness's identity
409 will be made known no later than the day of the deposition.

410 These questions were brought to a vote. The suggestion to add
411 "and continuing as necessary" was adopted by voice vote. The
412 Committee recommended publication of the proposal originally
413 advanced by the Subcommittee with this addition, adding these words
414 to Rule 30(b) (6):

415 * * * Before or promptly after the notice or subpoena is
416 served, and continuing as necessary, the serving party
417 and the organization must confer in good faith about the
418 number and description of the matters for examination and
419 the identity of each person who will testify. A subpoena
420 must advise a nonparty organization of its duty to make
421 this designation and to confer with the serving party. *
422 * *

423 The Committee Note will be revised to discuss the iterative
424 nature of the obligation to confer. The new Note language will be
425 circulated for review and a vote by the Committee.

426 A vote was called on the question whether to pursue further
427 the draft that would amend Rule 26(f) to include a reminder that
428 the Rule 26(f) conference may consider issues regarding
429 contemplated depositions under Rule 30(b) (6). No Committee member
430 voted to publish. All opposed publication. The draft was dropped
431 from further consideration.

432 *MDL Practice*

433 Judge Bates introduced the Report of the MDL Subcommittee by
434 noting that at present the main questions go to the scope of any
435 project that might be undertaken.

436 Judge Dow, the Subcommittee Chair, began by stating that "this
437 is the alpha, not the omega" of the work. The Subcommittee has
438 entered what will be an extensive information-gathering phase to

May 8 version

439 see whether to propose any rules for conducting centralized
440 proceedings in an MDL court.

441 Judge Dow also expressed thanks to Rules Committee Support
442 Office staff Womeldorf, Wilson, and Tighe for the work they have
443 done to gather background information on many topics. The Judicial
444 Panel on Multidistrict Litigation also has been a treasure trove of
445 information.

446 Third-party litigation funding is another big topic that has
447 been committed to the Subcommittee, in part because it may be
448 related to MDL practice. But the Subcommittee is not yet prepared
449 to suggest discussion in the Committee.

450 The Subcommittee has launched a "road show" that will involve
451 meetings with several groups. It has planned engagements with at
452 least five outside groups.

453 Work so far has identified many topics for study. The result
454 of the work is many things for the MDL world to think about. The
455 current agenda includes ten topics for study.

456 Professor Marcus led discussion of the ten current agenda
457 topics.

458 (1) Scope. The scope of inquiry might extend beyond
459 proceedings actually centralized in an MDL court. One possibility
460 would be to aim at all proceedings that involve a large number of
461 claimants – one proposal has been to establish special procedures
462 for bellwether trials in MDL proceedings that involve more than 900
463 claimants. That number, or some other, might be adopted as a
464 threshold for aggregations outside MDL consolidation and class
465 actions. Or it might be adopted as a threshold to separate MDL
466 proceedings to be governed by special MDL rules from smaller MDL
467 proceedings left outside the special rules. A different
468 possibility, closer to MDL proceedings, would be to take on actions
469 that seem ripe for MDL consolidation before the Judicial Panel
470 orders transfer, addressing such matters as timing. Something might
471 also be said about whether the MDL rules lose all force when an
472 individual action is remanded to the court where it was filed.

473 (2) Master Complaints and Answers. The use of master
474 complaints and answers seems to be increasing. Do they supersede
475 the original individual-case pleadings? Should they? Should they be
476 the focus of Rule 12(b) motions, motions for summary judgment, and
477 discovery rulings? If a case is remanded to the court where it was
478 filed, do rulings on a master pleading unravel? If master
479 complaints tend to be generated only after the consolidated
480 proceeding is pretty much organized, will this be a fit subject for
481 rules?

May 8 version

482 Discussion of this topic began with a judge noting that he
483 took on an MDL proceeding when there were 200 cases. The question
484 was what do defendants do to answer new complaints? The parties set
485 out a master complaint to be incorporated by individual plaintiffs
486 by directly filing a short-form complaint in the MDL proceeding.
487 The defendants do not even answer the short-form complaint, but can
488 move to dismiss it.

489 Further discussion asked whether there is much opportunity for
490 a rule to improve a practice that seems to be pretty well developed
491 already.

492 The next question was how the master pleading practice relates
493 to initial disclosures. In this MDL, each plaintiff files an
494 individual fact sheet 30 days after the short-form complaint. The
495 defendant files a fact sheet for that plaintiff thirty days after
496 the plaintiff files, stating that the product affecting that
497 plaintiff is Lot X, sold by Y. This is case management, not a
498 pleading rule.

499 A Committee member observed that there are big differences
500 between different case types. Antitrust cases, data breach cases,
501 personal injury, and still others do not present the same kinds of
502 problems. "We need to think about this." One response was that
503 these issues involve the scope of whatever rules might one day be
504 designed.

505 (3) Particularized Pleading/Fact Sheets. One proposal, focused
506 on personal-injury tort cases, has been to require particularized
507 fact pleading in a model similar to Rule 9(b). Fact sheets, not
508 pleadings, may be considered instead. Attention also can be
509 directed to "Lone Pine" orders. These and still other practices can
510 resemble initial disclosure of what will be claimed, of how it will
511 be supported, or even of some of the supporting evidence itself.

512 A Committee member suggested that "this is moderately
513 standardized." The fact sheet "does the particularizing." There is
514 no need to make it a Rule 9(b) pleading rule, especially if there
515 also is a master complaint.

516 Another participant suggested that it would be easy for the
517 Subcommittee to gather a couple of dozen fact sheet forms from
518 different MDL proceedings to give an idea of what is asked for.
519 They are not pleadings. They are sworn to. Defendants can use them
520 to identify who is a real plaintiff.

521 The question whether fact sheets have been used in anything
522 other than personal-injury MDL proceedings found only one answer –
523 that may have happened in a "fax" case that settled too early for
524 the fact-sheet approach to be tested.

May 8 version

525 (4) Rule 20 Joinder and Filing Fees. The direct joinder
526 question is raised by those who fear a "Field of Dreams" effect:
527 building an MDL proceeding works as an invitation to joinder by
528 would-be claimants who in fact have no connection to the events in
529 suit. Various forms of this proposal emphasize the value of
530 requiring payment of an individual filing fee for each plaintiff in
531 a multi-plaintiff complaint as a means of ensuring at least close
532 enough attention by counsel to the question whether there is any
533 support for the claim. One difficulty with this approach might be
534 that it could be difficult for the clerk's office to trace through
535 a very long pleading to determine just how many plaintiffs and fees
536 are involved. But it could be easy to require a filing fee for each
537 plaintiff who directly files in the MDL court. This could serve as
538 another screening device.

539 Individual filing fees in the largest MDL proceedings could
540 generate millions of dollars.

541 A judge with a pending MDL proceeding noted that each direct-
542 filing plaintiff provides a short-form complaint and pays a filing
543 fee. The parties agreed that new plaintiffs would file directly in
544 the MDL proceeding, and identify the district the plaintiff is from
545 and to which the case will be remanded if it is not resolved in the
546 MDL proceeding. There have been more than 3,000 direct filings.

547 Others noted that direct filing has become "very prevalent."
548 It depends on the arrangements agreed to by the parties. Another
549 Committee member agreed that direct filing is not unusual, but that
550 it also is not unusual to have tag-along cases filed elsewhere
551 before they are transferred to the MDL.

552 This discussion concluded with the question whether anyone had
553 experience with a case with multiple plaintiffs and only one filing
554 fee. No one identified any such case.

555 (5) Sequencing Discovery. Sequencing discovery to address
556 common core issues first is a familiar case-management tool. Would
557 a rule specifically addressing this practice be a positive
558 development? What of the need for case-specific discovery
559 addressing "bystander" or "outlier" claimants? Is it a problem to
560 delay case-specific discovery until completion of discovery on the
561 common core issues?

562 A Committee member observed that class-action lawyers see
563 sequencing of discovery as bifurcation, and do not like it.

564 A judge observed that Rule 16 authorizes sequencing. What more
565 might be accomplished by another rule? Should a rule tell a judge
566 to do it when it seems more a case-specific issue?

May 8 version

567 Another judge agreed that the authority is already there. But
568 perhaps there is a place for a best-practices rule, something akin
569 to the front-loading built into Rule 23 in the proposed amendments
570 now pending in the Supreme Court. This could be part of a broader
571 rule, or perhaps sufficiently relevant to another new rule to
572 warrant discussion in a Committee Note.

573 The first judge reported that in his MDL, the parties proposed
574 sequencing. "It was pretty obvious what needed to be done. It's
575 case management."

576 Another judge agreed. It is important to encourage the parties
577 to be creative.

578 (6) Third-party Litigation Financing and "Lead Generators."
579 Although joined in the list of agenda items, these two topics are
580 not necessarily linked to each other. There is considerable
581 interest in third-party financing. It is not clear whether third-
582 party financing has special ties to mass personal-injury tort MDLs,
583 or whether it is tied to MDLs of other sorts. The concern in the
584 mass tort cases is that lead generators explain the large numbers
585 of claims from "people who did not use the product."

586 Are there problems with third-party financing serious enough
587 to justify a rules response? What would the rule be, and where
588 would it fit?

589 A judge, seconded by Professor Coquillette, noted that the
590 Committee should be cautious in approaching the issues of
591 professional responsibility raised by some who view third-party
592 financing with alarm.

593 Additional discussion noted that third-party financing has
594 become involved with bankruptcy practice in New York, but it is
595 unclear just how. This prompted the further question whether, if
596 third-party financing is to be approached at all, any new rules
597 should address only the MDL context.

598 (7) Bellwether Trials. The broad questions about bellwether trials
599 can be framed by asking whether they should be encouraged?
600 Discouraged? Addressed in rules? No rule now addresses them. Indeed
601 there may be some ambiguity about the concept – in any mass tort
602 context, any trial provides useful information for the parties in
603 all other actions. If indeed a rule might be useful, it will remain
604 to decide where it should be lodged in the rules structure and what
605 it might provide.

606 A judge reported finishing a bellwether trial a week earlier.
607 It was a regular trial of an individual case. There was nothing
608 different about it. Although tried in Arizona, it involve a Georgia

May 8 version

609 plaintiff, application of Georgia law, and the same witnesses as
610 would have testified at trial in Georgia. This is a case management
611 technique. The parties wanted it. A total of six cases were set for
612 trial, with the parties' consent. Case selection can be an issue.
613 In this proceeding, each side proposed 24 cases for the process.
614 More extensive disclosures were required for these 48 cases. Twelve
615 of them went to full discovery: doctors were deposed, and the
616 plaintiffs were deposed. The parties then were able to agree on one
617 case to be a bellwether. The judge picked the remaining five,
618 looking to get a representative mix of cases. The purpose of these
619 trials is to facilitate settlement. "I'm drawing the line at six.
620 If they don't settle, the cases go home."

621 (8) Facilitating Appellate Review. The basic concern about
622 appeals is that interlocutory rulings that for good reason are not
623 appealable in ordinary litigation become so important in MDL
624 proceedings as to warrant appeal before final judgment. 28 U.S.C.
625 § 1292(b) interlocutory appeals by permission may not be sufficient
626 to meet the need. The recent study of Rule 23 showed that many
627 people wanted to amend Rule 23(f) to establish mandatory
628 jurisdiction of appeals from orders granting or denying class
629 certification. That wish was not granted. But some rulings in MDL
630 proceedings are "really, really important." Is there a way to
631 define when appeal should be available?

632 Judge Bates noted that if appeal jurisdiction is taken up, it
633 will be necessary and helpful to coordinate with the Appellate
634 Rules Committee.

635 Another judge found the desire to appeal understandable. But
636 there is a practical problem, at least in a busy circuit. In a
637 pending class action, he had to confront two lines of conflicting
638 circuit authority. He chose one to decide a summary-judgment motion
639 and certified the question for appeal. The panel decision was
640 rendered 27 months later, and the mandate has not yet issued. What
641 would happen in a case that afforded two or three opportunities for
642 interlocutory appeal on complicated issues? A suggestion that a
643 rule could require expedited appellate procedure was rewarded with
644 doubting laughter.

645 (9) Coordinating between "parallel" federal- and state-court
646 actions: Parallel actions may be centralized both in a federal
647 court MDL proceeding and in similar state-court consolidations.
648 Some observers suggest that the federal MDL should become the
649 leader, even suggesting enactment of legislation to remove related
650 state actions to the federal MDL. Is there a serious problem? What
651 is it? Can a rule reduce any problem? Informal coordination actions
652 do happen, at least at times.

653 A judge noted that she recently sat on the bench for three

May 8 version

654 days with a state-court judge at a Daubert hearing. The state
655 judge, applying state law, dismissed all the state cases. She,
656 applying federal law, cleared the path for the federal cases to go
657 to trial. She also observed that coordination could delay
658 settlement, for example if a strong state case is used as an
659 obstacle. So, perhaps, a strong individual case in a federal MDL
660 could become an obstacle to settlement.

661 A Committee member suggested there is no need for a rule. "I
662 often see some level of coordination to achieve efficiency by
663 avoiding redundant discovery." Defense counsel can join with
664 plaintiffs' counsel in arranging to do a deposition once, and in
665 adjusting for the phenomenon that state rules do not have the same
666 time limit for depositions as the federal rules. "Often we work it
667 out." Another problem, however, is presented by a race to settle
668 and take credit for it.

669 (10) PSC Formation and common-fund directives. Questions have
670 been raised about the formation of plaintiffs' steering committees,
671 executive committees, coordinating counsel, and similar
672 arrangements. Common-benefit funds to compensate lead counsel for
673 their efforts also raise many questions. And some observers suggest
674 that "insiders" are too often appointed to leadership positions.

675 Related concerns are raised by court-imposed caps on fees for
676 individual representation of individual plaintiffs, combined with
677 the "tax" for the common benefit fund.

678 Some courts borrow the Rule 23(g) and (h) criteria for
679 designation of lead counsel and their compensation. The Manual for
680 Complex Litigation advises judges to take an active interest in
681 these matters. Here too, the questions are whether there are
682 problems? Do any problems have rules solutions?

683 A judge suggested that these questions overlap third-party
684 financing questions. In his MDL the estimate was that plaintiffs'
685 counsel would have to invest \$20 million to pursue the case. Third-
686 party financing can be part of the answer to the need for heavy
687 investment. It can enable non-insider lawyers to take the lead. A
688 court must consider the resources the lawyers can commit to the
689 litigation. This observation was seconded by a fervent "amen."

690 Another judge reported learning that expenditures on a first
691 bellwether trial usually are astronomical, mounting into the
692 millions. "We want more diversity, new faces. But those on the
693 steering committee must be able to bear the cost."

694 Discussion of these ten agenda items concluded by asking
695 whether there are other matters the Subcommittee should
696 investigate, and with agreement that after learning more the

May 8 version

697 Subcommittee would likely profit from arranging a miniconference.
698 An outline of the format suggested gathering 6 MDL judges, 6
699 plaintiffs' lawyers, and six defense lawyers.

700 Judge Bates then opened an opportunity for comments by
701 observers.

702 John Beisner said that this process of inquiry is important.
703 The bar becomes accustomed to regular practices. For some time, it
704 was accepted that cases could be transferred for trial in the MDL
705 court by supplementing § 1407 transfer with § 1404 transfer. Then
706 the Supreme Court said that could not be done. The bar responded by
707 developing the "Lexecon waiver." Workarounds like this may rest on
708 foundations that appellate courts will not accept. Developing an
709 understanding of common practices may support new rules that
710 incorporate and advance them. He suggested further that data should
711 be compiled to inform MDL courts about what other MDL courts are
712 doing. The MDL process generally works well, but not all MDLs do.
713 When an MDL goes awry, it can come to grief after investing many
714 years and millions of dollars. Problems include orders that cannot
715 be reviewed until long after they are issued, and orders that are
716 not issued until there has been a long delay. It is important to
717 come up with best practices or common rules.

718 Another observer who practices on the plaintiff side asked
719 "What is broken to need fixing"? None of the agenda items address
720 anything that is broken. Flexibility is necessary. Courts have
721 express or inherent authority to address most of these issues. And
722 as for appellate review, there is always mandamus. Expanding the
723 opportunities for appeal will not do much. "The issues can be
724 addressed as they arise."

725 Susan Steinman said that a lot of the agenda ideas do not work
726 well for AAJ members. Flexibility is needed to address the
727 different needs of different kinds of cases. Mass disaster cases
728 are different from environmental disasters. The AAJ has a working
729 group to consider these problems. The issues that raise concerns
730 include master complaints and answers, particularized pleading-fact
731 sheets, and sequencing discovery. She also suggested that MDL cases
732 that "aren't quite ready to go" could be put in an inactive file
733 for later development. Professor Marcus added that the inactive-
734 file approach was used in Massachusetts for pleural thickening
735 asbestos cases.

736 Alex Dahl noted that Lawyers for Civil Justice has filed
737 written comments on the Subcommittee Report. He offered several
738 specific points. (1) "The Rules are not applied in all MDL cases."
739 Practice has evolved beyond the Rules. As a practical matter, the
740 Rules do not work when there are too many parties. Discovery does
741 not work to reveal false plaintiffs. (2) There must be a rule that

May 8 version

742 enables the parties to find out whether each MDL plaintiff has a
743 claim. (3) In response to a question whether new rules should
744 address all MDL proceedings, he said the need is for rules that
745 work. Distinctions can be drawn. For example, Rule 7 could be
746 amended to recognize the use of a master complaint, but to apply
747 only to cases in which a master complaint is in fact used. (4)
748 Devising rules that expand the opportunities to appeal is worth the
749 complication because appeals are important to the judicial system
750 as a whole and also to the parties. (5) The repeat-player
751 phenomenon is a real problem. Outsiders cannot learn about "real"
752 MDL procedure. If means can be found to educate outsiders in the
753 practices that have been honed by the repeat players, the problem
754 can be reduced. (6) The need for disclosure of third-party
755 financing is demonstrated by the 24 district rules and 6 circuit
756 rules that require disclosure. There should be a uniform national
757 rule that requires disclosure of nonparties that have a financial
758 interest in the outcome. Protection of the opportunity for judicial
759 recusal is a compelling reason for disclosure, but there are
760 additional reasons as well. The present local rules were not
761 designed to address the other reasons for disclosure, and vary one
762 from another. (7) In conclusion, MDLs are a complicated subject.
763 The Committee should act to make sure that the Civil Rules apply in
764 all cases. It should begin with a handful of topics including
765 discovery, trial, and appeals.

766 Judge Bates thanked the Subcommittee, Judge Dow, and Professor
767 Marcus for their excellent work.

768 *§ 405(g) Social Security Review*

769 Judge Bates introduced the work of the Social Security Review
770 Subcommittee by noting that the project has been recommended by the
771 Administrative Conference of the United States with the
772 enthusiastic endorsement of the Social Security Administration. It
773 raises interesting and somewhat novel issues about rulemaking for
774 a specific substantive area.

775 Judge Lioi delivered the Subcommittee Report. The Subcommittee
776 is in the early stages of exploring whether uniform review rules
777 should be developed. Working from a rough and "bare bones" draft
778 that illustrated one possible approach, it sought reactions from
779 the groups that provided initial advice in a meeting with the
780 Subcommittee last November 6. The draft covers such topics as
781 initiating an action for review, electronic service of the
782 complaint, the Commissioner's response, and briefing on the merits.
783 Reactions were provided by the Social Security Administration, the
784 Department of Justice, the National Organization of Social Security
785 Claimants' Representatives, and the American Association for
786 Justice. The initial draft was revised to reflect their reactions.
787 That draft was discussed in a Subcommittee conference call on March

May 8 version

788 9. The draft was then revised again; that revised draft is the one
789 included in the agenda materials.

790 The question for today is whether it will be useful to use
791 this revised draft, as it might be revised still further, as a
792 basis for eliciting further comments. The draft is not yet ready to
793 serve as the basis for refining into a foundation for work toward
794 actual rules.

795 The questions were explained further. The Subcommittee has not
796 decided whether it will recommend that any rules be adopted. It
797 will continue to gather information from as many as possible of the
798 people and groups with experience in social security review
799 actions. The outcome may be a recommendation that no rules be
800 developed. It may be that the wide variations now found in local
801 district practice reflect different conditions in the districts,
802 and that little would be accomplished by forcing all into a uniform
803 national template. Or it may be that although the variations do
804 exact substantial costs, it will be difficult to develop national
805 rules that effect substantial improvements. And there is some
806 remaining uncertainty whether it is appropriate to develop rules
807 for one specific substantive area.

808 If rules are to be developed, choices remain as to form. One
809 possibility would be to amend several of the present Civil Rules –
810 for example, a special pleading provision could be added to Rule 8.
811 Another possibility would be to create new rules within the body of
812 the Civil Rules. Abrogation of Rules 74, 75, and 76 has left a hole
813 that might be filled, in whole or in part, by social security
814 review rules. The draft in the agenda materials takes a different
815 approach, creating a new set of supplemental rules along the lines
816 of the supplemental rules for admiralty or maritime claims and
817 civil asset forfeiture. No choice has been made among these
818 possibilities.

819 The draft rules begin with a scope provision that may be
820 refined further as the work progresses. One possibility is to limit
821 the new rules to actions that are pure § 405(g) actions: One
822 claimant seeks nothing more than review of fact and law questions
823 on the administrative record, joining only the Commissioner as
824 defendant. That category would include a large majority – likely
825 nearly all – of § 405(g) actions. Any action presenting any
826 additional claims or including any additional parties would, as at
827 present, be governed only by the general Civil Rules. The
828 alternative possibility is to apply the § 405(g) rules to the part
829 of a broader action that seeks review on the administrative record,
830 leaving all other parts to the regular Civil Rules. Whichever
831 approach is taken, it will remain necessary to include a provision
832 invoking the full body of the Civil Rules except to the extent that
833 they are inconsistent with the supplemental rules.

May 8 version

834 The next step is a rule for initiating the review proceeding.
835 Discussions of this topic often begin by noting that review on an
836 administrative record is essentially an appeal, and can be
837 initiated by a document that is in effect a notice of appeal. The
838 draft rule characterizes the initial filing as a complaint,
839 reflecting the § 405(g) provision calling for review by filing a
840 civil action. The elements of the complaint are simple, covering
841 identification of the parties, jurisdiction, a general statement
842 that the Commissioner's decision is not supported by substantial
843 evidence or rests on an error of law, and a request for relief.
844 Successive drafts also have included an opportunity to "state any
845 other ground for relief," reflecting the possibility that a
846 claimant may raise issues outside the administrative record.

847 The next provision has met widespread approval among those who
848 have seen it. It provides that instead of Rule 4 service of a
849 summons and the complaint, the court makes service of process by
850 electronic notice to the Commissioner. The current draft places the
851 responsibility for designating the "address" for electronic service
852 on the Commissioner. Some districts have begun to use electronic
853 service by agreement of the Commissioner and local United States
854 Attorney. Their experience has been satisfactory. It may be that
855 this provision should direct service on the local United States
856 Attorney as well as the Commissioner, but still rely on the
857 Commissioner to determine whether service should be made directly
858 on the Commissioner, on the social security district where the
859 district court is located, on both, or on yet some other office.

860 The next step is the Commissioner's answer. Earlier drafts,
861 picking up a suggestion by the Social Security Administration,
862 provided that the answer would include only the complete record of
863 administrative proceedings. Discussion in the Subcommittee,
864 however, broadened this provision to say only that an answer must
865 be served and must include the record. This approach was taken from
866 concern that closing off the answer might lead to forfeiture of
867 affirmative defenses. Res judicata, for example, is an affirmative
868 defense that must be pleaded under Rule 8(c) or lost. Estoppel may
869 be another example.

870 Dispositive motions also are covered. Earlier drafts limited
871 dilatory motions to exhaustion and finality, timeliness, and
872 jurisdiction in the proper court. Summary-judgment motions were
873 excluded on the theory that they contribute no advantage when all
874 of the facts for decision are already in the administrative record,
875 and may be an occasion for delay or confusion. Some districts now
876 seize on summary-judgment procedure to frame the review, a sound
877 practice to the extent that it calls for identifying the issues and
878 tying them to the record. But many parts of Rule 56 are inapposite
879 and may cause confusion. All of the advantages of Rule 56 might be
880 gained directly by the review rules themselves. Be that as it may

May 8 version

881 for cases that involve nothing more than review on the record,
882 however, summary judgment has a role to play when other claims or
883 issues are introduced. The present draft says nothing of Rule 56,
884 and recognizes the full sweep of Rule 12 motions. The time to
885 answer is governed by Rule 12(a)(4). And the special role of
886 motions to remand is recognized by providing that a motion to
887 remand can be made at any time.

888 The procedure for bringing the case on for decision relies
889 primarily on the briefs. The current draft directs the plaintiff to
890 file a motion for the relief requested in the complaint and a
891 supporting brief. The Commissioner as defendant must file a
892 response brief, again with references to the record. The draft
893 includes bracketed provisions that the briefs must support the
894 arguments by references to the record.

895 The draft rules do not include other provisions that are
896 included in the draft rules prepared by the Social Security
897 Administration. Little other support has been found for provisions
898 that would specify the length of the briefs. Nor has there been
899 much other support for adding detailed provisions for seeking
900 attorney fees. The general feeling has been that district courts
901 should remain free to set rules for the format and lengths of
902 briefs that fit their local circumstances and general practices. So
903 too it has been felt that the general procedures for seeking
904 attorney fees are adequate. Still, there may be room to inquire
905 whether special provision should be made for seeking fees under the
906 Social Security Act as compared to fees under the Equal Access to
907 Justice Act.

908 Judge Lioi reminded the Committee that the question the
909 Subcommittee presents for discussion is whether the Subcommittee
910 should use the present draft of supplemental rules, as it might be
911 revised in light of ongoing discussions, to prompt further
912 responses from those who have experience on all sides of social
913 security review cases.

914 Discussion began with agreement that "it seems logical to seek
915 input from the people who do it." Another Committee member agreed
916 — there seems to be a strongly felt need. The draft will draw
917 attention. Responding to a question, Judge Lioi reiterated that
918 this is not a proposal for publication. The Subcommittee seeks only
919 to go forward in gathering more information. The first rounds have
920 been valuable, but the focus may have been diffused by the strong
921 reactions to proposals to specify stingy page limits for briefs.
922 Providing a clear target in the form of draft rules will also
923 stimulate clearly focused responses. Efforts will be made to find
924 and engage as many stakeholders as possible.

925 Judge Bates suggested that the stakeholders are not likely to

May 8 version

926 address the question whether it is appropriate to develop rules
927 that address a specific substantive subject. The Committee must
928 continue to deliberate this question. One alternative would be to
929 broaden any new rules to apply generally to all district-court
930 actions for review on an administrative record.

931 A Committee member responded by suggesting that it is improper
932 to have special rules for special parts of the docket, at least
933 unless special needs are shown to justify the specific focus.
934 Another Committee member shared this concern, but added that we can
935 continue to explore the need for any rules. Judge Lioi pointed out
936 that the Subcommittee Report touches on these questions, beginning
937 at line 47 on page 243. The Report in turn points to the discussion
938 at the November Committee meeting, as reported in the November
939 Minutes.

940 Judge Bates agreed that the need for uniform national rules is
941 part of the calculation. But he pointed out that the problem of
942 delay in winning benefits arises in the administrative proceedings;
943 Civil Rules will not address that, and district courts act quickly
944 enough that there does not seem to be much room to reduce delay
945 there. Nor can Civil Rules do anything about differences among the
946 circuits on substantive law.

947 Another judge thought the draft was a great starting point,
948 but asked why it contemplates Rule 12 motions – he has never seen
949 one in the many social-security review actions he has had. It was
950 noted that earlier draft rules had limited motions to issues of
951 exhaustion and finality, jurisdiction, and timeliness. But the
952 Subcommittee thought the full sweep of Rule 12 should be made
953 available. There may not be much risk of dilatory motions to
954 dismiss for failure to state a claim. It would be difficult for a
955 lawyer to frame a complaint that does not meet the proposed
956 standards; pro se litigants might actually benefit from the
957 education provided by a Rule 12(b)(6) motion. An additional
958 consideration is that much of the impetus for uniform national
959 rules seems to arise from the powerful time constraints that
960 confront the lawyers who represent the Commissioner. There is
961 little incentive to multiply proceedings by preliminary motions
962 that can do little more than anticipate the ways in which the
963 merits arguments will explore the administrative record. A
964 different judge sharpened the question: the draft rule sets out
965 seven matters to be included in the complaint. Is there a risk of
966 “Supplemental Rule 2(b)” motions challenging perceived inadequacies
967 in complying with the rule?

968 Discussion concluded with Judge Bates’s thanks to the
969 Subcommittee for its work.

970 *Rule 71.1(d)(3)(B)(i): Newspaper Publication*

May 8 version

971 A specific question about Rule 71.1(d) (3) (B) (i) was raised by
972 an outside observer. The question is whether the rule should
973 continue to make "a newspaper published in the county where the
974 property is located" the first choice for publication of notice of
975 a condemnation proceeding. Discussion at the November meeting
976 concluded by asking the Committee Chair, Judge Bates, and the
977 Reporters to make a recommendation about further action.

978 The recommendation is to remove this item from the agenda.

979 The context of Rule 71.1(d) helps to explain the question.
980 Property owners are served with a notice of condemnation
981 proceedings. If an owner resides within the United States or a
982 territory subject to the administrative or judicial jurisdiction of
983 the United States, personal service of the notice must be made "in
984 accordance with Rule 4." Rule 71.1(d) (3) (A).

985 Rule 71.1(d) (3) (B) (i) addresses service by publication when
986 personal service cannot be made under subparagraph (A). Publication
987 must be supplemented by mailing notice if the defendant's address
988 is known. Whether or not mailed notice is possible, publication
989 must be made "in a newspaper published in the county where the
990 property is located or, if there is no such newspaper, in a
991 newspaper with general circulation where the property is located."

992 The suggestion is to eliminate the preference for publication
993 in a newspaper published in the county where the property is
994 located. Publication in any newspaper of general circulation where
995 the property is located would suffice.

996 In this setting, the main concern centers on the efficacy of
997 publication that cannot be supplemented by mail addressed to a
998 defendant. Which publication is more likely to effect actual
999 notice? A locally published newspaper, even one that does not enjoy
1000 general circulation, or any of what may be more than one newspapers
1001 of general circulation? Empirical information is required to
1002 address that concern usefully, or, if empirical information is as
1003 difficult to generate as seems likely, empirical intuition. Where
1004 will a property owner who anticipates possible condemnation
1005 proceedings more likely look for notice?

1006 Several considerations prompt the recommendation to withdraw
1007 this question from further study. The present rule has been used
1008 without known questions for many years. The Department of Justice,
1009 the most common litigant in condemnation proceedings, is neutral
1010 about the proposal. The proposal itself rests on uncertain
1011 assumptions about the possible effects of state practice on
1012 publication under Rule 71.1(d) (3) (B) (i). Rule 4 service under
1013 subparagraph (A) apparently includes service under state law as
1014 incorporated in Rule 4(e) (1) and (h) (1), which may include service

May 8 version

1015 by publication on terms that do not give priority to a newspaper
1016 published in a particular county. But subparagraph (B) (i) seems an
1017 independent and self-contained provision that does not make any
1018 reference to state law. It governs by its own terms.

1019 One element of the empirical question goes to the prospect
1020 that there may be two, three, or even more newspapers of general
1021 circulation in the place where the property is located. Giving
1022 priority to a newspaper published in the county narrows the search,
1023 perhaps to one unique newspaper. Free choice among competing
1024 newspapers means that a careful property owner must attempt to
1025 identify and regularly read them all.

1026 Additional questions arise from issues that have been made
1027 familiar, but not easy, by repeated encounters. What counts as a
1028 newspaper in an era of physical publication, electronic
1029 publication, and mixed physical and electronic publication? Where
1030 is an electronic edition published? The Committee has not yet found
1031 these issues ripe for study as a general matter, and it would be
1032 awkward either to take them on or to ignore them in proposing
1033 amendment of Rule 71.1(d) (3) (B) (i).

1034 The Committee voted without opposition to remove this item
1035 from the agenda.

1036 *Rule 4(k)*

1037 Two proposals have been made to expand personal jurisdiction
1038 under Rule 4(k). They are presented to the Committee without any
1039 recommendation as to future action. The purpose is to identify the
1040 many complex and difficult challenges that will be faced if one or
1041 both is taken up, and to open a discussion of the practical
1042 benefits that might be gained by further extensions of personal
1043 jurisdiction. The nature and importance of the benefits should
1044 figure importantly in deciding whether to take on the challenges.

1045 One central challenge will be whether rules defining personal
1046 jurisdiction fall within the "general rules of practice and
1047 procedure" that may be prescribed under the Rules Enabling Act.
1048 Competing views on this question will be outlined in the present
1049 discussion. A second set of challenges arises from the common
1050 element that underlies both proposals. The proposals rest on the
1051 view that the constitutional constraint on personal jurisdiction in
1052 federal courts arises from the Fifth Amendment, not the Fourteenth
1053 Amendment. What Fifth Amendment due process requires is sufficient
1054 contacts with the United States as a whole, not sufficient contacts
1055 with any specific place within the territorial limits of one or
1056 another state.

1057 Moving beyond the challenges, the proposals rest on the belief

May 8 version

1058 that much good can be accomplished by extending the reach of
1059 federal court personal jurisdiction to Fifth Amendment due process
1060 limits. The need to select appropriate places to exercise the
1061 nationwide power can be satisfied by venue statutes, as they are
1062 now or as they might be amended to reflect the new jurisdiction.

1063 The background begins with present Rule 4(k). Both paragraphs
1064 (1) and (2) explicitly establish personal jurisdiction. Rule
1065 4(k)(1)(A) provides that serving a summons establishes personal
1066 jurisdiction over a defendant who is subject to the jurisdiction of
1067 a court of general jurisdiction in the state where the district
1068 court is located. This provision turns the jurisdiction of a
1069 district court on the longarm statutes of the state where it sits,
1070 and incorporates the 14th Amendment due process limits that
1071 constrain the longarm statute when it is applied by a state court.
1072 (Rule 4(k)(1)(B) extends personal jurisdiction, independent of
1073 state lines or practice, through a "100-mile bulge" to join a party
1074 under Rule 14 or Rule 19.)

1075 Rule 4(k)(2) is more adventuresome. It provides that "for a
1076 claim that arises under federal law," serving a summons establishes
1077 personal jurisdiction if "(A) the defendant is not subject to
1078 jurisdiction in any state's courts of general jurisdiction; and (B)
1079 exercising jurisdiction is consistent with the United States
1080 Constitution and laws."

1081 The first proposal, advanced by Professor Borchers, is more
1082 modest. It would simply expand Rule 4(k)(2) to include not only
1083 claims that arise under federal law but also cases in which
1084 jurisdiction is based on 28 U.S.C. § 1332 diversity and alienage
1085 jurisdiction. It would retain the requirement that the defendant
1086 not be subject to jurisdiction in any state's courts of general
1087 jurisdiction. The central purpose is to reach internationally
1088 foreign defendants that have sufficient contacts with the United
1089 States as a whole to support jurisdiction but lack sufficient
1090 contacts with any individual state. The purpose is illustrated by
1091 the circumstances of the Supreme Court's decision in *J. McIntyre*
1092 *Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). Nicastro, the
1093 plaintiff, was injured in New Jersey while operating a large
1094 machine that the defendant made in England. Although the machine
1095 made its way to the United States, and although the defendant
1096 clearly and deliberately sought to make as many sales as it could
1097 in the United States, the Court ruled that New Jersey could not
1098 exercise personal jurisdiction. The defendant neither sold the
1099 machine to the plaintiff's employer nor shipped it directly to the
1100 employer. The sale was made by an independent distributor in
1101 another state. At most only four, and perhaps just this one of the
1102 defendant's machines had come into New Jersey. The proposal is that
1103 the broader reach of the national sovereign authorized by the Fifth
1104 Amendment supports personal jurisdiction.

May 8 version

1105 Additional goals are offered by Professor Spencer to support
1106 the measure of personal jurisdiction that he believes proper,
1107 although he has come to believe that the limits of the Enabling Act
1108 mean that only Congress can adopt his proposal. This proposal would
1109 abandon Rule 4(k)(1) and expand Rule 4(k) to provide that serving
1110 a summons establishes personal jurisdiction when exercising
1111 jurisdiction is consistent with the United States Constitution.
1112 "[A]nd laws" might be added as a further constraint, drawing from
1113 present 4(k)(2)(B). This proposal would establish uniform personal
1114 jurisdiction rules for the federal courts, freeing them from
1115 dependence on the vagaries of such state statutes as do not extend
1116 to the limits of Fourteenth Amendment due process and likewise
1117 freeing them from Fourteenth Amendment limits that derive from the
1118 territorial definitions of state sovereignty. Federal courts would
1119 be freed to locate litigation in the most desirable court, as
1120 defined by federal venue statutes. Federal courts also would be
1121 freed from much of the preliminary wrangling that now arises over
1122 personal jurisdiction, since in most cases it will be clear that
1123 the defendant has sufficient contacts with the United States to
1124 satisfy Fifth Amendment due process. For diversity cases, expanded
1125 personal jurisdiction would help to advance the purposes of
1126 providing convenient federal courts for enforcing state-created
1127 rights. And in some ways, defendants also would be helped by
1128 expanding the narrow limits of present Rule 4(k)(1)(B) to allow
1129 broader joinder of defendants both by the plaintiff initially and
1130 by the defendant under Rules 13, 14, 19, and 20.

1131 These potential gains from expanded personal jurisdiction
1132 should be considered carefully. They may be real and important. Or
1133 they may be largely theoretical, particularly if experience shows
1134 that in most cases there is a convenient court that can assert
1135 personal jurisdiction over all parties that should reasonably be
1136 joined. The benefits, large or small, must then be weighed against
1137 the potential costs and uncertainties.

1138 One major uncertainty arises from Professor Spencer's
1139 conclusion that the Rules Enabling Act does not authorize the
1140 Supreme Court to prescribe rules defining personal jurisdiction. He
1141 will elaborate this view later in the meeting. The core conclusion
1142 is that personal jurisdiction lies outside the initial authority to
1143 prescribe "general rules of practice and procedure." On this view,
1144 procedure encompasses what the parties and court do once the court
1145 acquires personal jurisdiction. Jurisdiction is a distinct and
1146 separate concept. In a pinch, it also might be argued that rules
1147 that expand or limit personal jurisdiction abridge, enlarge, or
1148 modify a substantive right. A still more ambitious argument can be
1149 made that Article III judicial power necessarily entails authority
1150 to exercise personal jurisdiction to the limits permitted by Fifth
1151 Amendment due process. On this view, Rule 4(k)(1) is invalid not
1152 because it establishes personal jurisdiction but because it

May 8 version

1153 curtails the personal jurisdiction that inheres in any case that
1154 falls within a statute establishing subject-matter jurisdiction
1155 within Article III.

1156 A contrary view of the Enabling Act is also possible. One
1157 approach is to resist the temptation to rely on abstract
1158 definitions of "practice and procedure" and of "jurisdiction." On
1159 this approach, what is "practice and procedure" for Enabling Act
1160 purposes may be different from what is practice and procedure for
1161 other purposes. The question should be approached more directly by
1162 asking whether the Enabling Act should be interpreted to include
1163 rules that define personal jurisdiction. That approach does not
1164 lead to an automatic answer. Defining personal jurisdiction is a
1165 matter of important and sensitive concerns. It may be particularly
1166 sensitive to rely on courts to define the extent of their own
1167 power. In many ways, particularly with respect to internationally
1168 foreign defendants, personal jurisdiction is a more fundamental
1169 component of judicial power than the lines that limit federal
1170 subject-matter jurisdiction. A defendant from Maine or France may
1171 care more that he not be subject to suit in any court in California
1172 than that the court in California be a federal court or a state
1173 court.

1174 The approach that attempts a purposive interpretation of the
1175 Enabling Act can be bolstered by looking to tradition. The original
1176 version of Rule 4 expanded authority to serve summons from the
1177 district to anywhere in the state embracing the district. The
1178 Supreme Court upheld this rule as one relating to the manner and
1179 means of enforcing rights. In 1963 Rule 4 was amended to confirm
1180 and expand decisions interpreting an earlier version to enable
1181 federal courts to assert jurisdiction under state longarm statutes.
1182 Then Rule 4(k)(2) was added in 1993, reacting to a Supreme Court
1183 decision that although a foreign defendant might well be subject to
1184 personal jurisdiction because of sufficient contacts with the
1185 United States, jurisdiction could not be perfected for want of a
1186 rule authorizing service. The Court hinted that this lack could be
1187 corrected by Congress or by court rule. *Omni Capital Int'l. v.*
1188 *Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987). The 1993 Committee
1189 Note says that the amendment responds to the Court's "suggestion."
1190 The Committee Note also begins with a "SPECIAL NOTE: Mindful of the
1191 constraints of the Rules Enabling Act, the Committee calls the
1192 attention of the Supreme Court and Congress to new subdivision
1193 (k)(2). Should this limited extension of service be disapproved,"
1194 the Committee recommends adoption of the balance of the rule.

1195 The Committee, in short, seems to have acted, and to have
1196 acted repeatedly, on the view that the Enabling Act authorizes
1197 adoption of rules that define personal jurisdiction. This view
1198 seems to be supported by Supreme Court decisions. The tradition and
1199 opinions may be wrong. In any event a conclusion that authority

May 8 version

1200 exists does not define wise exercise of the authority.

1201 Expanding personal jurisdiction for cases governed by state
1202 law will add to the occasions for arguing choice-of-law issues. As
1203 the law now stands, a federal court must choose among competing
1204 state laws by adopting the choice-of-law rules of the state where
1205 it sits. This rule has been applied even in an interpleader action
1206 that could not have been entertained by the local state courts for
1207 want of personal jurisdiction over all claimants. Expanding
1208 personal jurisdiction could expand a plaintiff's opportunity to
1209 choose governing law by picking among the courts that have venue.
1210 It is possible to think about adding choice-of-law provisions to a
1211 rule that expands personal jurisdiction, but the task would be
1212 uncertain and contentious. And on some philosophies of choice-of-
1213 law it would abridge, enlarge, or modify substantive rights.

1214 Reliance on present venue statutes to establish suitable
1215 constraints on the exercise of nationwide personal jurisdiction
1216 also presents problems. A simple example is provided by 28 U.S.C.
1217 § 1391(c) (3): "a defendant not resident in the United States may be
1218 sued in any judicial district." For those defendants, there is no
1219 venue limit. A more complex example is provided by § 1391(c) (2),
1220 which provides that a defendant that is an entity with the capacity
1221 to sue and be sued "shall be deemed to reside * * * in any judicial
1222 district in which such defendant is subject to the court's personal
1223 jurisdiction with respect to the civil action in question." This
1224 provision interacts with § 1391(b), which establishes venue in "a
1225 judicial district in which any defendant resides, if all defendants
1226 are residents of the State in which the district is located." If
1227 there is only one defendant, venue again does not limit personal
1228 jurisdiction. If there are multiple defendants, venue again is no
1229 limit if all are entities subject to personal jurisdiction. Other
1230 examples may be found, but these suffice to suggest that present
1231 venue statutes are not adequate to the task. Carefully crafted
1232 legislation would be needed to establish satisfactory venue rules
1233 to locate litigation within a system of federal courts exercising
1234 general nationwide jurisdiction.

1235 A number of other questions would be raised as well. It is
1236 enough to sketch them. Congress has enacted a number of statutes
1237 that assert some form of "nationwide" personal jurisdiction. It is
1238 not clear whether all of them would be interpreted to reach as far
1239 as a new court rule might. If the rule goes farther than the
1240 statute, there might be a supersession question. The Enabling Act
1241 authorizes rules that supersede statutes, but this power is
1242 exercised only for compelling reasons. A different approach would
1243 be to cut the rule short if the statute does not go so far – that
1244 might be accomplished by retaining the requirement in present Rule
1245 4(k) (2) (B) that exercising jurisdiction be consistent with the
1246 United States "laws."

May 8 version

1247 Establishing personal jurisdiction for some claims and parties
1248 might also prompt further developments in the concept of pendent
1249 personal jurisdiction. The occasion would be much reduced by a
1250 general national-contacts rule, but might arise for related claims
1251 or even parties that share a common nucleus of operative fact but
1252 standing alone do not seem to have sufficient independent national
1253 contacts.

1254 A further complication relates to the venue statutes. There is
1255 a strong strain of thought that Fifth Amendment due process is not
1256 always satisfied by contacts with the nation as a whole. There may
1257 be some inherent requirements of fairness that protect against the
1258 transactional inconveniences of litigating in a distant forum.
1259 Working through these questions would take time, imagination, and
1260 sound judgment.

1261 Finally, it may be wondered what to make of the increasingly
1262 sharp distinctions between specific and general jurisdiction that
1263 are emerging in Fourteenth Amendment decisions, and of the elusive
1264 tests for asserting specific jurisdiction. If a defendant is
1265 engaged in a business that pervasively involves all the states,
1266 does any real distinction remain?

1267 Professor Spencer outlined his views as explained in two
1268 articles. The earlier article is included in the agenda materials.
1269 The more recent article remains in draft and is being revised for
1270 publication in 2019. The nubbin is that as desirable as it would be
1271 to expand federal personal jurisdiction by freeing it from ties to
1272 the lines of territorial sovereignty that confine state courts,
1273 jurisdiction is not a matter of practice or procedure. Enabling Act
1274 rules can only address the manner of adjudicating claims. Both Rule
1275 4(k) and the property jurisdiction provisions in Rule 4(n) go too
1276 far. Even Rule 4(k)(1), invoking the bases for personal
1277 jurisdiction in state courts, needs to be enacted by Congress.

1278 Rules of evidence are not procedure, but they are authorized
1279 by separate language in § 2072(a). It cannot be said that anything
1280 that is not substantive is procedural.

1281 The better line begins with recognizing that it is the Fifth
1282 Amendment that limits the territorial reach of federal courts. A
1283 federal court should be able to exercise personal jurisdiction
1284 whenever that is consistent with due process and the venue
1285 statutes. "Rule 4(k)(1) is an artificial constraint." With "some
1286 tweaking," the venue statutes can do the job of localizing
1287 litigation within the federal court system, along with a more fully
1288 developed Fifth Amendment fairness test. The federal courts have
1289 not yet had occasion to develop such fairness tests, but expanding
1290 a national-contacts foundation will provide the occasion.

May 8 version

1291 Present venue statutes reflect a background of Fourteenth
1292 Amendment due process thought. They will need to be revised to fit
1293 expanded personal jurisdiction.

1294 This expansion would not change the result in the Goodyear
1295 case – the Turkish manufacturer of a tire that failed in Paris
1296 would not become subject to federal-court jurisdiction. It is not
1297 clear whether national-contacts jurisdiction would support the
1298 claims of nonresident plaintiffs in a federal court in California
1299 against the defendant in the Bristol-Meyers case.

1300 Choice of law is not a problem. Expanding personal
1301 jurisdiction might give plaintiffs a greater choice of federal
1302 courts and thus expand the bodies of state choice rules they could
1303 shop for, but any state rule is limited to choosing a law that has
1304 a constitutionally adequate connection to the litigation. If
1305 Congress enacts expanded jurisdiction, it can give attention to
1306 this.

1307 Professor Spencer concluded by stating that it is worthwhile
1308 to continue Committee discussion, but that the aim should be to
1309 develop proposals for action by Congress.

May 8 version

1310 A Committee member asked whether the Committee has acted on
1311 matters outside the Enabling Act by making proposals to Congress.
1312 Professor Marcus noted that Evidence Rule 502 is a recent example
1313 of the special provision in 28 U.S.C. § 2074(b): "Any such rule
1314 creating, abolishing, or modifying an evidentiary privilege shall
1315 have no force or effect unless approved by Act of Congress." But it
1316 went through the full Enabling Act process. The only difference is
1317 that other Enabling Act rules take effect after submission to
1318 Congress "unless otherwise provided by law," § 2074(a).

1319 Apart from that, the Committee has not engaged in recommending
1320 legislation, either by developing a proposed statute or by a more
1321 open-ended suggestion that Congress should address a problem. The
1322 closest approaches have come when fully developed proposals have
1323 adopted Enabling Act rules in the ordinary course, but the rules
1324 can become effective only if existing statutes are revised. The
1325 Appellate Rules Committee has successfully won statutory revisions
1326 to support Appellate Rules amendments, and statutory revisions were
1327 also sought and won to support some of the rules changes adopted in
1328 the Time Computation Project that swept across multiple sets of
1329 rules. The Federal-State Jurisdiction Committee regularly comments
1330 on proposed legislation, and Enabling Act Committee Chairs
1331 occasionally send formal letters to Congress commenting on pending
1332 bills. But there is no known precedent for something like
1333 developing a package of proposed personal jurisdiction and venue
1334 statutes.

1335 A judge asked about the 1963 amendments of the personal
1336 jurisdiction provisions in Rule 4. Were they seen as expanding or
1337 as limiting personal jurisdiction? The answer is that they were
1338 seen to confirm existing interpretations of earlier Rule 4
1339 provisions, and to ensure that federal courts could reach as far as
1340 their neighboring state courts. There is no indication that they
1341 were seen as limiting inherent personal jurisdiction that otherwise
1342 would be exercised without Rule 4 provisions for service. Instead
1343 they were intended to enable a federal court to do what a state
1344 court could do, no more.

1345 This question came back in a different form: If Rule 4(k)(1)
1346 were rewritten to free federal courts from the limits on state-
1347 court jurisdiction, and for the purpose of expanding federal-court
1348 jurisdiction, what would be the practical effect? Will most cases
1349 have venue only where a substantial part of the events or omissions
1350 giving rise to the claims occurred, see § 1391(b)(2)? Professor
1351 Spencer answered that it would remain necessary to redefine
1352 "resides." But the outcome would not be complete chaos. The earlier
1353 discussion of the effects of the present definitions of "resides"
1354 was renewed, with an added twist. The discussion of multidistrict

May 8 version

1355 centralization pointed to the limits that prevent transfer for
1356 trial in an MDL court that cannot independently establish personal
1357 jurisdiction. Adopting national-contacts personal jurisdiction
1358 could dramatically change practice in this respect.

1359 Discussion returned to the benefits of expanding federal-court
1360 jurisdiction. It would reduce wrangling about personal jurisdiction
1361 in many cases. But it is difficult to predict just how far, and
1362 when, the actual result would be to bring actions to a federal
1363 court that could not entertain them now.

1364 The question was repeated: Is there some value in going to
1365 Congress first? A Committee member responded that normally the
1366 Committee does not do that.

1367 Another Committee member asked whether, if indeed the Enabling
1368 Act process cannot prescribe rules of personal jurisdiction, parts
1369 of present Rule 4 are invalid? It would be better to avoid acting
1370 in a way that would suggest that current rules are invalid. And the
1371 discussion shows that indeed these are complicated questions.

1372 Judge Bates suggested the Committee vote on three possible
1373 approaches: (1) Close out this agenda item. (2) Undertake full
1374 exploration of rules amendments now. This will be a major
1375 undertaking, with added complexity arising from interdependence
1376 with the venue statutes. or (3) Carry this topic forward on the
1377 agenda, but not pursue it actively now. No votes were cast for
1378 closing it out. Two votes were cast for present active pursuit.
1379 Eight votes were cast for pausing work, carrying the subject
1380 forward for future consideration.

1381 *Rule 73(b): Consent to Magistrate Judge*

1382 Judge Bates guided discussion of this agenda item. Rule
1383 73(b)(1) provides that to signify consent to conduct proceedings
1384 before a magistrate judge "the parties must jointly or separately
1385 file a statement consenting to the referral. A district judge or
1386 magistrate judge may be informed of a party's response * * * only
1387 if all parties have consented to the referral."

1388 This provision for anonymity implements the direction of 28
1389 U.S.C. § 636(c)(2), which directs that rules of court for reference
1390 to a magistrate judge "shall include procedures to protect the
1391 voluntariness of the parties' consent."

1392 The problem arises from a collision between the provision for
1393 anonymity and the CM/ECF system. As soon as a single party files a
1394 consent form, the system automatically forwards the consent to the
1395 district judge assigned to the case. Apparently there is no way to
1396 circumvent this feature. An alternative might be to direct the

May 8 version

1397 parties to deliver their separate consents to the clerk without
1398 filing them. That approach, however, would impose significant
1399 burdens on the clerk's office and would lead to occasional lapses
1400 in one direction or another.

1401 The suggestion to amend Rule 73(b)(1) made by the clerk for
1402 the Southern District of New York is for a simple change, deleting
1403 the reference to separate statements: "the parties must jointly ~~or~~
1404 ~~separately~~ file a statement consenting * * *." It may be that
1405 somewhat greater revisions should be made to facilitate the process
1406 of generating a joint statement. Guidance might be found in the
1407 joint consent form used in the Southern District of Indiana.

1408 Discussion began by suggesting that it is worthwhile to at
1409 least attempt to sort through this question.

1410 A judge observed that the problem is that one party consents,
1411 and others do not, and the judge finds out about it. Or it may be
1412 that all but one consent, and start to behave as if all consented,
1413 forcing a nonconsenting party to protest.

1414 Another judge observed that the rule functioned well in pre-
1415 ECF days. Now it is incumbent on the Committee to look at it. Yet
1416 another judge and a practicing Committee member agreed.

1417 A different judge observed that in some districts magistrate
1418 judges are automatically assigned to civil actions, leaving it to
1419 the parties to consent or withhold consent. Any amended rule must
1420 be compatible with this practice.

1421 Judge Bates concluded the discussion by stating that the
1422 question will be pursued further. Laura Briggs and a Committee
1423 member will be asked to help.

1424 *Other Agenda Items*

1425 17-CV-EEEEEE: Judge Bates described this proposal that return
1426 receipts be required for service by mail under Rule 5(b). He noted
1427 that the Committee has recently devoted close attention to Rule
1428 5(b), focusing on electronic service and accepting service by
1429 ordinary mail without further ado. The Committee voted to remove
1430 this item from the agenda without further discussion.

1431 18-CV-A: Rule 55(a) directs that "When a party against whom a
1432 judgment for affirmative relief is sought has failed to plead or
1433 otherwise defend, and that failure is shown by affidavit or
1434 otherwise, the clerk must enter the party's default." The proposal
1435 complains that one district court refuses to let its clerk enter
1436 default, permitting action only by a judge. The solution is to add
1437 a sentence embellishing the "must enter" already in the rule. Judge

May 8 version

1438 Bates suggested that there may be some reason to preserve an
1439 element of judicial discretion about entering the default, in part
1440 because Rule 55(c) allows the court to set aside a default for good
1441 cause. Nor should the Committee be charged with policing potential
1442 misapplications of a Civil Rule by continually adding new language
1443 to emphasize what the rule already says. The Committee voted
1444 without further discussion to remove this item from the agenda.

1445 18-CV-G: This proposal urges that complaints have become too long:
1446 "New Age complaints are completely out of control." It recommends
1447 a rule that would considerably shorten complaints. Judge Bates
1448 observed that most judges likely would agree that many complaints
1449 are too long. The Committee, however, has repeatedly considered
1450 Rule 8, often in depth, over the course of the last 25 years. There
1451 is little reason to again take up the subject now. The Committee
1452 voted to remove this item from the agenda without further
1453 discussion.

1454 *Pilot Projects*

1455 Judge Bates noted that the mandatory initial discovery pilot
1456 project is actively going forward in the District of Arizona and
1457 the Northern District of Illinois. Work continues to find districts
1458 to participate in the expedited procedures pilot project.

1459 Judge Campbell said that the mandatory initial discovery pilot
1460 took effect in the District of Arizona on May 1, 2017. So far 1,800
1461 cases are in the pilot. "It has been very smooth." The Arizona bar
1462 is used to extensive initial disclosures in state-court practice.
1463 The test will come when the cases come to summary judgment or trial
1464 and arguments are made to exclude evidence that was not disclosed.
1465 "We likely can deal with that," in part by drawing guidance from
1466 state-court practice.

1467 Judge Dow reported that the Northern District of Illinois
1468 launched the mandatory initial discovery pilot on June 1, 2017.
1469 Great help was provided by draft standing orders and related
1470 guidance from the District of Arizona. "Our lawyers aren't used to
1471 it," unlike lawyers in Arizona. Rumors have been heard that e-
1472 discovery vendors are advising firms not to file cases with massive
1473 e-discovery in the Northern District because of the project. But
1474 the court has been reasonable about the deadlines set in the pilot
1475 rules. Parties are not required to file terabytes of information in
1476 30 days. Emery Lee is collecting data for the Federal Judicial
1477 Center's evaluation of the project. About 75% of the cases in the
1478 Northern District are in the project. All but one of the active
1479 judges participate. Only one senior judge participates. The project
1480 is going well.

1481 Emery Lee described the FJC study of the mandatory initial
1482 discovery projects. He is approaching the second round of lawyer

May 8 version

1483 surveys of cases closed within the last six months. "We have data
1484 on 5,000-plus cases in the two districts together." A Committee
1485 member reported hearing that one effect of the project is that
1486 people settle when they find documents they do not want to
1487 disclose. Lee responded that the study is tracking that.

1488 The FJC also is studying data on the longstanding
1489 differentiated procedure practice in the Northern District of Ohio,
1490 with help from Judge Zouhary. Experience there suggests that it is
1491 easy to assign cases to tracks.

1492 Discussion of the mandatory initial discovery project turned
1493 to the Employment case protocol that was created in November, 2011.
1494 The FJC has collected data on cases resolved in 2016-2017. In all
1495 it has data on hundreds of cases. The more recent data include
1496 mature cases. There is a plan to collect data on a sample of
1497 comparison cases. The hope is to be able to report in November.

1498 Some courts already have adopted the parallel protocol for
1499 individual actions under the Fair Labor Standards Act.

1500 *Next Meeting*

1501 Judge Bates confirmed that the next scheduled meeting will be
1502 on November 2 in Washington, D.C.

The meeting adjourned.

Respectfully submitted,

Edward H. Cooper
Reporter

May 8 version

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TAB 6

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TAB 6A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Debra Ann Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 14, 2018

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on April 26-27, 2018 in Washington, D.C. At the meeting the Committee discussed ongoing projects involving matters such as possible amendments to Rules 404(b), 606(b), 702, 801(d)(1)(A) and 807. It also considered proposals submitted to the Committee suggesting changes to Rules 106 and 609(a)(1), as well as a proposal to adopt a rule governing illustrative aids.

The Committee made the following determinations at the meeting:

- It unanimously approved the proposed amendment to Rule 807, and is submitting it to the Standing Committee for final approval.
- It unanimously approved a proposed amendment to Rule 404(b), and is submitting it to the Standing Committee with the recommendation that it be released for public comment;

- It agreed to consider a possible amendment to Rule 106.
- It agreed to consider possible amendments to Rule 702 and also to explore ways to address problems regarding forensic expert evidence that might not involve rule amendments.
- It cleared agenda items regarding possible amendments to Rules 606(b), 609(a)(1), 611(a) (illustrative evidence), and 801(d)(1)(A).

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendments proposed as action items can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 807, for Final Approval

At its June, 2017 meeting, the Standing Committee unanimously approved a proposed amendment to Rule 807 for release for public comment. The project to amend Rule 807 began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation --- including discussion with a panel of experts at a Conference held at Pepperdine Law School --- the Advisory Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. “Equivalence” thus does little or nothing to guide a court’s discretion. Given the difficulty and disutility of the

“equivalence” standard, the Committee determined that a better, more user-friendly approach is simply to require the judge to find whether the statement is supported by sufficient guarantees of trustworthiness.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration --- or the lack thereof --- is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the drafters’ avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is used in so many different contexts. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be --- and has been --- used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a “just” result. The Committee has determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

- The current notice requirement is problematic in at least four respects:

- 1) Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

- 2) The requirement that the proponent disclose “particulars” has led to unproductive arguments and unnecessary case law.

- 3) There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4) The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable --- which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so.

Public Comment

The Committee received nine public comments on the Rule 807 proposal. It carefully considered those comments, most of which were positive, and made some changes as a result of the comments --- mainly style suggestions. The Committee also implemented some of the suggestions made by members of the Standing Committee at its June, 2017 meeting --- including adding a reference to Rule 104(a), and a reference to the Confrontation Clause, to the Committee Note. Finally, the Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and Committee Note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Committee unanimously recommends that the Standing Committee approve the proposed amendment to Rule 807 and the Committee Note, for referral to the Judicial Conference.

The amendment to Rule 807, and the Committee Note, are attached to this Report.

B. Proposed Amendment to Rule 404(b), for Release for Public Comment

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application. The focus has been on three areas:

- 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
- 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
- 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Committee considered a number of textual changes to address these case law developments. At its April, 2018 meeting the Committee determined that it would not propose substantive amendments to Rule 404(b), because they would make the Rule more complex without rendering substantial improvement. Thus, any attempt to define “inextricably intertwined” is unlikely to do any better than the courts are already doing, because each case is fact-sensitive, and line-drawing between “other” acts and acts charged will always be indeterminate. Further, any attempt to codify an “active dispute” raises questions about how “active” a dispute would have to be, and is a matter better addressed by balancing probative value and prejudicial effect. Finally, an attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference --- an example would be use of the well-known “doctrine of chances” to prove the unlikelihood that two unusual acts could have both been accidental.

The Committee also considered a proposal to provide a more protective balancing test for bad acts offered against defendants in criminal cases: that the probative value must outweigh the prejudicial effect. While this proposal would have the virtue of flexibility and would rely on the traditional discretion that courts have in this area, the Committee determined that it would result in too much exclusion of important, probative evidence.

The Committee did recognize, however, that some protection for defendants in criminal cases could be promoted by expanding the prosecutor’s notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” In addition, the Committee determined that the current requirement that the prosecutor must disclose only the “general nature” of the bad act should be deleted, in light of the prosecution’s expanded notice obligations under the DOJ proposal.

Finally, the Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

The Committee unanimously approved proposed amendments to the notice provision of Rule 404(b), and the textual clarification of “other” crimes, wrongs, or acts. The Committee recommends that these proposed changes, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 404(b), and the Committee Note, are attached to this Report.

III. Information Items

A. Forensic Expert Testimony, Rule 702, and *Daubert*.

At its April meeting, the Committee had its first opportunity to discuss the results of the Symposium held at Boston College School of Law in October, 2017. That Symposium consisted of two separate panels. The first panel included scientists, judges, academics and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Committee with extremely helpful insight, background, and suggestions for change. The Conference proceedings --- as well as accompanying articles by a number of the participants --- have been published in the Fordham Law Review.

In its discussion, the Committee determined that it would be difficult to draft a freestanding rule on forensic expert testimony, because it would have an inevitable and problematic overlap with Rule 702. The Committee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic (and other) expert testimony --- the problem of overstating results. In addition, the Committee is considering other ways to provide assistance to courts and litigants in meeting the challenges of forensic evidence. These include a Best Practices Manual and outreach efforts in collaboration with the Federal Judicial Center.

Finally, the Committee has agreed to consider an amendment to Rule 702 that would address the fact that a fair number of courts have treated the Rule 702 reliability requirements of sufficient basis and reliable application as questions of weight and not admissibility. One possibility being explored is an amendment that would specify that the court must find these requirements met by a preponderance of the evidence. But no formal amendment on any Rule 702 matter has yet been considered.

B. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The courts are not uniform in the treatment of these issues. Some courts have held that when a party introduces a portion of a statement that is misleading, it can still object, on hearsay grounds, to completing evidence that corrects the misimpression. One possibility being explored by the Committee is to require a proponent who offers a misleading portion of a statement to also offer the completing portion at the same time. That would avoid a common hearsay problem because the proponent would be offering the completing statement and it is often admissible as a statement of a party-opponent. Another possible change is to clarify in the text that the right to complete arises only if the proponent offers a portion that is misleading. An amendment along these lines, as well as a provision to cover oral statements, will be considered by the Committee at its next meeting.

C. Possible Amendment to Rule 801(d)(1)(A)

The Committee has given careful and lengthy consideration to the possibility of amending Rule 801(d)(1)(A), which currently provides for substantive admissibility for a limited set of prior inconsistent statements of a testifying witness (those made under oath at a formal proceeding). The proposed amendment considered by the Committee at its April meeting would expand the rule to allow for substantive admissibility of prior inconsistent statements that were audiovisually recorded. The proposal was the subject of an FJC survey, which indicated that the courts and litigators surveyed were about as divided as the Committee itself about the merits of the proposed amendment. Ultimately the proposal was rejected by the Committee. A majority of Committee members expressed concerns about strategic use of the exception by all parties in both civil and criminal litigation, proliferation of audiovisual statements, and the possibility that a prior inconsistent statement might itself be found to be sufficient evidence in a criminal case.

D. Possible Amendment to Rule 609(a)(1)

At its April meeting the Committee briefly considered three possible amendments to Rule 609(a)(1), which provides for admissibility (subject to a balancing test) of a witness's convictions that did not involve dishonesty or false statement. One proposal, to eliminate the rule, was quickly rejected as inconsistent with the hard-fought compromise that Congress reached in the process of enacting Rule 609(a)(1). A second proposal, to limit impeachment under the rule to theft-related convictions, was rejected as underinclusive. A third rule was directed toward impeachment of defendants in a criminal case. It would have instructed judges to

consider probative value in light of the fact that an accused has a built-in motive to falsify; and also to consider that prejudicial effect is heightened when the conviction is similar to the crime with which the defendant is charged. This specification of balancing factors was rejected as micromanaging courts.

E. Rule 606(b) and the Supreme Court’s Decision in *Pena-Rodriguez v. Colorado*

At its April, 2017 meeting, the Committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court’s 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) --- barring testimony of jurors on deliberations --- violated the defendant’s Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant’s witnesses during deliberations. The Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Committee revisited the question at its April, 2018 meeting and came to the same conclusion. The Committee has asked the Reporter to monitor Rule 606(b) cases for any development or expansion that would alter the Committee’s previous decision. Federal courts have thus far rejected efforts to expand the *Pena-Rodriguez* exception to Rule 606(b) beyond the clear statements of racial animus at issue in that case. The Committee will continue to monitor the case law applying *Pena-Rodriguez*.

F. Proposed Amendment to Rule 611(a) on Illustrative Aids

The Committee considered a suggestion from members of the public that it should adopt a rule on the use of illustrative evidence at trial. The line between “demonstrative” evidence, used substantively to prove disputed issues at trial, and “illustrative” evidence, offered solely as a pedagogical aid to assist the jury in understanding other evidence, is sometimes a difficult one to draw. But the Committee determined that an amendment was not necessary, because courts generally get it right --- courts routinely and properly distinguish between evidence offered to demonstrate a fact and an illustrative aid that is not evidence at all. There was a consensus on the Committee that illustrative aids present no significant difficulty and that there is no need for a rule covering their use.

G. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court

held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee’s consideration --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Spring, 2018 Meeting

The draft of the minutes of the Committee’s Spring, 2018 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE¹

Rule 807. Residual Exception

(a) **In General.** Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804:

- (1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness~~—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and~~
- ~~(2) it is offered as evidence of a material fact;~~
- ~~(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~

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

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard” has not

served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay "not specifically covered" by a Rule 803 or 804 exception. The

amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

- First, the amendment requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence).

- Second, the prior requirement that the declarant’s address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read

the rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

Changes Made After Publication and Comment

The provision on the relationship between the residual exception and Rules 803 and 804 was changed in two respects: 1) it was moved back from a subdivision to the preface, where it was initially; and 2) the phrase “not specifically covered” was changed to “not admissible under.”

The Committee Note was revised slightly to address such matters as the “near-miss” analysis, the applicability of Rule 104(a), and the relationship of Rule 807 to the Confrontation Clause.

Summary of Public Comment

Daniel Church of Morris, Wilnauer Church (EV-2017-003), supports the amendment because it “would reduce the

surprise element to an adversary and gives the court the discretion needed to make an informed ruling.”

Brian Roth (EV-2017-004), supports the amendment as being “more clearly worded” than the original.

Karl Romberger (EV-2017-005), supports the Committee's proposed changes, and “endorse[s] the observations about how best to assess the trustworthiness of residual hearsay.” He concludes that “[t]he Committee's efforts should improve legal practices in all fora where evidence is received.”

Aniello Ceretto (EV-2017-006), opposes the amendment insofar as it adds a good cause exception to the pretrial notice requirement. He states that it is “going to lead to many more adjournment requests or if not, then bad court decisions undermining public confidence in the reliability of court decisions based on hearsay.”

Sara Lessard (EV-2017-007), believes that the proposed amendment “is an amazing opportunity for ordinary people to understand the rule better.”

Julius King (EV-2017-009), states that “the current FRE 807 is problematic for several reasons and the new proposed FRE 807 properly addresses most of those issues.” He states that “the proposed change to the trustworthiness requirement of FRE 807 is satisfactory because it would clarify the rule by removing the ‘comparative trustworthiness’ standard and foster consistency among trial courts by requiring judges to consider, if any, corroborating evidence that strengthens the requirement.” Mr. King approves most of the changes to the notice requirement, but opposes the deletion of the declarant’s address from the notice requirement.

The American Association for Justice (EV-2017-011), “generally supports the proposed amendments to Federal Rule of Evidence 807” and suggests some stylistic changes to “help clarify the purpose and intent of the amendments. The Association generally supports the changes to the notice requirement, but states that the term “substance” is vague and that the Committee Note should provide more guidance on the meaning of the term.

The Federal Magistrate Judges’ Association (EV-2017-012), suggests that the trustworthiness requirement should be evaluated in comparison with testimony given under oath and subject to cross-examination. The Association also suggests that corroboration should not be singled out as a factor in the trustworthiness analysis, and if it is, the court should limit consideration to corroborating evidence that is reliable.

The National Association of Criminal Defense Lawyers (EV-2017-013), agrees that “the existing requirement that the residual hearsay have ‘circumstantial guarantees of trustworthiness’ equivalent to those required for Rule 803 or 804 exceptions has not been a workable standard, given the differences in trustworthiness among the recognized hearsay exceptions themselves.” The Association also states that the changes to the notice requirement “are generally well-taken” but it recommends that language be added to the Committee Note to make clear that disclosures by the defendant in a criminal case need not be detailed, and that the good cause exception should be liberally applied to protect a defendant in a criminal case who fails to give pre-trial notice.

TAB 6C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

**Rule 404. Character Evidence; Other Crimes,
Wrongs or ~~Other Acts~~**

* * * * *

(b) Other Crimes, Wrongs, or ~~Other Acts~~.

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; ~~Notice in a Criminal Case.~~*
This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.—~~On~~

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

~~request by a defendant in a criminal case, the prosecutor must:~~

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) ~~provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and~~

(B) articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing~~before trial~~ sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence—or during trial and in any form if the court, for good cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided. In addition, notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and

the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied, even in cases in which a final determination as to the admissibility of the evidence must await trial.

- The good cause exception applies not only to the timing of the notice as a whole but also to the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts

5 FEDERAL RULES OF EVIDENCE

“other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

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Advisory Committee on Evidence Rules
Minutes of the Meeting of April 26-27, 2018
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 26-27, 2018 at the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Debra Ann Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
A.J. Kramer, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from the Committee on Rules of Practice and Procedure
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Robert K. Hur, Esq., United States Attorney for the District of Maryland
Dr. Joe S. Cecil, Esq.
Ted Hunt, Esq. (Department of Justice)
Andrew Goldsmith, Esq., (Department of Justice)
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone)
Professor Liesa L. Richter, Academic Consultant to the Committee
Dr. Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure
Bridget M. Healy, Esq., Attorney Advisor, Administrative Office of the Courts
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Patrick Tighe, Esq., Rules Committee Law Clerk

I. Opening Business

Approval of Minutes

The Chair welcomed everyone to the meeting and solicited discussion of the minutes from the October 26, 2017 meeting of the Committee in Boston. A motion was made to approve the minutes, which was seconded and approved.

Standing Committee Meeting

The Chair reported on the Standing Committee meeting in January, 2018 during which she updated the Standing Committee concerning the projects and rules amendments being considered by the Evidence Advisory Committee. Judge Livingston noted that she received largely positive, albeit limited, feedback from the Standing Committee with respect to the projects being pursued by the Evidence Advisory Committee.

II. Symposium on Forensic Evidence, FRE 702, and *Daubert*

Judge Livingston then opened discussion of the first item on the agenda: the Committee's role in addressing challenges to forensic expert testimony, as well as more general problems under *Daubert* and Rule 702. Judge Livingston noted that this was the first opportunity the Advisory Committee had to discuss the vast array of information provided to the Committee at the fall symposium on expert forensic evidence and Rule 702, held at Boston College Law School. She further noted that the project began with recommendations from the President's Council of Advisors on Science and Technology ("PCAST") that the Advisory Committee draft a "Best Practices Manual" with respect to forensic evidence or alternatively prepare a new Committee note to Rule 702. Although no specific rule change was recommended, PCAST expressed interest in a revision to the detailed Committee note to FRE 702 to address special considerations associated with forensic evidence.

The Reporter made several observations about the PCAST recommendations. He noted that it is not statutorily permissible to revise a Committee note in the absence of any change to a rule. Although it might be possible that a relatively minor change to a rule would, after discussion, prove appropriate, the Committee has consistently followed the principle that it is not good rulemaking to amend a rule for the purpose of creating a note. In addition, there are problems with a Best Practices Manual emanating from the Advisory Committee. The Reporter noted that a Best Practices Manual for the authentication of electronic evidence was started under the auspices of the Committee, but ultimately had to be published under the names of the contributing authors because of concerns that a Best Practices Manual might be outside the Committee's rulemaking authority.

In light of these concerns, the Chair explained that the Advisory Committee would first discuss and consider the possibility for rule revisions that might assist courts and litigants in dealing with expert opinion evidence, particularly in the area of forensic feature comparison. Short of potential amendments to the Evidence Rules, the Committee could consider what role the Advisory Committee might play in the arena of expert forensic testimony.

The Chair thereafter recognized Dr. Joe Cecil, who had recently retired from the FJC and had served as the Liaison from the FJC to the Evidence Advisory Committee for many years, including in 2000 when the amendments to FRE 702 were enacted. Dr. Cecil is an author of the highly respected Reference Manual for Scientific Evidence relied upon by judges to better understand scientific evidence, and he contributed to the PCAST. The Chair explained that Dr. Cecil had been invited to share with the Committee how his work on scientific evidence might inform or assist in the Committee's inquiry into forensic expert testimony.

Mr. Cecil explained a bit of the background and focus of the Reference Manual for Scientific Evidence, noting that the first Manual was published in 1994 and that the most recent version came out in 2011 shortly after the National Academy of Sciences 2009 Report on forensic evidence. He noted that the Manual is now published in collaboration with the National Academy of Sciences and is extensively peer reviewed. He explained that the focus of the Manual is to give judges who may not have a science background the necessary scientific foundation to decide questions involving science in the courtroom. For example, the Manual includes chapters on statistics, toxicology, epidemiology, and forensic feature comparison. Dr. Cecil emphasized that the Manual is designed to impart scientific information, but is *not* designed to tell judges how to decide issues and cases. It is informative but not prescriptive. For those reasons, Dr. Cecil did not believe that the Reference Manual was a "substitute" for the Best Practices Manual envisioned by PCAST. Dr. Cecil stated that he was open to working with the Committee in the development of a Best Practices Manual should the Committee decide to sponsor such a project.

Judge Livingston inquired whether the FJC has education programs to further assist in addressing issues of forensic expert evidence. Dr. Lau remarked FJC currently does not sponsor many judicial programs on forensic evidence, but that programs could be developed if there is demand. He further noted that the European Union does have a Best Practices Manual on Forensic Evidence. The Reporter inquired of Dr. Cecil whether the FJC would be able to identify the scientists in the relevant fields that the Advisory Committee would need to consult in developing a Best Practices Manual. Dr. Cecil responded that the FJC was in contact with many noted scientists and could help the Committee in identifying those resources. He further noted that the National Academy of Sciences could also help identify experts. Judge Livingston inquired as to the timeline for the next edition of the Reference Manual. Dr. Cecil reported that no firm timeline exists, but that funds are currently being raised to support the publication of a new edition. The Reporter also inquired whether the Reference Manual would be able to resolve disputed issues identified in the PCAST report. Dr. Cecil stated that the Manual served to identify and explain such disputes, but does not provide resolution.

The Chair thereafter introduced a guest from the Department of Justice ("DOJ") who had been invited to the Committee meeting to explain the work being done by DOJ with respect to forensic investigation and testimony. Ted Hunt is the Senior Advisor on Forensic Evidence for DOJ. He began by stating that improving forensic investigation and evidence is a high priority for the Deputy Attorney General. He noted that his position as the Senior Advisor on Forensic Evidence was created last April and that a permanent working group on forensic evidence had been established to bring together all relevant stakeholders to improve and validate forensic

testing, and to provide guidelines for testimony by forensic experts. Mr. Hunt noted five key areas of focus:

1. Discontinuing statements by analysts and prosecutors expressing “a reasonable degree of scientific certainty” regarding findings. The Department directed prosecutors and analysts not to use this language in reporting results 18 months ago.
2. Establishing uniform terminology for examiners and analysts to employ in their reports and testimony to ensure that all terminology is scientifically based, appropriately qualified in scope, and not overstated. The first document on uniform terminology in latent print comparison was released in February of 2018 and additional directives for other disciplines will be forthcoming.
3. Monitoring expert forensic testimony for quality assurance to ensure that any mistakes are corrected immediately. This is a permanent program that evaluates testimony through real-time observation of testimonial presentations, as well as through transcript review. Feedback is promptly provided.
4. On-line posting of internal DOJ laboratory policies and procedures to enhance transparency. These documents are provided to defense counsel during discovery and also are being made publicly available, in order to provide greater insight and education into DOJ laboratory methodology, as well as to serve as a model for state crime labs.
5. Performing research and additional scientific study to strengthen the foundations of forensic science. The Department is conducting large-scale studies involving hundreds of examiners and thousands of forensic samples in a multi-year project in order to improve forensic methodologies.

Mr. Hunt concluded his remarks by emphasizing that each of the projects described was designed to enhance the reliability of forensics, to increase collaboration across federal and state laboratories, and to increase the capacity of forensic services.

The Reporter asked Mr. Hunt about who it is that performs the testimonial monitoring function that he described. Mr. Hunt explained that a peer of comparable qualifications does the monitoring and immediately critiques in-court testimony of an examiner to prevent exaggeration or overstatement of results and to avoid deviation from uniform language tailored to each field of forensic study. The Chair asked Mr. Hunt how an expert testifying about a forensic method that had not been validated through black box studies was permitted to express confidence while testifying according to the Department’s program. In response, Mr. Hunt described international standards of accreditation established for various forensic disciplines based upon extensive literature and hundreds of training hours that demonstrated the reliability of those methods, though without the more rigorous black box studies emphasized in the PCAST Report. The Reporter followed up, asking Mr. Hunt whether a ballistics expert could say a shell casing was “a match” for a particular weapon. Mr. Hunt stated that pre-trial rulings by the court would determine exactly what the expert could say, but that a ballistics examiner should be able to say that a shell casing was fired from a particular gun. The Reporter again queried whether that meant that examiners could testify to a “match” according to the Department protocol described by Mr. Hunt, to which he responded that it depends upon the discipline.

Dr. Cecil offered that the DOJ efforts to improve research and quality control were commendable, but that difficult issues remain concerning identification of a match between a forensic sample and an exemplar. According to Dr. Cecil, DOJ guidelines continue to permit an examiner to state that she can identify the source of a particular sample and testimony to that level of certainty conflicts with the consensus in the scientific community that there is inadequate foundation for that specific attribution. Dr. Cecil noted that other groups, like the European Union, require more temperate terminology, involving a “likelihood” of attribution, in order to prevent overstatement. Mr. Hunt responded that the Department’s published documents on particular disciplines, such as the ULTR on Latent Prints, would list approved terms of art for the particular discipline, but then require explanations of those terms and a description of limitations. According to Mr. Hunt, it is impossible to craft a single term that accurately captures conclusions across forensic disciplines, and explanation of terminology is far more important than the particular term used.

A member of the Committee asked Dr. Cecil whether the concern of the scientific community is the failure of examiners to explain limitations or uncertainty surrounding a particular forensic methodology. Dr. Cecil explained that scientists prefer to express findings in confidence intervals that more accurately represent the likelihood of a match rather than in conclusions about a match. He stated that the concern of the scientific community is that there is inadequate foundation to make a specific attribution to a particular defendant for many disciplines. Scientists would prefer more discussion of confidence intervals in the legal arena. Mr. Hunt noted that the Department’s Latent Print document makes limitations on findings very transparent and that this publicly available document is accessible to defense counsel for purposes of cross-examination.

Another Committee member then asked Mr. Hunt what the remedy would be if an examiner did overstate conclusions during his testimony. Mr. Hunt stated that there would be a duty to notify the parties immediately of any misstatement by a testifying expert.

The Chair thanked Dr. Cecil and Mr. Hunt for their helpful contributions and explained that one possible response to the issues surrounding forensic testimony could be a change to the Rules. The Reporter directed the Committee’s attention to a draft of a new Rule 707 on Forensic Evidence on page 50 of the agenda materials. He noted that the draft rule was not a proposal, but more of a thought experiment drafted for the Symposium for purposes of discussion. The Reporter noted difficulties surrounding a definition of “forensic evidence” in a rule. In addition, the draft Rule 707 would overlap, problematically, with existing Rule 702. For that reason, amending Rule 702 might be a better solution.

The Reporter stated that one idea for amending Rule 702 would be a new subsection prohibiting an expert from overstating results. That more limited amendment was also prepared for discussion at the Symposium and was received favorably by a number of the panelists. An alternative would be a positive statement, such as that experts must accurately report the strength of their findings. The Reporter suggested that the Committee might review a formal proposal for such a textual change at a subsequent meeting.

Judge Dever, the Liaison from the Criminal Rules Committee, reported that Criminal Rules is addressing some of the concerns surrounding forensic expert evidence with potential amendments involving criminal discovery. Judge Dever stated that a subcommittee had been appointed to determine whether the expert disclosure obligations under Criminal Rule 16 should be broadened along the lines of Civil Rule 26. He suggested that more robust advance disclosure to criminal defendants could aid them in testing expert testimony through *Daubert* motions and could also help in avoiding overstatement by providing a meaningful opportunity for expert cross-examination. Given the wide array of subjects about which experts are testifying, a broader criminal discovery provision could give defendants better access to information to challenge experts in all fields. Professor Coquillette noted the importance of having the Criminal and Evidence Committees work together on the issue of expert testimony in criminal cases and also commended the Department of Justice for its efforts. Judge Dever noted that the Criminal Rules Committee was gathering information from all constituencies, the Department of Justice, the Federal Public Defender, as well as the scientific community to get a broad perspective on the issue of criminal discovery of expert opinion evidence.

The Chair thanked Judge Dever for his report and noted that it was very helpful to coordinate with the Criminal Rules Committee in thinking about potential amendments to the Evidence Rules. Of the possible amendments, the Chair noted that one preventing overstatement was one that seemed most plausible. She further noted the challenge presented by the disconnect between civil and criminal cases with respect to expert testimony that was highlighted at the Boston College symposium. Civil lawyers lamented the vast resources being needlessly consumed by *Daubert* challenges, while criminal lawyers expressed concern about the lack of attention being given to forensic expert testimony in criminal trials. The divergent experiences in civil and criminal cases present another challenge for rulemakers. She noted that a Best Practices Manual might be an alternative to rulemaking to address these matters.

The Reporter explained that it would not be possible to write a rule prohibiting overstatement by testifying experts on the criminal side only, because that would imply that overstatement is acceptable in civil cases, which of course it is not. He then provided an update on the case law regarding FRE 702 and forensic expert testimony and directed the Committee's attention to the case digest in the agenda materials. A review of recent cases revealed that courts are relying on precedent to support the admissibility of many forensic methods without conducting independent analysis of *Daubert* factors. The cases also showed significant overstatement by forensic experts, including testimony that a sample identification was "100% accurate." A Committee member asked what conclusion a testifying expert could make if testifying to a "reasonable degree of scientific certainty" constituted overstatement. Mr. Hunt responded that with sufficient foundation, an expert should be able to opine that a sample comes from a particular source, but stated that the Department of Justice did not believe that it was necessary to testify to a "reasonable degree of scientific certainty." Mr. Hunt stated that no "magic word" would be adequate in all cases and that explanation by the examiner of the meaning and limitations of her findings was more important.

The Reporter expressed concerns that the findings of both the National Academy of Sciences and of PCAST have been largely ignored by the courts in the recent opinions and that a

Best Practices Manual (that cannot emanate directly from the Evidence Advisory Committee) might also be ignored.

Judge Dever then asked Mr. Hunt whether the Department of Justice was working to monitor testimony by state examiners to the extent that state experts testify in federal cases. Mr. Hunt responded that federal prosecutors governed by Department policies would not elicit improper testimony from state examiners, and further noted that one of the goals of publishing Department of Justice best practices was to provide a model for state laboratories as well.

The Chair then noted that it might be advisable for the Evidence Advisory Committee to appoint a small subcommittee to do intense reading and study regarding the possible role of the Committee in addressing concerns with forensic evidence. She stated that she and the Reporter currently felt that an amendment to Rule 702 preventing overstatement of findings appeared to be the most promising possibility and that a potential amendment distinguishing between scientific and other types of expert opinion testimony appeared less viable.

Mr. Hur then thanked the Reporter for his detailed case digest and stated that the cases are the data that the Committee should be considering. He opined that the courts are grappling carefully and thoughtfully with *Daubert* issues and limiting expert testimony where necessary. He seconded Mr. Hunt's assertion that the Department of Justice was already working to prevent overstatement of expert conclusions. The Reporter emphasized the excessive reliance on precedent by the federal courts in place of detailed consideration of other *Daubert* factors, and the overstatement found in the cases. Mr. Hur noted the longstanding acceptance of certain scientific methods like latent fingerprint analysis. While he acknowledged that courts could start from the ground up in a *Daubert* analysis of such methodologies, he stated that the reliance on the longstanding precedent reaches the same result – the proper admissibility of such testimony. Mr. Hur further opined that the PCAST report is having an impact, noting that defense counsel have cited to it. He further emphasized that the PCAST report looked favorably on the black box studies conducted by the FBI in connection with fingerprint evidence. Mr. Hur stated that the courts need more time to absorb the PCAST report and for its findings to filter into *Daubert* analysis.

The Reporter then turned the Committee's attention to another concern about the application of Rule 702 raised by two members of the public in a law review article. Specifically, the article found that some federal courts treat the sufficiency of an expert's basis, and the application of the expert's methods, as questions of weight for the jury --- when in fact these matters are both questions of admissibility under Rule 702, as amended in 2000. The Reporter explained that the subdivisions of Rule 702 set forth admissibility requirements that a trial judge must find to be satisfied by a preponderance of the evidence *before* allowing the expert to testify before the jury. Therefore, federal courts that are treating these foundational requirements as matters of weight that may be given to a jury are indeed wrong. That said, the Reporter noted that FRE 104(a) clearly applies to the admissibility requirements of FRE 702, and that crafting an amendment that essentially tells federal courts to "apply the rule" may be challenging.

One member of the Committee remarked that the federal cases treating the requirements of FRE 702 as matters of weight are very troubling. Essentially, it is as if some courts are saying

that FRE 702 doesn't apply in their circuit. The Committee member suggested that it might be important to amend Rule 702 to prevent it from being ignored. Another Committee member also reported being taken aback by the federal courts blatantly ignoring Rule 702. That Committee member wondered whether a rule revision (that could also be ignored) would be the most fruitful solution or whether judicial education might be a better solution to the problem.

A Committee member reiterated the sharp divide between expert discovery in civil and criminal cases, noting that the adversarial process works out many issues with expert testimony on the civil side and that the failure of the adversarial process on the criminal side is placing greater burdens on trial judges to police the use of forensic experts. Judge Dever noted that the Department of Justice was training on this issue in an effort to get more information about testifying experts to defense counsel earlier in the process to allow for more adversarial testing. Andrew Goldsmith, the Criminal Discovery Coordinator in the Deputy Attorney General's office noted that a January, 2017 memo from Sally Yates on expert discovery was now part of the U.S. Attorney's Manual and that all federal prosecutors are receiving training on early disclosure. He opined that it was important for the Evidence Advisory Committee to collaborate with the Criminal Rules Committee and suggested that a rule change was unnecessary because prosecutors are giving defense counsel the information they need with respect to testifying experts. Professor Coquillette noted that issues regarding expert testimony are well resolved through adversarial testing in civil cases, but that has not historically been the case in criminal trials. He remarked that he was delighted to learn that the Department of Justice was working to rectify the imbalance.

Judge Livingston closed the discussion of the fall symposium and of Rule 702 and *Daubert*. She noted the sense of complexity of the issues raised and the need for further study by the Committee. She stated that proposals for rule amendments regarding overstatement of conclusions, and Rule 702 admissibility requirements, would be considered at a future meeting.

III. Proposed Amendment to Rule 807

The Reporter opened discussion of the proposed amendment to Rule 807 that was released for public comment. The public comment period closed on February 15, 2018. In order to facilitate discussion of revisions raised by the public comment and by the Standing Committee, the Reporter directed the Committee's attention to a supplementary memorandum prepared in advance of the meeting.

The Chair noted that the memo was designed to provide a draft of the amendment to Rule 807 that would make it easier to resolve issues raised during the public comment period. The Chair and the Reporter proceeded to walk the Committee through the following revisions to the proposed amendment as released for public comment:

- Y The language regarding the hearsay exceptions in Rules 803 and 804 was moved from an admissibility requirement back into the prefatory section of the rule. Both the American Association for Justice and Judge Furman recommended this change, noting concerns that a trial judge might find it necessary to test proffered hearsay against every exception

in Rules 803 and 804 before applying Rule 807 – which was never the intent of the proposal.

- ÿ In response to concerns that the term “substance” of the statement used in the amended notice provision could prove vague, a “See” cite to Rule 103(a)(2) governing offers of proof (in which the “substance” of the proffered evidence must be presented) was added to the Advisory Committee note.
- ÿ A reference to the use of corroborating evidence to determine the “accuracy” of a hearsay statement in the Advisory Committee note was replaced with language requiring the use of corroborating evidence to determine “whether a statement should be admissible under this exception.”
- ÿ In addition, language requiring a finding of “sufficient guarantees of trustworthiness” was retained over a requirement that a trial judge find the hearsay “trustworthy” to avoid any reading of the amendment that would make Rule 807 narrower and more difficult to satisfy.
- ÿ The language in the Rule text regarding Rules 803 and 804 was changed from “not specifically covered by a hearsay exception in Rule 803 or 804” to “not admissible under a hearsay exception in Rule 803 or 804” to reflect the “near-miss” interpretation given to the existing rule by the majority of courts. The near-miss issue was added to the Committee note as well.
- ÿ The word “limit” used in the proposed Committee note was changed to “guide” to better reflect the intent of the sufficient guarantees of trustworthiness requirement in informing the trial court’s exercise of discretion.
- ÿ A reference to Rule 104(a) was added to the Note, in response to a suggestion from a member of the Standing Committee.
- ÿ A reference to the Confrontation Clause was added to the Note, in response to a suggestion from a member of the Standing Committee.

The Committee discussed the revised draft of the proposed amendment to Rule 807 and the accompanying Committee note. Judge Furman suggested replacing omitted language in the Committee note clarifying that a trial judge need not make a finding that the hearsay is not admissible under any Rule 803 or 804 exception before employing the residual exception. The language was removed from the Committee note when the Rule 803/804 language was eliminated as an admissibility requirement and moved back into the preface. Judge Furman expressed concern that a trial judge might still think that such findings were necessary and advocated retaining the clarifying language. He also proposed deleting language in the note that rule 807 should be “invoked only when necessary” as unduly limiting. Committee members agreed with these suggestions.

Another Committee member argued that if the intent of Rule 807 is not to allow parties to use the residual exception unless they need it, then inadmissibility under Rules 803 and 804 should be required. The Chair responded that making it an admissibility requirement would risk forcing trial judges to make a threshold examination of every Rule 803 and 804 hearsay exception before applying Rule 807 – which was not intended, and which would unnecessarily constrain the use of the rule. Judge Campbell raised the concern that the Committee Note would say that a party could *not* use Rule 807 to admit hearsay admissible through Rules 803 and 804 (suggesting that a party could not proceed directly to Rule 807 to admit hearsay) when nothing in the text of Rule 807 would prevent a party from doing just that. The Reporter noted that case law interpreting existing Rule 807 does prohibit parties from proceeding directly to Rule 807. Judge Campbell proposed altering the Committee note to provide that nothing in the amendment is intended to “alter the case law holding that parties may not proceed directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804.” Committee members agreed with that suggestion. Another Committee member noted that Rule 807 is always the last exception argued by parties and the Reporter highlighted litigants’ natural incentives to start with the Rule 803 and 804 hearsay exceptions because Rule 807 is ordinarily more difficult to satisfy.

The Reporter then explained that revised language in the Committee note had been added to deal with the “near-miss” precedent and the new rule text stating that hearsay not “admissible” through a Rule 803 or 804 exception (as opposed to “not specifically covered by” an exception) could be admissible under Rule 807. He noted that the language was designed to suggest that courts employing a near-miss analysis of hearsay offered through Rule 807 should think about how nearly a proffered hearsay statement misses a standard exception, as well as about the importance of the requirement of a Rule 803 or 804 exception that the hearsay statement fails to satisfy. One Committee member expressed concern that the near-miss language in the Committee note might lead some to believe that near-miss analysis was a substitute for considering sufficient guarantees of trustworthiness. The proposed Committee note was revised to clarify that a near-miss analysis may be part of an inquiry into guarantees of trustworthiness, but is not a replacement for that inquiry. Judge Furman also expressed concern that litigants and judges might not appreciate which requirements of the Rule 803 and 804 hearsay exceptions are the “important ones.” The reference to the importance of the admissibility requirements was removed from the Committee note to accommodate that concern.

The Reporter next explained that a member of the Standing Committee suggested adding a sentence to the Committee note clarifying that testimonial hearsay satisfying the requirements of Rule 807 would nonetheless be excluded under the Sixth Amendment Confrontation Clause in a criminal case. Given that the Constitution prohibits the admission of uncross-examined testimonial hearsay through *any* of the hearsay exceptions, the Chair queried why this reference to the Sixth Amendment was needed in the note to Rule 807 when the notes to the other hearsay exceptions contain no such caveat. The Reporter responded that the categorical exceptions generally avoid the admissibility of testimonial hearsay, because the admissibility requirements require a showing that would be inconsistent with primary motivation for use in a criminal prosecution. For example, a record that satisfies the requirements of the business records exception in Rule 803(6) would, by definition, not be testimonial, because it would have to be made in the course of regularly conducted activity. And a statement admissible as an excited

utterance will not be testimonial because it must be made under the influence of a startling event, which is inconsistent with preparing a statement for a criminal prosecution. In contrast, Rule 807 presents the greatest risk of admitting testimonial hearsay due to its “sufficient guarantees of trustworthiness” standard. So there is some justification for adding the language about the right to confrontation in the Committee Note. No further objections were made to its inclusion.

The Committee then discussed changes to the notice provision and the Committee Note regarding notice. The Reporter noted that the “See” cite to Rule 103(a)(2) in the Committee Note was designed to inform the court’s inquiry into whether the “substance” of the statement had been disclosed. He also noted that language in the note regarding case law under the former requirement that “particulars” be disclosed had been removed as unhelpful. The Reporter also explained that conflicting statements about the rigor or flexibility of the good cause exception to the notice requirement had been removed. The suggestions were a provision that good cause should not be easily found (provided by a Standing Committee member) and a provision that good cause should be easily found as to criminal defendants (provided by the National Association of Criminal Defense Lawyers). The Committee decided to leave the interpretation of good cause to trial judges and the extensive pre-existing case law from courts that had applied a good cause exception even though it was not specifically provided for in the rule.

At the conclusion of the Committee’s discussion, the Chair explained that the Reporter would provide a clean copy of the revised Rule 807 and accompanying Committee note reflecting all changes made during the discussion and that the Committee would vote on sending the proposed amendment to the Standing Committee, with the recommendation that it be released for public comment, on the following day. Thereafter, the Committee adjourned.

The Committee meeting resumed Friday, April 27

Mr. Hur served as the representative of the Department of Justice, as Ms. Shapiro could not be present.

IV. Rule 702 and Rule 104(a) Admissibility Requirements (Revisited)

Judge Livingston explained that the Committee would take Rule 807 back up later in the day after all Committee members had a chance to review the latest version of the proposed amendment prepared by the Reporter. She then asked the Reporter to share an idea for resolving the misapplication of Rule 702 by federal courts who are treating the Rule’s admissibility requirements as matters of weight. The Reporter suggested that the preface to Rule 702 that precedes the admissibility requirements could be modified to address this concern by stating that a qualified expert may testify if “the court finds the following by a preponderance of the evidence.” The Reporter explained that adding this language would emphasize that the Rule 702 requirements are admissibility requirements governed by Rule 104(a). He explained that a Committee Note could accompany such a revision, explaining that it was a needed clarification to address confusion in the courts. While the new language would basically state the existing rule --- that Rule 104(a) applies to the Rule 702 requirements --- it has the benefit of making the principle explicit, thus hard to ignore. And it might be justified in light of the disregard of the admissibility requirements by many courts.

Judge Campbell then opened the discussion with an example from a hypothetical trial in which an expert testifies in a *Daubert* hearing that he rejects 7 of 10 seminal studies in an area and is relying on the 2 or 3 minority studies in the field as the basis for his opinion. Judge Campbell queried, if the judge is not persuaded that the three minority studies are reliable and sufficient, but the jury might be, does the judge exclude? The Reporter responded that the trial judge must make a finding by a preponderance of the evidence on the admissibility requirements before allowing the expert to testify, and that it would be error to permit the testimony if the judge is not satisfied that the expert's basis is sufficient, as would be the case in Judge Campbell's hypothetical. Another Committee member stated that the question is whether Rule 702 works under a Rule 104(b) analysis, and the Reporter responded that this was indeed the issue that some courts were struggling with, but that the admissibility requirements in Rule 702 are clearly governed by Rule 104(a) --- as also stated in *Daubert* itself. The Reporter then asked whether the Committee members would be interested in reviewing a draft with revised prefatory language requiring a finding of each of the Rule 702 requirements by a preponderance of the evidence. Committee members expressed interest in reviewing such a draft and the Chair suggested that such a proposal might be part of the broader conversation the Committee would continue to have about its role in helping trial judges apply Rule 702.

V. Prior Inconsistent Statements: Possible Amendment to Rule 801(d)(1)(A)

Judge Livingston next opened the discussion of a potential amendment to Rule 801(d)(1)(A) that would allow for substantive admissibility of prior inconsistent statements of witnesses that were recorded audio-visually and available for presentation at trial. She acknowledged that the Committee had been considering the proposal for a long time. She traced the history of Rule 801(d)(1)(A), noting that the original Advisory Committee had favored a wide open approach allowing substantive admissibility of all prior inconsistent statements by testifying witnesses --- an approach that is now employed in a number of states, including California and Wisconsin. She noted that Congress pushed back on this proposal, expressing concern that a criminal defendant might be convicted solely on the basis of out of court statements of a witness who did not implicate the defendant at trial. This concern resulted in the compromise rule embodied in existing Rule 801(d)(1)(A) requiring prior inconsistent statements to be made under oath and in a prior proceeding if they are to be used substantively.

The Chair noted that this Advisory Committee began reviewing prior inconsistent statements due to concern that the limiting instructions provided to jurors when such statements are admitted for impeachment purposes only are difficult to comprehend and follow. In addition, the Committee noted Wigmore's opinion that cross-examination is the greatest engine for the discovery of truth in exploring the possibility of broader admissibility of hearsay statements made by testifying witnesses. Some expansion of the admissibility of prior inconsistent statements was also thought to be consistent with the basic thrust of the Federal Rules of Evidence to make more information admissible and available to the fact-finder. With the caveat that evidence rulemaking should focus on the process of deriving the truth at trial, some value was also seen in the likelihood that a rule allowing substantive admissibility of audio-visually recorded statements would encourage more recording and greater documentation of witness

statements. On the other hand, concerns had been expressed about the reliability of prior inconsistent statements and the ways in which the oath and the grand jury process contribute to reliability. Other potential downsides to an amendment could be added litigation costs needed to determine whether statements were recorded “audio-visually” or were made “off camera.” And questions had arisen about the impact of the amendment at a time when recording technology was exploding to include dash-cam and body-cam footage, as well as cellphone and social media recordings. There were also lingering concerns over the impact on summary judgment practice in civil cases. The Chair noted that every straw vote taken on the proposal in the Committee resulted in 2/3 of the Committee in favor of exploring the amendment and 1/3 opposing it.

After this introduction, the Reporter noted that the Department of Justice had proposed allowing substantive admissibility of prior inconsistent statements acknowledged by a witness at trial, in addition to audio-visual witness statements. Committee members inquired about the interaction between the audio-visual and acknowledgement proposals. The Chair explained that the Department’s proposal would be more liberal because it would allow substantive admissibility of any prior inconsistent a witness would acknowledge while on the stand – whether recorded or not. Judge Campbell asked whether case law had developed over how a witness “acknowledges” a prior statement. The Reporter noted that there was case law in jurisdictions with an acknowledgement rule and that the acknowledgement provision had sometimes resulted in problematic inquiries at trial, but that this was not an inevitable outcome.

Dr. Lau noted that technologies making it relatively easy to create fake video content were proliferating and that the Committee should consider that falsifying video material might become extremely easy 5-10 years from now. The Reporter responded that if this was a problem, then it was a problem for *all* electronic evidence, not just the narrow band of audiovisual statements that would be admissible under the amendment. The Federal Public Defender noted that defendants and witnesses already deny making statements that appear on video and that experts are employed to determine whether a defendant actually made a statement reflected in a recording.

The Chair asked Dr. Lau to report on the survey performed by the Federal Judicial Center on the proposed admissibility of audio-visual inconsistent witness statements. Dr. Lau noted that federal judges seemed to be split along lines similar to those in the Committee, with little appetite for the adoption of wide-open substantive admissibility of prior inconsistent statements and some support for a compromise approach to expanding admissibility. Judges expressed few concerns about expanded use of prior inconsistent statements in civil cases. In criminal cases, judges reported encountering oral prior inconsistent statements more frequently than they encounter audio-visual statements. Judge Livingston noted the bottom line in the survey that 58% of judges supported or strongly supported the proposal, while 29% opposed or strongly opposed it.

The Reporter thanked the FJC for the survey and the report and noted appreciation for feedback received from the American Association of Justice (“AAJ”), the National Association of Criminal Defense Lawyers (“NACDL”), and the Innocence Project on the proposal as well. He noted that the feedback from AAJ was largely favorable. The AAJ suggested adding a reference to future recording technologies in the Committee note. The Innocence Project suggested a pilot project to further explore the proposal in action due to two primary concerns: 1)

the possibility that a recorded statement may be the last in a long series of statements taken from the witness that may not reflect all of what the witness has said and 2) the concern that a defendant could be convicted solely on the basis of a prior inconsistent statement. The Reporter first noted that it would be wonderful to be able to conduct million dollar pilot projects in connection with rulemaking efforts, but that no Committee had ever done such a project prior to rulemaking and that it would be impossible. He also responded to the substantive concerns raised by the Innocence Project. He noted that a Federal Rule of Evidence could not mandate the recording of all of a witness's statements because that would exceed the Advisory Committee's statutory mandate. He explained that an evidence rule might condition admissibility of one recorded statement on the availability of all other statements in recorded form to the opponent, but questioned whether that would be advisable. With respect to the concern that a defendant could be convicted on the basis of a prior inconsistent statement alone, the Reporter reiterated that Rule 801(d)(1)(A) makes statements admissible for their truth, but does *not* deal with the sufficiency of the evidence to convict. He noted that Congress rejected the same objection to Rule 801(d)(1)(C) dealing with prior statements of identification and that a Committee note could clarify that the amendment does not speak to sufficiency.

Judge Furman noted that the issue of admissibility is intertwined with sufficiency because a prior inconsistent statement that could not be used to get a case to the jury under the existing rule could support submission to the jury under the proposal. He queried whether the Committee has solicited feedback from the defense bar in states where there is wide-open substantive admissibility of prior inconsistent statements. The Reporter responded that the Committee had received such feedback and described research by Professor Dan Blinka into the practice in Wisconsin that solicited input from all constituencies, the defense bar included. That report suggested that there is very little controversy over substantive admissibility of prior inconsistent statements in that jurisdiction. The Reporter also obtained input from noted Evidence expert Professor Ed Imwinkelried, who reported little activity in the California cases concerning the substantive admissibility of prior inconsistent statements in California. The Chair stated that it is not surprising that there is little controversy over the admissibility of prior inconsistent statements in Wisconsin and California because the wide-open rule that makes all such statements substantively admissible is straightforward. She expressed concern, however, that a compromise position that allows only audio-visual or acknowledged prior inconsistent statements could generate significant litigation over the scope of those limitations.

Another Committee member reminded the Committee of the symposium at Pepperdine in 2016 in which California prosecutors talked about the impact of substantive admissibility of prior inconsistent statements in obtaining plea agreements in domestic violence cases, and in proving up gang-related prosecutions, where witnesses often recant. He noted the report that defendants would accept a plea knowing that a prosecution could proceed even without the cooperation of the victim. The Chair noted that one of the concerns of the Innocence Project is that innocent defendants might plead guilty if witness statements taken in the aftermath of an incident, that have since been recanted, can form the basis of a prosecution. The Federal Public Defender also noted situations in which a domestic partner calls police out of anger at a partner and recants later because there was no abuse. He explained that there are times when the initial report is not accurate, even in the domestic violence context, and that the proposal would allow substantive use of these recanted early reports. He also reiterated the concerns of the Innocence

Project about a series of interviews that lead up to the final audio-visual statement and the inability of the jury to view the entire back and forth that created the prior inconsistent statement. Finally, he expressed concern that the government might claim that a prior inconsistent statement was substantively admissible under the proposed rule even if the *defense* sought to offer the statement only for impeachment purposes. The Reporter noted that an Advisory Committee note had been included to prevent that possibility. The Federal Public Defender further expressed concern about unreliable body-cam or cell phone recordings, noting that defense lawyers could record witnesses exonerating defendants and substantively admit those statements if the witness shows up and testifies favorably for the prosecution. He suggested that the proposal could create abuses and litigation on both sides of criminal cases.

Another Committee member noted that any prior inconsistent statement may already be used to impeach a testifying witness and that juries don't understand the limiting instruction accompanying such statements. This Committee member suggested that the proposal would be an improvement because it would impose more rigor with respect to the prior inconsistent statements admitted substantively than is currently required of prior inconsistent statements already allowed to impeach. Judge Lioi remarked that it does matter a great deal in criminal cases if the prior inconsistencies are allowed fuller use because substantive admissibility may be enough to defeat a defendant's otherwise valid Rule 29 motion for acquittal. The Chair also noted potential impact on summary judgment practice in civil cases if plaintiffs produce audio-visual statements that are inconsistent with a witness's deposition testimony. Judge Campbell noted that such a recorded statement may allow a civil case to go to trial under the proposal where summary judgment could be granted under the existing rule. The Reporter noted that if the recorded statement were a sham designed to defeat summary judgment, existing case law would permit a judge to disregard the statement even after an amendment. He further queried whether an audio-visually recorded statement by a witness expected to testify at trial that supported the plaintiff's case shouldn't mean that the case *should* proceed to trial.

Another Committee member questioned the absence of an oath requirement for statements that would be admissible under the proposal, indicating that the statements would lack the gravity of the statements admissible under existing Rule 801(d)(1)(A). The Reporter noted that the trial cross-examination before the jury required by the Rule was designed to reveal any weaknesses in the statement. Another Committee member remarked that the effect on Rule 29 practice in criminal cases should drive the result on the proposal, especially in light of evidence suggesting that jurors do not follow instructions with respect to prior inconsistent statements offered only for impeachment once they get a case. This Committee member suggested that audio-visually recorded statements of a testifying witness who is subject to cross-examination at trial -- that the jury can view for itself -- might be worthy of substantive effect and justifiably affect Rule 29 practice. The Committee member expressed some uncertainty regarding the Department of Justice proposal to include acknowledged witness statements in an amendment. The Reporter suggested that the Department's acknowledgement proposal should be included in the rule, if it were released for public comment, in brackets to signal that the Committee had not endorsed the acknowledgement option, but was seeking input from the public concerning it. He noted that this was done with the selective waiver provision of Rule 502 that did not ultimately find its way into the rule as enacted.

Another Committee member asked whether there is data suggesting that jurors do not understand limiting instructions regarding prior inconsistent statements offered for impeachment only. The Reporter noted that there was such data, involving mock juries, as well as judicial experience. The Committee member suggested that jurors do understand when instructed clearly. Another Committee member expressed concern about the voluminous dockets of the federal trial courts and the possibility that the proposed rule could increase the volume of cases requiring evidentiary hearings or trial. The Committee member noted the high volume of prisoner cases that could be impacted by an amended rule. The Reporter suggested that recordings submitted by plaintiffs in prisoner litigation would reflect anticipated testimony at a new trial that might necessitate evidentiary hearings, even without Rule 801(d)(1)(A).

The Chair again expressed skepticism about the proposal, noting concerns about Rule 29 practice in criminal cases and summary judgment practice in civil cases, concerns about plea bargaining impact and increased litigation costs surrounding the Rule. Although she doubted whether a change was worth the candle, she noted that social science has shown that jurors do not understand limiting instructions and noted the results of the Federal Judicial Center survey revealing that the majority of trial judges favored the change. The Chair noted that the Committee could send it out for public comment or table the idea for two years. Another Committee member queried what the standard for releasing a proposal for public comment should be. Judge Campbell noted that there are many potential standards, but that the consensus on the Standing Committee was that the public comment process should not be used as a research tool. On the other hand, if the Advisory Committee thinks the Rule is probably a good idea depending upon what public comment reveals, that is a sound basis for forwarding a proposal. The Reporter noted that the Rule 801(d)(1)(A) proposal certainly had not been rushed to public comment given several years of research, an FJC survey, two symposia, and Committee consideration at six consecutive meetings. Professor Coquillette noted that the risk of sending something forward to the Standing Committee improvidently was a loss of credibility for the Advisory Committee. The Reporter observed that negative public comment has been a catalyst for effective rule changes; in 2006 a proposal to amend Rule 408 to allow civil settlements to be admissible in criminal cases was released at the urging of the Department of Justice. The Reporter noted that very negative commentary fostered a compromise rule, which is now in effect. The Chair opined that tabling the proposal would provide the Committee more time to see how body and dash cameras, as well as cell phone recordings affect trials in the future.

The Reporter explained that the question for the Committee was whether to send the proposal forward to the Standing Committee to be released for public comment or to remove it from the Committee's agenda. A Committee member made a motion to refer the proposed amendment to the Standing Committee with the acknowledgement provision included in brackets for release for public comment. The Committee voted 5-4 *in favor* of sending the proposed amendment to the Standing Committee. The Committee then proceeded through the proposed Committee note to determine which portions of that note would advance with the proposed rule, and reached agreement on a Committee Note.

However, following lengthy discussion by the Committee of potential amendments to Rules 807, 606, and 404(b) [detailed below], and after the lunch break, Rob Hur of the Department of Justice was recognized by the Chair. Mr. Hur stated that he was moved by the many good points

made in opposition to the proposal to amend Rule 801(d)(1)(A), particularly those made by the Federal Public Defender. Having consulted with Betsy Shapiro and Andrew Goldsmith, Mr. Hur changed the Department of Justice vote on the proposed amendment from one in favor to one against, making the vote tally 5-4 *against* the proposed amendment, thus defeating it. Therefore, Rule 801(d)(1)(A) was not referred to the Standing Committee for release for public comment.

VI. Rule 807 Approved

After the Committee reviewed all revisions to the proposed amendment to Rule 807, it was unanimously approved for transmission to the Standing Committee, with the recommendation that it be sent to the Judicial Conference for approval.

The text and Note of the Rule, a GAP report, and a summary of public comment, are attached to these Minutes.

VII. Rule 606(b) and *Pena-Rodriguez*

The Chair next raised the Rule 606(b) ban on juror testimony about deliberations, and the impact of the Supreme Court's 2017 decision in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that Rule 606(b) could not be applied to bar testimony of racist statements about the defendant made in juror deliberations --- such a bar violated the defendant's Sixth Amendment right to a fair trial. The Chair noted that the Committee had discussed three potential amendments to Rule 606(b) to bring the rule text in line with *Pena-Rodriguez* at its spring 2017 meeting, and had tabled the issue after discussion. Rule 606(b) was back on the Committee's agenda again to consider the need for an amendment to reflect the holding. The Chair explained that if the Committee decided not to take action on Rule 606(b) at this meeting, the topic would be tabled for at least a year to observe the case law developing in the wake of *Pena-Rodriguez*.

The Reporter directed the Committee's attention to a digest of federal cases interpreting *Pena-Rodriguez*, and observed that courts have declined to expand the exception to the no-impeachment rule beyond that holding --- which was limited to statements of racial bias toward the defendant in jury deliberations. He then briefly outlined the potential amendments previously considered by the Committee, including an amendment that would expand an exception beyond that required by *Pena-Rodriguez*, one that would seek to codify the racial animus exception from *Pena-Rodriguez* narrowly in rule text, and a generic amendment that would create an exception to the no-impeachment rule for evidence required by the Constitution. The Committee previously rejected both the expansive and narrowly-tailored potential amendments as problematic, and at the meeting it focused on the more generic constitutional exception in the rule that would flag the *Pena-Rodriguez* issue for litigators consulting only rule text.

Two possibilities have been considered. First, an amendment that makes an exception to the no-impeachment rule "when excluding the testimony would violate a party's constitutional rights." This generic constitutional exception would be modeled upon the one that currently exists in Rule 412(b)(1)(c). Due to concern in the Committee at the spring 2017 meeting that a generic constitutional exception in Rule 606(b) could be read to expand upon *Pena-Rodriguez* and to permit post-verdict juror testimony in any case where a defendant claims violation of a

“constitutional right” by the jury, a Committee member suggested using the restrictive language of the AEDPA in a Rule 606(b) amendment to avoid such an expansive reading. Such an amendment would allow juror testimony about deliberations when “excluding the testimony would violate clearly established constitutional law as determined by the Supreme Court of the United States.” This proposal was suggested as a way to send up a red flag or at least a yellow light for courts considering using Rule 606(b) to expand beyond the holding in *Pena-Rodriguez*. The Reporter explained that the use of the AEDPA language would be problematic due to its substantive restriction on lower courts and suggested that a generic constitutional exception like the one in Rule 412 was a better solution for the Committee to consider. The Chair and the Committee agreed that the AEDPA alternative would not work, and proceeded to reconsider the generic constitutional exception.

The Reporter also brought to the attention of the Committee a law review note to be published in the *Columbia Law Review* on *Pena-Rodriguez* that chronicled the Advisory Committee’s inaction on Rule 606(b). The note advocated expansion of the *Pena-Rodriguez* exception to the no-impeachment rule beyond racist statements and favored a general constitutional exception in Rule 606(b) that would accommodate such future expansions. The Chair reiterated that the goal of the Committee was to raise the *Pena-Rodriguez* issue for the trial lawyer consulting only the text of evidence rules, without suggesting expansion.

Judge Campbell expressed concern that even a generic constitutional exception would invite lawyers to seek expansion of the *Pena-Rodriguez* holding. He posited a case in which a defendant claims that the jury violated his constitutional rights and points to a constitutional exception to Rule 606(b) to show that the court must hear juror testimony. Judge Campbell suggested that the lack of an exception in Rule 606(b) currently helps courts hold the line on *Pena-Rodriguez* because courts can point to the prohibition in the Rule as support for the idea that no other exceptions exist. If the Committee removes that constraint, he suggested that courts might feel compelled to expand to create exceptions to Rule 606(b) for other constitutional violations. The Reporter noted that the Committee note accompanying an amendment would explain that no expansion was intended. The Reporter also reiterated that courts are finding that *Pena-Rodriguez* did not create constitutional rights outside the narrow circumstance it recognized, meaning there is no other constitutional right to introduce post-verdict juror testimony.

Judge Furman noted that there is a recognized constitutional right not to have the jury draw an adverse inference from a defendant’s silence. If a defendant claims that right was violated in the jury room, Judge Furman queried why an amended Rule 606(b) wouldn’t also allow juror testimony on that point. The Reporter responded that courts had already rejected such arguments after *Pena-Rodriguez* and that nothing in any Evidence Rule could determine substantive constitutionality.

A Committee member suggested that Judges Campbell and Furman made compelling points and that it would be difficult for a court to refuse to take juror testimony about other constitutional violations with an amended Rule 606(b) containing a generic constitutional exception. The Committee member stated that the proposal to amend Rule 606(b) was rightly tabled by the Committee in the spring of 2017 to avoid potential expansion by rule.

The Reporter emphasized that it is not optimal to have an evidence rule that could be applied unconstitutionally, and queried whether the language of an amendment might be tweaked to provide some signal in rule text without suggesting any expansion of *Pena-Rodriguez*. Another Committee member suggested that the only way to truly prevent expansion would be to reference *Pena-Rodriguez* in rule text. The Reporter suggested that it would not be appropriate rulemaking to have an amendment that specifically referenced a case, and moreover that to do so would be to risk the possibility that another amendment would be required should the Supreme Court expand upon the *Pena-Rodriguez* exception.

Other Committee members, after this discussion, agreed that a potential constitutional exception was problematic and that tabling the issue was appropriate. The Chair wrapped up the discussion by noting that the issue would be tabled for one to two years to allow more time for case law to develop before the Committee reconsidered action on Rule 606(b).

VIII. Possible Amendment to Rule 404(b)

The Chair next turned the Committee's attention to potential amendments to Rule 404(b) that had been considered in light of recent Seventh and Third Circuit cases limiting admissibility of evidence of uncharged misconduct in criminal cases. The Chair explained that four different proposals remained on the Committee's agenda: 1) a proposal to restrict use of the "inextricably intertwined" doctrine that takes prior act evidence outside the protections of Rule 404(b); 2) a substantive amendment requiring judges to exclude bad act evidence offered for a proper purpose, where the probative value as to that purpose proceeds through a propensity inference; 3) a proposal to add the balancing test from Rule 609(a)(1)(B) to Rule 404(b) to require that the probative value of prior act evidence offered against a criminal defendant outweigh unfair prejudice; and 4) a proposal to expand the prosecution's notice obligation in criminal cases. The Chair explained that she met with the Reporter prior to the meeting in an effort to streamline the Committee's consideration by subjecting each proposal to an independent determination and vote by the Committee.

The Chair first addressed the "inextricably intertwined" proposals. She stated that the inextricably intertwined doctrine in the courts is problematic, partly due to the variable terminology adopted by courts employing it (including acts that "pertain" to the charged crime, those that are "integral" to the charged crime, those which "complete" the story of the charged crime, or are "intrinsic" to the charged crime). The proposal before the Committee to limit the inextricably intertwined doctrine was an amendment requiring all acts "indirectly" proving the charged crime to proceed through Rule 404(b). The Chair concluded that such an amendment would not be workable or helpful in applying Rule 404(b), particularly because it might sweep any and all conduct apart from the act specifically charged into a Rule 404(b) analysis. The Chair gave an example of a defendant fleeing the scene of the charged crime as indirect evidence that would have to proceed through Rule 404(b) if such an amendment were adopted. One Committee member noted that the inextricably intertwined doctrine is important in determining which acts of a defendant are "other" acts for purposes of Rule 404(b) and opined that the restyling project was wrong to move the word "other" (to read "crimes, wrongs or other acts" instead of "other, crimes, wrongs or acts"). That Committee member suggested that if any other

amendments to Rule 404(b) are proposed, the word “other” should be relocated to its former position. The Reporter agreed that a change might be made if other amendments were proposed, but noted that such a change would not affect the case law on inextricably intertwined acts, because courts would still need to decide which acts were “other” regardless of the placement of the term. The Reporter also noted that the style change did not result in any change in the courts in the application of the inextricably intertwined doctrine.

The Committee determined that it would no longer proceed with any attempt to rectify the “inextricably intertwined” doctrine through an amendment to Rule 404(b).

The Chair then recommended that the Committee remove from the agenda the proposal to bar admission of uncharged misconduct unless the court found the evidence probative of a proper purpose by a chain of reasoning that did not rely on any propensity inferences. She noted that the proposal came from the Seventh Circuit’s opinion in *United States v. Gomez*. She expressed skepticism that a required “chain of non-propensity inferences” could be a workable requirement. She suggested that requiring a trial judge to find a chain of non-propensity inferences sounded more like taking an evidence exam than managing a trial. She further suggested that the original Advisory Committee had rejected “mechanical solutions” in drafting Rule 404(b) and had rejected the notion that there was a truly binary distinction between a “propensity use” and use for a proper purpose -- to show “intent” for example. The line between intent and propensity is often difficult if not impossible to draw. The Chair concluded that *Gomez* made the exercise in eliminating propensity inferences sound easy and straightforward when it often is not.

One Committee member suggested that Rule 404(b) is the most critical rule of evidence in a criminal case and that the real reason that other acts are offered is in fact to suggest the defendant’s propensity to commit crimes. In this Committee member’s opinion, this evidence improperly tips the scales significantly against the defendant, and so the prosecution ought to bear a heavier burden in establishing admissibility. The member concluded that incorporating the *Gomez* test would not be too burdensome on judges, and that the amendment should be adopted. The Federal Public Defender agreed, stating that Rule 404(b) evidence is by far the most prejudicial evidence offered in criminal trials. He noted that proof of Rule 404(b) acts often consumes far more time at trial than proof of the charged offense. He further contended that the instruction given to jurors regarding the use of Rule 404(b) evidence is incomprehensible and offers defendants no protection.

Rob Hur noted that the Department shared the Chair’s concerns that requiring articulation of the chain of reasoning would be unworkable. He opined that a review of pre-trial transcripts reveals that trial courts are already putting the burden on prosecutors to demonstrate the admissibility of this evidence and that Rule 404(b) issues are thoroughly flushed out at the trial level. Mr. Hur further stated that the recent shift in Circuit precedent was having an effect on prosecutorial behavior vis a vis Rule 404(b). Prosecutors know they need to follow the Rule and defend the admissibility of the evidence on appeal. Therefore, he argued that the courts are resolving these issues appropriately and no amendment is necessary. The DOJ did concede that an amendment to the notice provision of Rule 404(b), to codify what the Department is already doing to ensure that defendants receive timely and proper notice, might be viable.

In response to the suggestion that further development in the courts would resolve any problems with Rule 404(b), the Reporter pointed to a recent opinion in the Tenth Circuit, *United States v. Banks*. In that case, the court acknowledged recent efforts to analyze other acts carefully in other circuits, but rejected this trend and held summarily that drug crimes are admissible in the Tenth Circuit to show knowledge. The Reporter suggested that cases like *Gomez* might arguably go too far in preventing use of other act evidence through Rule 404(b), but that other circuits may continue to do too little to prevent misuse. He suggested that an amendment that falls somewhere in between these divergent approaches may be optimal. Mr. Hur cautioned that Congress may get involved if the Committee chose to pursue an amendment limiting admissibility of Rule 404(b) evidence.

The Chair highlighted another recent Tenth Circuit opinion, *United States v. Henthorn*, in which the government was permitted to offer evidence to show that the defendant's first wife died alone in his presence in very suspicious circumstances, to rebut the defendant's argument that his second wife's death while alone with him in suspicious circumstances was an unfortunate accident. She noted that the relevance of the prior accident turned to some degree on the doctrine of chances --- it is highly unlikely that one husband would lose two wives in such similar and tragic circumstances by accident. But she also explained that some suggestion of the defendant's propensity to kill his wives might be found in the evidence. She noted that Wigmore opined that there should be room for a difference of opinion. The Chair explained that the propensity ban in *Gomez* failed to account for that difference of opinion and could confuse trial judges.

A motion to remove the non-propensity inference requirement from discussion passed by a vote of 6-3.

The next amendment alternative discussed was a proposal to add a new balancing test to Rule 404(b) requiring the probative value of other acts evidence offered against a criminal defendant to outweigh unfair prejudice. The Reporter explained that this alternative would offer a more flexible solution that avoids the mechanical tests rejected by the Advisory Committee Note to the current rule, and would avoid any rigid requirement of a chain of non-propensity inferences. He noted that the proposed balancing test would not be a true "reverse" balancing because it would not require probative value to "substantially" outweigh prejudice. Instead, it would be the same balancing test found currently in Rule 609(a)(1)(B), that protects criminal defendants from similar character prejudice. He suggested that it made good sense to have similar balancing tests governing Rule 404(b) and Rule 609(a)(1)(B) evidence offered against criminal defendants because the two rules deal with similar character concerns. He further explained that Congress crafted the protective test in Rule 609(a)(1)(B) that could be usefully applied to Rule 404(b) evidence as well. The Reporter explained that making the balancing test slightly more protective would eliminate the characterization of Rule 404(b) as a rule of inclusion --- a characterization that has resulted in almost per se admission of prior offenses in many federal drug prosecutions. Still, the balancing test would continue to permit probative other acts to be admitted. The Reporter noted that there is support for such a balancing test in pre-Rules cases and that the Uniform Rules of Evidence and some states employ the more protective standard.

Rob Hur from the Department of Justice noted that the applicable balancing represents a policy choice about Rule 404(b) evidence and that Congressional adoption of Rule 404(b), limited only by the standard Rule 403 balancing test, is reason enough to reject a balancing amendment. Another Committee member expressed concern that a balancing amendment would not help courts deal with the issue of what counts as prejudice and whether propensity uses are permissible. That Committee member suggested that no change be made unless it is one to fix the concern about other acts offered for propensity purposes. The Reporter responded that a balancing test requiring the prosecution to demonstrate that probative value outweighs bad character prejudice would do a better job of protecting defendants from improper uses of Rule 404(b) evidence. Another Committee member questioned whether having the same test for Rules 404(b) and 609(a)(1)(B) was appropriate, given that the past convictions are offered for impeachment only under Rule 609, but can be offered on the merits under Rule 404(b). The Reporter responded that the prejudice in both instances is the same, and that the different goals in admitting the evidence is factored in as part of the consideration of probative value --- so that there is no reason not to apply the same test for both situations.

The Chair asked for a straw vote on whether to continue discussing a balancing amendment or whether to remove it from the agenda. The Committee voted 5-4 to continue discussing the balancing alternative.

One Committee member queried why the test to protect criminal defendants from character prejudice in Rule 609(a)(1)(B) should differ from the balancing test in Rule 404(b), apart from historical practice. The Chair noted that Rule 404(b) helps the prosecution sustain its burden of proof, while Rule 609 pertains to impeachment only. The Reporter then noted that decisions about balancing and protections are indeed policy decisions commonly underlying rules of evidence like Rule 412. The policy underlying the balancing amendment of Rule 404(b) would be living up to our commitment to try cases and not people. Judge Lioi commented that the Rule 403 factors serve that purpose well and put the government through its paces, to which the Reporter responded that the proposed balancing test would utilize the identical factors but would simply replace the Rule 403 balance favoring inclusion with one requiring probative value to outweigh prejudice. Another Committee member noted that an amended balancing test would ensure that Rule 404(b) is a rule of exclusion and not inclusion. The Reporter noted that it would be a rule of “mild exclusion” where it would simply require probative value to overcome prejudice to even a slight degree to be admitted.

The Chair then stated that Rule 404(b) is not a rule of exclusion. Instead, it prohibits one inference that a defendant is a bad person due to past misdeeds. She opined that other act evidence relevant to anything other than that bad character inference is admissible subject to Rule 403. She further argued that young prosecutors are so nervous about overstepping with Rule 404(b) evidence that they often limit comments on such evidence in closing argument to brief statements that the evidence is admissible to prove “intent” for example. The Chair concluded that the balancing test should not be made more protective because it might limit the admissibility of evidence prosecutors need to prove a case.

The Reporter noted that the courts permissively admitting other act evidence under the Rule 403 standard are not necessarily ruling incorrectly because that standard favors admissibility so heavily. The question raised by a balancing alternative is whether Rule 404(b) should allow evidence of other acts to come in as freely as it does. Although the drafters of Rule 404(b) limited it only with Rule 403, the Reporter emphasized that there is much less legislative history regarding Congressional intent for Rule 404(b) than there is regarding the proposed balancing test found in Rule 609. Therefore there should not be substantial concern about overriding congressional intent.

At the conclusion of these remarks, another straw vote was taken on whether to proceed with consideration of a balancing amendment. The Committee vote was 7-2 against continuing consideration of a balancing amendment.

The Committee then discussed the final potential amendment to Rule 404(b) – changes to the notice provision in criminal cases. The Reporter explained that a proposal to eliminate the requirement that the defense request notice in criminal cases had already been unanimously approved by the Committee. The Reporter also called the Committee’s attention to a proposed amendment to the notice provision circulated to the Committee by the DOJ prior to the meeting. This provision would require a prosecutor to “provide reasonable notice of the general nature of any such evidence.” It would also require a prosecutor to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning supporting the purpose.” Finally, it would require the prosecution to provide notice “in writing” before trial or during trial “if the court, for good cause, excuses lack of pretrial notice.”

Committee members raised concerns about requiring the prosecution to provide notice of only the “general nature” of Rule 404(b) evidence. Some discussion was had about requiring the government to disclose “the substance” of the evidence to make the Rule 404(b) notice provision consistent with the notice provision in the proposed amendment to Rule 807. Concern was also raised about the lack of any timing requirement for the notice. Some suggested that requiring notice 14 days in advance of trial could be superior, although Mr. Hur thought a timing requirement could prove rigid and unworkable. The Reporter suggested that the language used in the proposed amendment to Rule 807 requiring disclosure sufficiently before trial to allow the opponent to meet the evidence could be a useful solution to the timing issue, and would promote uniformity in the Rules. Other Committee members agreed that trial judges set deadlines in pre-trial orders and that including a 14-day limit in rule text was unnecessary.

The Federal Public Defender commented that prosecutors commonly provide the minimum notice possible and resist all efforts by the defense to obtain more information. He noted that there is a great deal of needless litigation over who the Rule 404(b) witness will be and what act will be proved and that prosecutors rely on the terms “general nature” in Rule 404(b) to defend minimal notice. The Reporter queried whether use of the term “substance” would represent an improvement over “general nature.” The Department of Justice suggested that the articulation requirement in the proposed notice provision would resolve the existing concerns over the quality of the notice. The Federal Public Defender did not think the articulation of reasoning requirements would necessarily help in identifying the specific act to be proved and thought that a “particulars” or “specific details” requirement would be superior.

Judge Furman suggested putting the term “substance” together with the “fair opportunity to meet the evidence” qualification to address the problem. Judge Campbell suggested deleting the required description of the act in the notice and simply stating that the prosecutor must provide “reasonable notice of any such evidence” --- which all agreed was workable. Committee members agreed that requiring notice in writing sufficiently in advance of trial “to give the defendant a fair opportunity to meet the evidence” would be a good solution to the timing issue as well. The DOJ noted that the good cause exception to the notice requirement should apply to all of the prosecutor’s obligations (including articulation). The Reporter explained that the good cause exception was made applicable to all notice obligations due to its placement at the conclusion of all notice requirements, and that the Committee Note could emphasize that the good cause exception would go to articulation as well as timing.

The Committee voted unanimously to approve the amendment to the notice provision of Rule 404(b).

The Reporter then took the Committee through the text of Rule 404(b) and a proposed Committee Note that was set forth in the agenda book. During that discussion, one Committee member proposed moving the word “other” in the heading of Rule 404(b) and in the text of Rule 404(b)(1) to return the word to its correct pre-restyling position; “Other crimes, wrongs, or acts.” The Committee unanimously agreed with this proposal. The Reporter also recommended changing “Permitted Uses” in the heading of Rule 404(b)(2) to “Other Uses.” He explained that headings were added to the Rule as part of the restyling and that “Other Uses” more accurately reflects the operation of Rule 404(b)(2). The Committee tentatively agreed with this proposal.

The Committee generally approved the proposed Committee Note, subject to further wordsmithing after the meeting. After discussion by email, the following changes were made to the proposal:

- “Permitted uses” in the heading of Rule 404(b)(2) would be retained.
- Two changes proposed by the Style Subcommittee to the Standing Committee would be implemented.
- The good cause provision would be amended to provide, consistently with Rule 807, that if the court finds good cause to allow notice during the trial, that notice can be given in any form.
- Minor changes to the Committee Note were made to clarify that the good cause exception as to articulation would apply to additional proper purposes that became evident after notice was provided.

The Committee, by email, unanimously approved the text and the Committee Note of the proposed amendment to Rule 404(b). The proposed amendment will be submitted to the Standing Committee with the recommendation that it be released for public comment.

The Committee resolved that it would revisit certain questions during public comment, such as whether notice provided after trial has begun (upon a showing of good cause) must be made in writing, and whether the Committee Note should be changed with respect to good cause and the articulation requirements.

The text and Committee Note of the proposed amendment to Rule 404(b) is attached to these Minutes.

IX. Possible Amendment to Rule 106

The next item on the agenda for the Committee's consideration was a potential amendment to the Rule 106 rule of completion. The amendment would rectify a conflict in the courts over the admissibility of otherwise inadmissible hearsay to complete misleading statements, and would include oral statements within the coverage of Rule 106. The Reporter reminded the Committee that Judge Paul Grimm had raised these problems about Rule 106 for the Committee's consideration, and directed the Committee's attention to Judge Grimm's thoughtful opinion on the issues in the agenda materials.

The Reporter explained that the hearsay issue relates to a very narrow circumstance in which the government offers a portion of a defendant's statement that is misleading (as a statement of a party opponent under Rule 801(d)(2)(A)) and the remainder of the statement is necessary for completion --- but is hearsay. Some courts find that the hearsay rule bars the defendant's attempt to admit the remainder of his own hearsay statement through Rule 106 to correct the distortion, because a defendant may not admit his own hearsay statement under Rule 801(d)(2). In those cases, the unfairness created by the government's misleading presentation of a partial statement goes uncorrected. The question for the Committee is whether this result is appropriate under the traditional "door-opening" approach of the evidence rules that seeks to ensure that adversaries are not prejudiced by a misleading presentation of evidence.

The Reporter explained that Rule 502(a), regarding subject matter waiver of privilege, borrowed the language of Rule 106 exactly and embodies the same principle: that a misleading use of privileged information by one side allows the opponent full access to privileged materials on the same subject to correct any distortion. He argued that it was difficult to understand why the government should be permitted to lodge a hearsay objection to prevent needed completion of a misleading statement, when similar behavior by a litigant is sufficient to waive privilege. An amendment would be necessary to address the cases in which courts prevent defendants from correcting a misleading partial statement due to the rule against hearsay.

One option previously discussed by the Committee would be to amend Rule 106 to allow the completing statement to be admitted solely for its not-for-truth purpose in showing the full "context" of the partial statement already admitted. The Reporter suggested, however, that the "context" option would be problematic in that the parties would not be left on equal footing: the government could argue the truth of the misleading portion of the statement, while the defendant could not argue the truth of the completing portion. The only way to a fair result would be to allow the completing statements to be admissible for their truth. Otherwise the proponent is given an advantage from a misleading presentation.

The Reporter also noted that, prior to a style amendment designed to make Rule 106 gender neutral, the language of Rule 106 required the *proponent* of the original partial and misleading statement to admit the completing portion of the statement at the same time the misleading portion was admitted. If the government were required to admit the completing statement itself,

the hearsay objection would be eliminated because the government would be offering the defendant's entire statement through Rule 801(d)(2)(A), as a statement by a party-opponent. That prior version of the Rule suggests that Congress did not intend to have the hearsay rule prevent completion of a misleading partial statement. Moreover, the legislative history indicates that Congress rejected a DOJ request to provide in Rule 106 that the completing statement had to be independently admissible.

Judge Furman suggested that a return to the language requiring the original proponent to do the completing would be a good alternative to an amendment that would allow the opponent's completion over a hearsay objection. This would avoid establishing a hearsay exception outside the context of Article 8 of the Federal Rules. The Reporter expressed concern that a return to the old provision might be too subtle to correct the unfair result in some of the recent cases. A Committee member stated that requiring the proponent to do its own completing would not be too subtle and would represent a more surgical solution to the problem than a broader hearsay exception would.

Another Committee member noted a footnote in Judge Grimm's opinion on Rule 106 stating that the Advisory Committee had voted unanimously against an amendment to address these issues in 2002-2003, finding that the costs of an amendment exceed its benefits due to judicial handling of the issues. The Reporter explained that amendments to Rule 106 had come up in 2002 and again in 2006, but were rejected due to other more pressing rulemaking priorities at the time. He noted that recent cases allowing misleading partial statements to go uncorrected present a more significant conflict and concern in the case law. The Chair queried whether the conflict is confined to the Sixth and Ninth Circuit, and whether everyone else is basically getting it right. The Reporter noted prior amendments designed to correct even lesser conflicts and concluded that an amendment would be the only way to correct the unfairness in the Circuits that allow a misleading partial statement to go uncorrected, given the many years in which this conflict has gone uncorrected.

The Chair agreed that the function of the Advisory Committee is to resolve conflicts, but advocated proceeding slowly. She expressed reluctance to propose a hearsay exception for completing statements and more interest in a housekeeping amendment that would require the party offering a misleading portion to also offer the completing remainder --- without creating a broader hearsay exception. The Chair noted that the Department of Justice had proposed limiting completion to circumstances in which the original portion is "misleading." The Reporter noted that Judge Grimm thought that limiting the rule to "misleading" statements would be workable.

Judge Furman reiterated his proposal to return to the language of Rule 106 requiring the original proponent to complete the proffered statement, to be accompanied by Advisory Committee notes explaining that hearsay is not a bar to completion and that the Committee was returning to the original language to resolve the split in the cases. Judge Campbell expressed the concern that opponents would use such a requirement as a tactical advantage to interrupt the proponent of a statement repeatedly to demand completion. Judge Furman noted that the Rule 106 existing requirement that completion is required only in narrow circumstances would limit

such interruptions. The Reporter stated that limiting Rule 106 to “misleading” statements expressly might further clarify that the Rule is limited in scope.

The Chair asked the Committee whether it was interested in considering an amendment requiring the proponent to do its own completion, with a “misleading” limitation added to the rule text. The Committee voted to consider such a proposal for the next meeting with a Committee note explaining that there “can be no hearsay objection because the proponent is required to introduce the completing portion.”

The discussion then moved to whether oral statements should be covered by Rule 106. The Chair noted that Rule 106 currently applies only to written or recorded statements and that Judge Grimm advocates extending Rule 106 to cover oral statements needed to complete misleading statements. She noted that many courts allow completion of oral statements through their inherent Rule 611(a) authority, but that the question was whether to bring oral statements under the umbrella of Rule 106. The Reporter noted that one concern that had been raised about completing oral statements was the difficulty in proving the content of an oral statement. He noted that Judge Grimm thought that extensive and distracting inquiries into the content of an oral statement could be prevented by the trial judge through Rule 403 --- and that courts have done so. The Reporter further questioned why the difficulty in proving the content of completing oral statements should foreclose their use, when the difficulty in proving the content of the oral statement originally offered by the proponent poses no obstacle to its proof.

Committee members discussed practical problems in the completion of oral statements testified to by a witness and how they might be handled at trial. Judge Lioi noted that the most common statements sought to be corrected at trial appear in depositions or in transcripts of wiretap recordings. In those cases, she explained, the trial judge knows exactly what was said, can see whether a proffered portion is misleading, and decide how much of the remainder is necessary to complete. Extending Rule 106 to oral statements might open up a can of worms because it would allow completion without providing the judge access to this crucial information needed to rule on this issue. The Reporter stated that an Advisory Committee Note would be useful in giving the court guidance that trial judges should decline to consider completion of oral statements if problems of proof become too complicated and time-consuming. Andrew Goldsmith from the DOJ noted that Criminal Rule 16 ensures pre-trial notice of any oral statements of the defendant that will be offered at trial, meaning that disputes about completion should not arise on the fly in the heat of trial. The Reporter remarked that such pre-trial disclosures should make completion issues surrounding a defendant’s oral statements easier to resolve.

The Committee voted to continue consideration of an amendment to Rule 106 that would add oral statements to the rule at its next meeting. The Reporter agreed to write up amendment alternatives for the fall meeting including a hearsay exception proposal, a requirement that the proponent complete to avoid the hearsay issue, the addition of the limiting term “misleading,” and the addition of oral statements to Rule 106.

X. Proposed Amendments to Rule 609(a)(1)

The Chair explained that there were multiple proposals on the table concerning Rule 609(a)(1) and the use of a criminal defendant's non-dishonesty felony convictions to impeach his trial testimony. She noted that there are only a small number of states with greater protections for criminal defendants, and that the vast majority of states are following the federal approach. The Reporter noted that the first alternative to an amendment was to prohibit non-dishonesty felony impeachment of criminal defendants --- or even more broadly to abrogate Rule 609(a)(1) entirely. The Committee at the previous meeting, however, expressed reluctance about such bans, as in tension with the hard-fought compromise in Congress that resulted in Rule 609(a).

The Chair asked whether Committee members wished to discuss an abrogation alternative. No interest was expressed in pursuing abrogation and no further discussion about an amendment abrogating Rule 609(a)(1)(B) impeachment was had.

The Reporter noted another potential amendment, suggested by Professor Ric Simmons, to limit Rule 609(a)(1) impeachment to theft convictions. Michigan follows this approach. The Reporter explained that such an amendment would allow impeachment with the non-dishonesty felony convictions most probative of untruthfulness --- like theft and receipt of stolen property -- - while eliminating impeachment with less probative felonies like assault and sex crimes. The Reporter recognized that there could be some difficulty in defining the crimes to be included in a theft-related amendment (such as receipt of stolen property) but a Committee Note might be useful in defining such crimes. A Committee member opined that crimes such as drug distribution should not be absolutely barred, because they are often indicative of a life of underhandedness that could be probative for impeachment. The Chair noted that defense counsel in criminal cases frequently impeach prosecution witnesses with felony convictions that are not theft-related, and suggested that defendants it would not be advisable to abrogate impeachment for these witnesses, or solely for the criminal defendant. The Committee thereafter rejected a potential amendment to Rule 609(a)(1) that would limit felony impeachment to theft-related offenses.

The Reporter then raised the possibility of an amendment to the balancing test in Rule 609(a)(1)(B) suggested by Professor Jeff Bellin. A small adjustment to the balancing test could restore congressional intent to protect defendants from routine felony impeachment and provide defendants with prior convictions a more meaningful opportunity to testify. This revision would require courts to consider the marginal impeaching value of prior felony convictions in light of the inherent bias of a criminal defendant testifying to evade conviction. Professor Bellin notes that a defendant is already significantly impeached by his desire to avoid punishment and that the probative value of prior felony convictions is reduced by this alternative impeaching factor. A balancing test that expressly requires courts to take the defendant's bias into account would result in a more accurate assessment of probative value. Professor Bellin has also suggested that courts should be strongly cautioned against admitting prior felonies similar to the current charges for the purpose of impeachment. The Reporter noted that the extensive digest compiled in the agenda materials on Rule 609(a)(1)(B) rulings demonstrates that courts frequently admit similar crimes for impeachment purposes. The Reporter described data compiled by Professor Bellin indicating that jurors do not limit consideration of prior felonies to impeachment, do not follow limiting instructions as to impeachment, and that jurors punish

defendants who choose to remain off the stand to avoid impeachment with a silence penalty notwithstanding instructions not to do so.

Judge Campbell contended that the suggested modifications to the Rule 609(a)(1)(B) balancing test seemed pretty prescriptive and would micromanage a trial judge's balancing process unduly. Further, Judge Campbell thought that including some specific factors for consideration might suggest the omission of others, making the amended test underinclusive. In the end, he did not see why it would be advisable to mandate specifics for trial judges applying this balancing test. The Reporter agreed that it may not have been necessary to include such specifics in the initial rule, but that evidence from the cases shows that judges are not properly accounting for these factors such that spelling them out now may be necessary. Moreover, the proposed amendment focuses on marginal probative value and the similarity of the conviction to the crime charged, but does not purport to limit the court's use of other factors.

The Chair stated that trial judges don't think in terms of "marginal probative value," but evaluate impeachment in light of the defendant's position on the stand and in the hurly burly of the courtroom. The Reporter responded that the reported cases belie that notion --- they indicate that the courts do take account of other matters affecting marginal probative value (such as other convictions) but not the self-interest of the defendant.

The Chair expressed her view that it was inadvisable to micromanage trial judges in their assessments of probative value and prejudicial effect. No Committee member provided further discussion or moved for the adoption of a proposed amendment to the balancing test. In the absence of any further comment, the Chair stated that the proposed amendment to the balancing test would be tabled. The Reporter noted that he had hoped for a more robust Committee exchange on potential amendments to Rule 609(a)(1)(B), particularly with regard to the balancing test.

XI. Rule 611 and Illustrative Evidence

The final item on the agenda originated with a proposal from a law review article suggesting that the Committee should adopt a rule on the use of illustrative evidence at trial. The line between "demonstrative" evidence, used substantively to prove disputed issues at trial, and "illustrative" evidence, offered solely as a pedagogical aid to assist the jury in understanding other evidence, is a difficult one to draw. An idea for a draft of an amendment to Rule 611 was included in the agenda materials to govern the use of truly "illustrative" evidence at trial. This draft rule was not designed as a proposal for the Committee, but was included to give the Committee an idea of what might be done if it wished to consider the matter further. The draft amendment was placed in Rule 611 because courts typically find authority to regulate illustrative evidence in Rule 611(a). The draft would not cover demonstrative evidence at all, but would regulate the use of illustrative aids. It would prohibit a judge from sending an illustrative aid to the jury during deliberations absent the consent of all parties.

Judge Campbell asked whether there is any indication that courts are confused about these issues. The Reporter noted that there is some confusion in the cases regarding the distinction between demonstrative and illustrative evidence, and also between pedagogical summaries and

those substantively admissible under Rule 1006. The Reporter opined that there was not a crying need for an amendment, but that there could be value in providing organizing principles around illustrative evidence. The Chair asked for the experience of the trial judges in the room with respect to illustrative aids. There was a consensus among judges that illustrative aids present no significant difficulty and that there is no need for a rule covering their use. Several members of the Committee noted, however, that they found the Maine rule on illustrative evidence and the thoughtful accompanying legislative notes, which were included in the agenda materials, to be extremely valuable.

XII. Closing Matters

The Committee thanked the Reporter for the immense amount of work he put into the excellent agenda materials and the meeting was adjourned.

XIII. Next Meeting

The fall meeting of the Evidence Rules Committee will be held at the University of Denver in Colorado on Friday, October 19, 2018.

Respectfully submitted,

Liesa L. Richter
Daniel J. Capra

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30 Years of the Rules Enabling Act

Item 7 will be an oral presentation.

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JUDICIARY STRATEGIC PLANNING

The Executive Committee has requested that all Committees of the Judicial Conference consider priority elements of the *Strategic Plan for the Federal Judiciary* when conducting committee planning and policy development activities. A memorandum from Chief Judge Merrick B. Garland, chair of the Executive Committee, and Chief Judge Carl E. Stewart, the judiciary's planning coordinator, is included as Attachment 1. At the meeting on June 12, 2018, the Standing Committee will hear from Brian Lynch, Long-Range Planning Officer at the Administrative Office, and primary staff support to the strategic planning process.

STRATEGIC PLANNING PRIORITIES

The Judicial Conference's approach to strategic planning assigns the Executive Committee the responsibility for identifying elements of the *Strategic Plan* to receive priority attention. These priorities are identified with suggestions from Judicial Conference committees (JCUS-SEP 10, pp. 5-6). Attachment 2 is the letter sent to the Executive Committee on behalf of the Standing Committee following discussion at the Committee's January 2018 meeting.

The Executive Committee considered at its February 2018 meeting suggestions from committees for priorities to consider over the next two years. In support of the Chief Justice's direction that the judiciary examine its practices and address issues regarding workplace conduct, the Executive Committee determined to add the *Strategic Plan's* core value of accountability and Goal 3.2b to the four strategies and two goals from the *Strategic Plan* that were previously identified as priorities (Strategies 1.1, 1.3, 2.1, and 4.1, and Goals 4.1d and 7.2b). The core value of accountability calls for "stringent standards of conduct and the self-enforcement of legal and ethical rules" and Goal 3.2b calls for the "development of programs and special initiatives that will allow the judiciary to remain an employer of choice while enabling employees to strive to reach their full potential." The Executive Committee asks all committees to pay particular attention to priority core values, strategies, and goals from the Strategic Plan when setting the agendas for future committee meetings, determining which actions and initiatives to pursue, and assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

Strategic Plan Priorities 2018-2020

Core Value	Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources
Strategy 1.1	Pursue improvements in the delivery of justice on a nationwide basis.
Strategy 1.3	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Strategy 2.1	Allocate and manage resources more efficiently and effectively.

- Goal 3.2b** Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.
- Strategy 4.1** Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.
- Goal 4.1d** Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.
- Goal 7.2b** Communicate and collaborate with organizations outside the judicial branch to improve the public’s understanding of the role and functions of the federal judiciary.

UPDATE ON STRATEGIC INITIATIVES

The primary method of integrating the *Strategic Plan* into Conference committee planning and policy development activities has been the pursuit of strategic initiatives (JCUS-SEP 10, pp. 5-6). Strategic initiatives are projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan*. Strategic initiatives are distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

After the Standing Committee’s June 2017 meeting, Judge David Campbell sent a progress report on behalf of the Standing Committee to Judge William Jay Riley, who was then serving as the judiciary’s planning coordinator, regarding the rules committees’ progress in implementing initiatives in support of the Strategic Plan (Attachment 3).

Chief Judge Stewart has now requested an update from the Committee on its strategic initiatives. He also asked all committees to consider whether any changes to their strategic initiatives are warranted, based on the strategic planning priorities or other judiciary initiatives. For example, committees might consider whether to make changes to their strategic initiatives to reflect efforts to study or address issues of racial fairness, implicit bias, or diversity. Chief Judge Stewart recognizes that some committees might require additional time to consider changes to their strategic initiatives, and that some efforts might not warrant reporting if they are not strategic in nature.

A proposed response providing an update on the progress of the Committee’s strategic initiatives will be distributed at the June 12, 2018 meeting of the Standing Committee for discussion.

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544


MERRICK B. GARLAND
CHAIRMAN, EXECUTIVE COMMITTEE

(202) 216-7460
(202) 208-2449 FAX

March 22, 2018

MEMORANDUM

To: Members of the Judicial Conference
Conference Committee Chairs

From: Merrick B. Garland 
Chairman, Executive Committee

Carl E. Stewart
Judiciary Planning Coordinator 

RE: WORKPLACE CONDUCT SAFEGUARDS IDENTIFIED AS ADDITIONAL
STRATEGIC PLAN PRIORITY

When the Conference approved the *Strategic Plan for the Federal Judiciary*, it assigned the Executive Committee the responsibility for identifying elements of the *Strategic Plan* to receive priority attention. These priorities are identified with suggestions from Judicial Conference committees (JCUS-SEP 10, pp. 5-6).

In support of the Chief Justice's direction that the judiciary examine its practices and address issues regarding workplace conduct, at its February 2018 meeting the Executive Committee identified as a priority for the next two years ensuring the sufficiency and effectiveness of current safeguards in the judiciary to protect all employees from wrongful conduct in the workplace. This priority is embodied in the *Strategic Plan* core value of accountability (which calls for stringent standards of conduct and the self-enforcement of legal and ethical rules) and Goal 3.2b (which calls for development of programs and special initiatives that will allow the judiciary to remain an employer of choice while enabling employees to strive to reach their full potential). The Executive Committee therefore identified the core value of accountability and Goal 3.2b as priorities for the next two years along with the four strategies and two goals from the *Strategic Plan* that were previously identified as priorities (Strategies 1.1, 1.3, 2.1, and 4.1, and Goals 4.1d and 7.2b).

The Executive Committee asks Judicial Conference committees to pay particular attention to priority core values, strategies, and goals from the *Strategic Plan* when setting the agendas for future committee meetings and determining which actions and initiatives to pursue. The Executive Committee also asks committees to consider these

priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures. The priorities for 2018-2020 are below.

Strategic Plan Priorities 2018-2020

- Core Value** Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources
- Strategy 1.1** Pursue improvements in the delivery of justice on a nationwide basis.
- Strategy 1.3** Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary values.
- Strategy 2.1** Allocate and manage resources more efficiently and effectively.
- Goal 3.2b** Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.
- Strategy 4.1** Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.
- Goal 4.1d** Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.
- Goal 7.2b** Communicate and collaborate with organizations outside the judicial branch to improve the public’s understanding of the role and functions of the federal judiciary.

cc: Hon. Jeremy D. Fogel
 Hon. Candy W. Dale
 Hon. Catherine Peek McEwen
 Jeffrey P. Minear
 Committee Staff

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

CHAIRS OF ADVISORY COMMITTEES

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

January 21, 2018

The Honorable Carl E. Stewart
Chief Judge
United States Court of Appeals
United States Court House
300 Fannin Street, Room 5226
Shreveport, LA 71101

Dear Judge Stewart:

On behalf of the Committee on Rules of Practice and Procedure (“Standing Committee”), I am responding to the request that the Standing Committee provide its input on two questions related to the *Strategic Plan for the Federal Judiciary*.

First, on the question of which strategies and goals should be considered priorities for the next two years, the Standing Committee affirms the importance of those priorities already established. The Standing Committee suggests recognizing as another priority the objectives of Director Duff’s recently-established working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from wrongful conduct in the workplace. Members of the Standing Committee also discussed the particular importance of increased public education around civic issues concerning both the Judiciary as a co-equal branch of government and the role of the courts. These observations fall under the Strategic Plan’s “Issue 7: Enhancing Public Understanding, Trust, and Confidence” and more particularly Goal 7.2b (concerning collaborative efforts with organizations outside the judicial branch to improve the public’s understanding of the role and functions of the federal judiciary) and Goal 7.2c (concerning facilitating the voluntary participation by judges and court staff in public outreach and civic education programs).

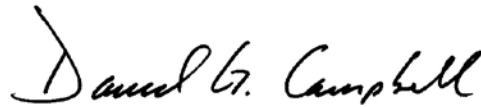
Second, the Standing Committee was asked to advise “whether the strategic planning approach for the Judicial Conference and its committees is likely to be an effective mechanism for considering Conference committee actions to study and address racial fairness, implicit bias,

The Honorable Carl E. Stewart
January 21, 2018
Page 2

diversity and related topics.” The Standing Committee expressed no strong view on what mechanism could most effectively address these issues within the Judiciary. Coordinated activities by the Circuit Judicial Councils could be considered to address the many topics related to racial fairness. Members relayed that in their experience outside the federal courts, strategic planning exercises tend to focus on aspirational goals rather than concrete outcomes. The Standing Committee expressed a hope that good ideas and intentions will translate into concrete actions.

On a personal note, thank you for agreeing to serve as the planning coordinator for the Judiciary in addition to your other responsibilities. It is a daunting job, and I hope you will contact me if there is a particular role the Standing Committee might play, or if you have any questions about the comments above.

Sincerely,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large initial "D".

David G. Campbell

cc: Brian Lynch

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

July 5, 2017

The Honorable William Jay Riley
United States Court of Appeals
Eighth Circuit
Roman L. Hruska Courthouse
111 South 18th Plaza, Suite 4303
Omaha, Nebraska 68102-1322

Dear Judge Riley:

On behalf of the Committee on Rules of Practice and Procedure (“Standing Committee”), I am responding to your request to provide an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*.

In June 2012, the Standing Committee identified the following eight ongoing initiatives that supported the *Strategic Plan*:

- Implementing the 2010 Civil Litigation Conference
- Evaluating the Rules Governing Prosecutors’ Disclosure Obligations
- Evaluating the Impact of Technological Advances
- Bankruptcy Forms Modernization Project
- Examining Amendments to Address Redaction and Sealing of Appellate Filings
- Analyzing and Promoting Recent Rules Amendments
- Improving the Public’s Understanding of the Federal Judiciary
- Preserving the Judiciary’s Core Values

The Standing Committee has since provided periodic assessments of the extent to which these identified initiatives have progressed. As previously reported, work on two of the eight identified initiatives has concluded (Evaluating the Rules Governing Prosecutors’ Disclosure Obligations and Examining Amendments to Address Redaction and Sealing of Appellate

Filings). A third rules committee initiative—the Advisory Committee on Bankruptcy Rules’ Forms Modernization Project—was substantially implemented by December 1, 2015, the effective date for replacing most official bankruptcy forms with modernized versions, and has since been fully completed.

This letter provides updates on two initiatives where there has been significant activity since our last update in July 2016—Implementing the 2010 Civil Litigation Conference and Evaluating the Impact of Technological Advances. As to the remaining three of our listed initiatives—Analyzing and Promoting Recent Rules Amendments, Improving the Public’s Understanding of the Federal Judiciary, and Preserving the Judiciary’s Core Values—we have not provided specific updates as each is inherent in the ongoing work of the rules committees and their charge to prescribe rules of practice and procedure and rules of evidence through a deliberative, collaborative, and public process prescribed by the Congress under the Rules Enabling Act, 28 U.S.C. § 2071, *et seq.*

Implementing the 2010 Civil Litigation Conference

The Standing Committee continues to work with the Advisory Committee on Civil Rules (“Civil Rules Committee”) in implementing the results of a conference on civil litigation that was held at Duke University School of Law in May 2010 (“2010 Conference”).

Purpose

As previously reported, the 2010 Conference brought together more than seventy moderators, panelists, and speakers with a goal of identifying ways to improve federal civil litigation. The purpose of this initiative is to improve federal civil litigation by implementing the ideas that emerged from the Conference, specifically: rules amendments, education of the bench and the bar, and the development and implementation of pilot projects.

Desired Outcome

As we have reported in past updates, the primary desired outcome of this initiative is to determine whether clarifying certain rules, particularly those governing discovery rights and obligations and the sanctions for failing to meet these obligations, would reduce costs and delays in civil litigation, and, if so, to propose amendments to the rules to achieve those clarifications. A second desired outcome is to determine whether rule changes would make judges more effective case managers, better able to tailor motions, discovery, and other pretrial work to what is proportional in each case, and, if so, propose those rule changes. A third desired outcome is to continue reviewing evolving pleading practices after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Civil Rules Committee proposed amendments designed to reduce the costs and delays in civil litigation, increase realistic access to the courts, and further the goals of Rule 1 “to

secure the just, speedy, and inexpensive determination of every action and proceeding.” The resulting package of amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37 took effect on December 1, 2015. Once the rules became effective, the Civil Rules Committee embarked on a nationwide educational effort, partnering with the Federal Judicial Center (“FJC”) to develop and present materials to the bench and bar. Initial reports are that the rules are having the desired effect.

As highlighted by the Chief Justice in his 2016 Year End Report, the Civil Rules Committee has also developed two pilot projects “to test several promising case management techniques aimed at reducing the costs of discovery”: the Mandatory Initial Discovery Pilot (“MIDP”) and the Expedited Procedures Pilot (“EPP”). The Judicial Conference approved both pilot projects at its September 2016 session.

The MIDP seeks to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce the cost, burden, and delay in civil litigation. Under the MIDP, a party must produce information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case, including information that is both favorable and unfavorable to the party. Two districts are participating in the MIDP—Arizona and Northern Illinois. The Civil Rules Committee continues to work on recruiting additional districts. If the MIDP results in a measurable reduction of cost, burden and delay, the Civil Rules Committee will consider proposing amendments to the civil rules to adopt mandatory initial discovery in civil cases.

The EPP is designed to expand practices already employed successfully by some judges and thereby promote a change in judicial culture by confirming the benefits of active management of civil cases. The chief features are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances. The aim is to have 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months. Currently, the Civil Rules Committee is seeking districts to participate in the EPP.

With respect to pleading practices, the Civil Rules Committee continues to monitor developments. So far, the Civil Rules Committee has determined that the case law in the wake of *Twombly* and *Iqbal* does not require a rulemaking response.

Related Strategies and Goals

The 2010 Civil Litigation Conference Implementation Initiative is related to Strategy 1.1, which seeks to “[p]ursue improvements in the delivery of justice on a nationwide basis”; Goal 1.1a, which seeks to “[r]educe delay through the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities”; Goal 1.1b, which seeks to “[r]educe unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure”; Strategy 5.1, which seeks to “[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process”; and Goal 5.1b, which seeks to “[a]dopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.”

Assessment Approach or Methodology

As with all of the rules committees’ work, this initiative has been and will continue to be assessed through the Rules Enabling Act process.

Status or Timeframe

As discussed above, a package of rules proposals went into effect on December 1, 2015, the pilot projects are projected to last for a period of three years, and, as described above, the portion of the initiative related to monitoring pleading standards is ongoing.

Partnerships

The rules committees and the FJC partnered in a major educational effort around the 2015 civil rules package. The rules committees, the FJC, and the Judicial Conference Committee on Court Administration and Case Management (the “CACM Committee”) have coordinated on the development and implementation of the pilot projects.

Assessment

The first and second desired outcomes—determining whether clarifying certain rules would reduce costs and delays in civil litigation, and if so, proposing amending the rules to achieve those clarifications—has been achieved through the Rules Enabling Act process. The rules committees will continue to monitor the effectiveness of the rules amendments.

The pilot projects were developed with features for ongoing monitoring and assessment. However, success depends on participation by additional districts. Recruitment efforts are ongoing.

The third desired outcome of continuing to monitor pleading practice is ongoing.

Evaluating the Impact of Technological Advances

The Standing Committee continues to work with all of its rules committees to assess the impact of technology on federal litigation and to identify ways to account for and take advantage of technological advances.

Purpose

This is an ongoing initiative, the original purpose of which was to work with the Advisory Committee on Criminal Rules (“Criminal Rules Committee”) to identify ways in which technology can be used to make the preparation and development of criminal cases more efficient, without approaching constitutional limits or sacrificing the important role of in-person appearances and communications. It has evolved into an ongoing study and assessment by the rules committees regarding rules amendments necessitated or prompted by technological advances.

Desired Outcome

As previously reported, the original purpose of this initiative was achieved by the promulgation of a package of amendments to the criminal rules that took effect on December 1, 2011. However, this initiative has evolved to encompass other technology-related rules amendments such as the coordinated effort among the rules committees to identify rules changes made necessary by changes in technology and to develop rules proposals to reflect the reality of technology. One example is elimination of the “3-day rule” in each set of national rules to account for the widespread use of electronic service. Coordinated rules amendments went into effect on December 1, 2016.

Another example of coordinated work is the development of rules for electronic filing, service, and notice. Coordinated “e-rules” proposals by all the rules committees were published for public comment in August 2016. The amendments were subsequently approved by the rules committees at their spring 2017 meetings and by the Standing Committee at its June 2017 meeting. The proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49, along with a conforming amendment to Criminal Rule 45(c), will be submitted to the Judicial Conference at its September 2017 session.

Another rule change prompted by the realities of technology—specifically electronically stored information—is a proposed new criminal rule to address disclosures and discovery in criminal cases. The proposal originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and electronically stored information. A subcommittee of the Criminal Rules Committee concluded that the original proposal was too broad, but that a narrower amendment might be warranted. A mini-conference was held in Washington, D.C. on February 7, 2017 for the purpose of obtaining feedback on the threshold question of whether an

amendment is warranted, gathering input about the problems an amendment might address, and receiving focused comments and critiques of specific proposals. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The subcommittee then drafted a proposed new Rule 16.1, which focuses on the process, manner, and timing of pretrial disclosures, particularly with ESI in mind. The Criminal Rules Committee and the Standing Committee approved proposed new Rule 16.1 for publication for public comment in August 2017.

Related Strategies and Goals

The Technology Initiative is related to Strategy 1.1, which seeks to “[p]ursue improvements in the delivery of justice on a nationwide basis”; Goal 1.1a, which seeks to “[r]educe delay through the work of judicial councils, chief judges, Judicial Conference committees and other appropriate entities”; Strategy 2.1, which seeks to “[a]llocate and manage resources more efficiently and effectively”; Strategy 4.1, which seeks to “[h]arness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts”; Goal 4.1c, which seeks to “[d]evelop systemwide approaches to the utilization of technology to achieve enhanced performance and cost savings”; and Strategy 5.1, which seeks to “[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.”

Assessment Approach or Methodology

The Technology Initiative will be assessed through the Rules Enabling Act process.

Status or Timeframe

Rule amendments related to electronic filing, service, and notice have been approved by the rules committees and forwarded to the Judicial Conference. These amendments will become effective in December 2018 if approved through the remaining stages of the Rules Enabling Act process. The proposal for a criminal rule addressing disclosures and discovery in criminal cases will be issued for public comment in August 2017. The rules committees will continue to consider technology-related amendments to the various rules of procedure and the Federal Rules of Evidence.

Partnerships

The rules committees have partnered with the CACM Committee in the Technology Initiative, particularly, to coordinate developments in CM/ECF and in electronic filing with any rules-based approaches to these issues.

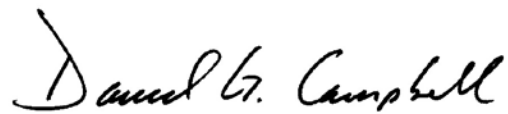
The Honorable William J. Riley
July 5, 2017
Page 7

Assessment

The first desired outcome was successfully completed when the set of technology amendments to the criminal rules went into effect. The proposed electronic filing, service, and notice rules, as well as proposed new Criminal Rule 16.1 are making their way through the required Rules Enabling Act process.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive, flowing style.

David G. Campbell

cc: Brian Lynch

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TAB 9

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TAB 9A

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Coordination and Inter-Committee Work

Item 9A will be an oral report.

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TAB 9B

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**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>	<ul style="list-style-type: none"> • 11/8/17: Senate Judiciary Committee Hearing held – “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators” • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Updated May 24, 2018

Page 1

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017, cont.			<p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Innocent Party Protection Act	<p>H.R. 725</p> <p><i>Sponsor:</i> Buck (R-CO)</p> <p><i>Co-Sponsors:</i> Farenthold (R-TX) Franks (R-AZ) Goodlatte (R-VA) Sessions (R-TX) Smith (R-TX)</p>		<p>Bill Text: https://www.congress.gov/115/bills/hr725/BILLS-115hr725rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends procedures under which federal courts determine whether a case that was removed from a state court to a federal court on the basis of a diversity of citizenship among the parties may be remanded back to state court upon a motion opposed on fraudulent joinder grounds that: (1) one or more defendants are citizens of the same state as one or more plaintiffs, or (2) one or more defendants properly joined and served are citizens of the state in which the action was brought.</p> <p>Joinder of such a defendant is fraudulent if the court finds: actual fraud in the pleading of jurisdictional facts with respect to that defendant, state law would not plausibly impose liability on that defendant, state or federal law bars all claims in the complaint against that defendant, or no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant. In determining whether to grant or deny such a motion for remand, the court: (1) may permit pleadings to be amended; and (2) must consider the pleadings, affidavits, and other evidence submitted by the parties.</p> <p>A federal court finding that all such defendants have been fraudulently joined must: (1) dismiss without prejudice the claims against those defendants, and (2) deny the motion for remand.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt17/CRPT-115hrpt17.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate; referred to Judiciary Committee • 3/9/17: Passed House (224-194) • 2/24/17: Reported by the Judiciary Committee • 1/30/17: Introduced in the House; referred to Judiciary Committee;

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</p>	<p>H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA)</p> <p><i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)</p>	<p>CV 23</p>	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p> <p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House
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**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>H.R. 985, cont.</p>			<p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	
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**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>Stopping Mass Hacking Act</p>	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) “Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DeBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) “(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant.”</p> <p>Summary (authored by CRS): This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>Back the Blue Act of 2017</p>	<p>S. 1134 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 2437 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>To amend section 1332 of title 28, United States Code, to provide that the requirement for diversity of citizenship jurisdiction is met if any one party to the case is diverse in citizenship from any one adverse party in the case.</p>	<p>H.R. 3487 <i>Sponsor:</i> King (R-IA)</p> <p><i>Co-Sponsor:</i> Smith (R-TX)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr3487/BILLS-115hr3487ih.pdf</p> <p>Summary (authored by CRS): This bill amends the federal judicial code to specify that U.S. district courts have jurisdiction on the basis of diversity of citizenship if at least one adverse party does not share the same citizenship as another adverse party.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 9/6/17: referred to Subcommittee on the Constitution and Civil Justice. • 7/27/17: Introduced in the House; referred to Judiciary Committee
<p>To amend title 28, United States Code, to limit the authority of district courts to provide injunctive relief, and for other purposes.</p>	<p>H.R. 4927 <i>Sponsor:</i> Brat (R-VA)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr4927/BILLS-115hr4927ih.pdf</p> <p>Summary (authored by CRS): This bill limits the authority of federal district courts to issue injunctions. Specifically, it prohibits a district court from issuing an injunction unless the injunction applies only: (1) to the parties to the case before that district court, or (2) in the federal district in which the injunction is issued.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/5/18: Introduced in the House; referred to Judiciary Committee
<p>Litigation Funding Transparency Act of 2018</p>	<p>S. 2815 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-Sponsors:</i> Cornyn (R-TX) Tillis (R-NC)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/s2815/BILLS-115s2815is.pdf</p> <p>Summary: Section 2: Transparency and Oversight of Third-Party Litigation Funding in Class Actions. This section amends chapter 114 of Title 28 by adding a § 1716. Section 1716 would provide that in any class action, class counsel must disclose to the court and all named parties the identities of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right. Also includes timing provisions.</p>	<ul style="list-style-type: none"> • 5/10/2018: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

<p>Litigation Funding Transparency Act of 2018, cont.</p>			<p>Section 3: Transparency and Oversight of Third-Party Litigation Funding in Multi-District Litigation. Amends 28 U.S.C. § 1407</p> <p>Section 4: Applicability. Provides that the amendments made by the Act would apply to any case pending on or commenced after the date of enactment.</p> <p>Report. None.</p>	
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