

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

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

Professor William K. Kelley  
Judge Carolyn B. Kuhl  
Judge Patricia Millett  
Judge Gene E.K. Pratter  
Elizabeth J. Shapiro, Esq.\*  
Kosta Stojilkovic, Esq.  
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules

Judge Michael A. Chagares, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules

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

Advisory Committee on Criminal Rules

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

Advisory Committee on Civil Rules

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

Advisory Committee on Evidence Rules

Judge Debra Ann Livingston, Chair  
Professor Daniel J. Capra, Reporter

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

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\* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

## OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

## APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

## STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

## CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. “Testimony” as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees’ response to the CARES Act directive to consider emergency rules.

### **MULTI-COMMITTEE REPORTS**

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court’s decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee’s work to determine whether any rule change is needed. This process will take time.

## **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

### *Action Items*

*Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal).* Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal “may [be] dismiss[ed]” by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase “if provided by applicable statute” to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as “well taken” but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys’ responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word “mere” was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule’s statement that a court “must” dismiss. He noted that several circuits’ local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit’s local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

*Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2.* Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a “simple, non-substantive act.” Consistent with *Garza*, the proposed amendments seek to simplify and make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an *expressio unius* conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that “and limit” be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term “trap” in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding “inadvertently” to the first sentence using the word “trap” in the committee note – thus: “These decisions inadvertently create a trap . . .” Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

*Publication of Proposed Amendment to Rule 25 (Filing and Service).* The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public’s right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee’s mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

#### *Information Items*

*Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing).* Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

*Suggestion Regarding Decision on Grounds Not Argued.* Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

*Suggestion Regarding In Forma Pauperis Standards.* Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

*Suggestion Regarding Rule 4(a)(2).* Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

*Suggestion Regarding Rule 43 (Substitution of Parties).* Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

*Review of Recent Amendments.* Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court’s electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee’s clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge’s disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

## **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

### *Action Items*

*Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination).* Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims).* Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for “insured depository institution[s].” “Insured

depository institution” has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for “insured depository institution” from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines “insured depository institution,” in 11 U.S.C. § 101(35), and the Code’s definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement).* Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from “Corporate Ownership Statement” to “Disclosure Statement.” The Advisory Committee received two comments in response to publication. One comment suggested that the word “shall” in Rule 7007.1 be changed to “must.” While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to “corporate ownership statement.” The comment offered two reasons: (1) “disclosure statement” is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title (“Corporate Ownership Statement”) retained and the word “disclosure” in subparagraph (b) changed to “corporate ownership,” with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally).* Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee’s ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee’s revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act’s public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

*Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1.* Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of “debtor” for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from \$2,725,625 to \$7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most \$2,725,625; (2) a debtor with debts over \$2,725,625 but not more than \$7,500,000; and (3) a debtor that doesn’t meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of “current monthly income” in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

*Publication of Restyled Parts I and II of the Bankruptcy Rules.* Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

*Publication of SBRA Rules and Official Forms.* The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

*Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim).* Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

*Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers).* Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

*Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint).* A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

*Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal).* Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

*Information Items*

*Amendment to Interim Rule 1020.* As previously noted, the CARES Act altered the definition of “debtor” under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

*Director’s Forms for Subchapter V Discharge.* The Advisory Committee approved three Director’s Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

**REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

*Actions Items*

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify “file” or “attributed.” Professor Cooper responded that the provisions are intended to qualify “attributed.” A different member shared concerns about the “or” structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as “if ordered by the court or if an alternative situation applies.” He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of “unless the court orders otherwise” earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): “is attributed to that party or intervenor at the time that controls the determination of jurisdiction.” Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties’ obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding “unless the court orders otherwise.” The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify “file” or “attributed.” This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify “attributed.” A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state “In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule.” A second sentence would then state that the disclosure statement must name and identify the “citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court.” Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

*Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).* Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – “unless the court orders otherwise” – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

*Publication of Proposed Amendment to Rule 12(a)(4).* Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

#### *Information Items*

*Report of the Subcommittee on Multidistrict Litigation (MDL).* Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – “opt outs”

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

*Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases.* The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

*Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading).* The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

*Suggestion Regarding Rule 17(d) (Public Officer's Title and Name).* The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

## **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

### *Action Items*

*Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony).* Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its “case-in-chief.” Following Judge Campbell’s suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence “at trial” or in a party’s “case-in-chief.” The Advisory Committee concluded that “case-in-chief” was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use “during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).” Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26’s much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to “prompt notice” of any “modification, expansion, or contraction” of the party’s expert testimony. She suggested that “contraction” might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is “correction.” The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the “contraction” language could lead to a party being penalized for disclosing too much. This member recommended removing “contraction” from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word “modification,” which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

*Information Items*

*Proposals to Amend Rule 6 (The Grand Jury).* The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee’s role to provide advisory opinions on what a court’s power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to “occupy the field” or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee’s intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer’s previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

### OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at \$30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

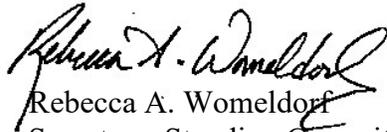
Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

### CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

  
Rebecca A. Womeldorf  
Secretary, Standing Committee