# ADVISORY COMMITTEE
# ON
# BANKRUPTCY RULES

## September 14, 2021

**Revised September 1, 2021**

# ADVISORY COMMITTEE ON BANKRUPTCY RULES

September 14, 2021 Virtual Meeting

**Discussion Agenda**

1. Greetings and introductions; welcome to new member Judge Benjamin Kahn (Judge Dow).



2. Approval of minutes of April 8, 2021 virtual meeting (Judge Dow).



3. Oral reports on meetings of other committees:

   A. Standing Committee – June 22, 2021 (Judge Dow, Professors Gibson and Bartell).



   B. Advisory Committee on Appellate Rules – April 7, 2021 (Judge Donald).

   C. Advisory Committee on Civil Rules – April 23, 2021 (Judge McEwen).

   D. Bankruptcy Committee – June 22-23, 2021 (Judge Connelly, Judge Isicoff).

4. Report of the Consumer Subcommittee (Judge Connelly).

   A. Consider Suggestion 21-BK-G to amend Rule 1007(b)(7) and/or Form 423 to allow debtors to file a certificate of debtor education instead of Form 423 (Professor Bartell).



   B. Consideration of *City of Chicago v. Fulton,* 141 S. Ct. 585 and Suggestions 21-BK-B, 21-BK-C, and 21-BK-J for rule amendments that would allow some or all turnover proceedings to be brought by motion rather than by adversary proceeding (Professor Gibson).

**Discussion Agenda**

5. Report of the Forms Subcommittee (Judge Kahn).

   A. Consider Suggestion 21-BK-K to revise Official Form 113, section 3.1, to remove the statement that the plan will not treat a secured claim after the stay is lifted with respect to the collateral securing the claim (Professor Gibson).

      **Tab 5A** August 18, 2021 memo by Professor Gibson .....140

6. Report of Technology and Cross Border Insolvency Subcommittee (Judge Oetken, Professor Gibson).

   A. Suggestion 20-BK-E from CACM (Judge Fleissig) for rule amendment establishing minimum procedures for electronic signatures of debtors and others. Related suggestions 21-BK-H, and 21-BK-I (Professor Gibson).

      **Tab 6A** August 20, 2021 memo by Professor Gibson.....148

      **Tab 6A1** September 1, 2021 memo by Federal Judicial Center.....170

7. Report of the Restyling Subcommittee (Judge Krieger; Professor Bartell).

   Oral report on work in progress.

8. Future meetings: The spring 2022 meeting will be on March 31 and April 1, 2022.

9. New Business.

10. Adjourn.

**Proposed Consent Agenda**

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting. **Absent any objection, all recommendations will be approved by acclamation at the meeting.** Any of these matters may be moved to the Discussion Agenda if a member or liaison feels that discussion or debate is required prior to Committee action. Requests to move an item to the Discussion Agenda must be brought to attention of the Chair by noon, Eastern Time, on **Tuesday, September 7, 2021.**

1. Technical Amendment to Rule 9006(a)(6) adding Juneteenth to the list of Federal Holidays.

   **Consent Tab 1A** August 23, 2021 memo by Professor Bartell.....164

2. Business Subcommittee (Judge McEwen).

   A. Recommendation of No Action regarding Suggestion 21-BK-F to shorten the deadline to file schedules in Chapter 11, subchapter V cases.

# TAB 1

# RULES COMMITTEES — CHAIRS AND REPORTERS

## Committee on Rules of Practice and Procedure
## (Standing Committee)

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

## Advisory Committee on Appellate Rules

| Chair | Reporter |
|---|---|
| Honorable Jay S. Bybee<br>United States Court of Appeals<br>Las Vegas, NV | Professor Edward Hartnett<br>Seton Hall University School of Law<br>Newark, NJ |

## Advisory Committee on Bankruptcy Rules

| Chair | Reporter |
|---|---|
| Honorable Dennis R. Dow<br>United States Bankruptcy Court<br>Kansas City, MO | Professor S. Elizabeth Gibson<br>University of North Carolina at Chapel Hill<br>Chapel Hill, NC |
| | **Associate Reporter** |
| | Professor Laura B. Bartell<br>Wayne State University Law School<br>Detroit, MI |

## Advisory Committee on Civil Rules

| Chair | Reporter |
|---|---|
| Honorable Robert M. Dow, Jr.<br>United States District Court<br>Chicago, IL | Professor Edward H. Cooper<br>University of Michigan Law School<br>Ann Arbor, MI |
| | **Associate Reporter** |
| | Professor Richard L. Marcus<br>University of California<br>Hastings College of the Law<br>San Francisco, CA |

## Advisory Committee on Criminal Rules

| Chair | Reporter |
| --- | --- |
| Honorable Raymond M. Kethledge<br>United States Court of Appeals<br>Ann Arbor, MI | Professor Sara Sun Beale<br>Duke Law School<br>Durham, NC |
| | **Associate Reporter** |
| | Professor Nancy J. King<br>Vanderbilt University Law School<br>Nashville, TN |

## Advisory Committee on Evidence Rules

| Chair | Reporter |
| --- | --- |
| Honorable Patrick J. Schiltz<br>United States District Court<br>Minneapolis, MN | Professor Daniel J. Capra<br>Fordham University School of Law<br>New York, NY |

# ADVISORY COMMITTEE ON BANKRUPTCY RULES

| Chair | Reporter |
|---|---|
| Honorable Dennis R. Dow<br>United States Bankruptcy Court<br>Kansas City, MO | Professor S. Elizabeth Gibson<br>University of North Carolina at Chapel Hill<br>Chapel Hill, NC |
| | **Associate Reporter** |
| | Professor Laura B. Bartell<br>Wayne State University Law School<br>Detroit, MI |

## Members

| | |
|---|---|
| Honorable Thomas L. Ambro<br>United States Court of Appeals<br>Wilmington, DE | Honorable Rebecca B. Connelly<br>United States Bankruptcy Court<br>Harrisonburg, VA |
| Honorable Bernice B. Donald<br>United States Court of Appeals<br>Memphis, TN | Honorable David A. Hubbert<br>Acting Assistant Attorney General, Tax Division (ex officio)<br>United States Department of Justice<br>Washington, DC |
| Honorable Ben Kahn<br>United States Bankruptcy Court<br>Greensboro, NC | Honorable Marcia S. Krieger<br>United States District Court<br>Denver, CO |
| Honorable Catherine P. McEwen<br>United States Bankruptcy Court<br>Tampa, FL | Debra L. Miller, Esq.<br>Chapter 13 Bankruptcy Trustee<br>South Bend, IN |
| Honorable J. Paul Oetken<br>United States District Court<br>New York, NY | Jeremy L. Retherford, Esq.<br>Balch & Bingham LLP<br>Birmingham, AL |
| Damian S. Schaible, Esq.<br>Davis Polk & Wardwell LLP<br>New York, NY | Professor David A. Skeel<br>University of Pennsylvania Law School<br>Philadelphia, PA |
| Tara Twomey, Esq.<br>National Consumer Bankruptcy Rights Center<br>San Jose, CA | Honorable George H. Wu<br>United States District Court<br>Los Angeles, CA |

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Executive Office for U.S. Trustees
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Honorable Laurel M. Isicoff
(*Committee on the Administration of the Bankruptcy System*)
United States Bankruptcy Court
Miami, FL

Honorable William J. Kayatta, Jr.
(*Standing*)
United States Court of Appeals
Portland, ME

## Clerk of Court Representative

Kenneth S. Gardner
Clerk
United States Bankruptcy Court
Denver, CO

## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
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| Liaison for the Advisory Committee on Bankruptcy Rules | Hon. William J. Kayatta, Jr.<br>*(Standing)* |
| Liaisons for the Advisory Committee on Civil Rules | Peter D. Keisler, Esq.<br>*(Standing)*<br><br>Hon. Catherine P. McEwen<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Criminal Rules | Hon. Jesse M. Furman<br>*(Standing)* |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. James C. Dever III<br>*(Criminal)*<br><br>Hon. Carolyn B. Kuhl<br>*(Standing)*<br><br>Hon. Sara Lioi<br>*(Civil)* |

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***(Standing)***

# Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective July 1, 2021

| | |
|---|---|
| **Business Subcommittee**<br>Judge Catherine Peek McEwen, Chair<br>Judge Thomas Ambro<br>Judge Benjamin Kahn<br>Judge Marcia S. Krieger<br>Judge J. Paul Oetken<br>Damian S. Schaible, Esq.<br>Professor David Skeel<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>Kenneth S. Gardner, *ex officio* | **CARES ACT Emergency Rules Taskforce**<br>Judge George H. Wu, Chair<br>Debra L. Miller, Esq.<br>Damian S. Schaible, Esq.<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>Kenneth S. Gardner, *ex officio* |
| **Consumer Subcommittee**<br>Judge Rebecca Buehler Connelly, Chair<br>Judge Bernice Bouie Donald<br>Judge George H. Wu<br>Debra L. Miller, Esq.<br>Jeremy L. Retherford, Esq.<br>Tara Twomey, Esq.<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>Kenneth S. Gardner, *ex officio* | **Forms Subcommittee**<br>Judge Benjamin Kahn, Chair<br>Judge George H. Wu<br>Jeremy L. Retherford, Esq.<br>Tara Twomey, Esq.<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>Kenneth S. Gardner, *ex officio*<br>David Hubbert, Esq., *ex officio*<br>Debra L. Miller, Esq. |
| **Privacy, Public Access, and Appeals Subcommittee**<br>Judge Thomas Ambro, Chair<br>Judge Bernice Bouie Donald<br>Judge Catherine Peek McEwen<br>Damian S. Schaible, Esq.<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>David Hubbert, Esq., *ex officio* | **Restyling Subcommittee**<br>Judge Marcia S. Krieger, Chair<br>Judge A. Benjamin Goldgar<br>Judge Benjamin Kahn<br>Debra L. Miller, Esq.<br>Tara Twomey, Esq.<br>Ramona D. Elliott, Esq., *EOUST liaison*<br>Kenneth S. Gardner, *ex officio* |
| **Technology and Cross Border Insolvency Subcommittee**<br>Judge J. Paul Oetken, Chair<br>Judge Rebecca Buehler Connelly<br>Judge Benjamin Kahn<br>Professor David Skeel<br>Ramona D. Elliott, Esq., *EOUST liaison* | |
| | |
| **Appellate Rules Liaison:**<br>Judge Bernice Bouie Donald | **Bankruptcy Committee Liaison:**<br>Judge Rebecca Buehler Connelly |
| **Civil Rules Liaison:**<br>Judge Catherine Peek McEwen | |

**Effective (no earlier than) December 1, 2021**

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 3 | The proposed amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule. | AP 6, Forms 1 and 2 |
| AP 6 | The proposed amendment would conform the rule to the proposed amended Rule 3. | AP 3, Forms 1 and 2 |
| AP Forms 1 and 2 | Proposed conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders. | AP 3, 6 |
| BK 2005 | The proposed amendment to subdivision (c) replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142. | |
| BK 3007 | The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim. | |
| BK 7007.1 | The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1. | AP 26.1, BK 8012 |
| BK 9036 | The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute. | |

Revised August 24, 2021

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

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

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 25 | The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. | |
| AP 42 | The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020). | |
| BK 3002 | The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." | |
| BK 5005 | The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified. | |
| BK 7004 | The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title. | |
| BK 8023 | The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties. | AP 42(b) |
| BK Restyled Rules (Parts I & II) | The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019) | The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020. | |

Revised August 24, 2021

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

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

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A) | The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments. | |
| CV 7.1 | An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021.<br><br>The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. | AP 26.1 and BK 8012 |
| CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) | Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). | |
| CR 16 | Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule. | |

**Effective (no earlier than) December 1, 2023**

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 2 | Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. | BK 9038, CV 87, and CR 62 |
| AP 4 | The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi). | CV 87 (Emergency CV 6(b)(2)) |
| BK 3002.1 and five new related Official Forms | The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. | |
| BK 3011 | Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites | |
| BK 8003 and Official Form 417A | Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree. | AP 3 |
| BK 9038 (New) | Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. | AP 2, CV 87, and CR 62 |
| BK Restyled Rules (Parts III-VI) | The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| Official Form 101 | Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022. | |
| Official Forms 309E1 and 309E2 | Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021. | |
| CV 15 | The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than." | |

**Effective (no earlier than) December 1, 2023**

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| CV 72 | The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b). | |
| CV 87 (New) | Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. | AP 2, BK 9038, and CR 62 |
| CR 62 (New) | Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. | AP 2, BK 9038, and CV 87 |
| EV 106 | The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements. | |
| EV 615 | The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. | |
| EV 702 | The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d). | |

**Legislation that Directly or Effectively Amends the Federal Rules**
**117th Congress**
**(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Protect the Gig Economy Act of 2021** | **H.R. 41**<br>*Sponsor:*<br>Biggs (R-AZ) | CV 23 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors. | • 1/4/21: Introduced in House; referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **Injunctive Authority Clarification Act of 2021** | **H.R. 43**<br>*Sponsor:*<br>Biggs (R-AZ) | CV | **Bill Text:**<br>https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. | • 1/4/21: Introduced in House; referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **PROTECT Asbestos Victims Act of 2021** | **S. 574**<br>*Sponsor:*<br>Tillis (R-NC)<br><br>*Co-sponsors:*<br>Cornyn (R-TX)<br>Grassley (R-IA) | BK | **Bill Text:**<br>https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf<br><br>**Summary:**<br>Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts. | • 3/3/2021: Introduced in Senate; referred to Judiciary Committee |

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| **Sunshine in the Courtroom Act of 2021** | **S.818**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Co-sponsors*:<br>Blumenthal (D-CT)<br>Cornyn (R-TX)<br>Durbin (D-IL)<br>Klobuchar (D-MN)<br>Leahy (D-VT)<br>Markey (D-MA) | CR 53 | **Bill Text:**<br>https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf<br><br>**Summary:**<br>This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines.<br><br>This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." | • 3/18/21: Introduced in Senate; referred to Judiciary Committee<br>• 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees<br>• 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee |
| **Litigation Funding Transparency Act of 2021** | **S. 840**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Co-sponsors:*<br>Cornyn (R-TX)<br>Sasse (R-NE)<br>Tillis (R-NC)<br><br>**H.R. 2025**<br>*Sponsor:*<br>Issa (R-CA) | | **Senate Bill Text (HR text not available):**<br>https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf<br><br>**Summary:**<br>Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." | • 3/18/21: Introduced in Senate and House; referred to Judiciary Committees<br>• 5/3/21: Letter received from Sen. Grassley and Rep. Issa<br>• 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates |

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| **Justice in Forensic Algorithms Act of 2021** | **H.R. 2438**<br>*Sponsor:*<br>Takano (D-CA)<br><br>*Co-sponsor:*<br>Evans (D-PA) | EV 702 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf<br><br>**Summary:**<br>A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes."<br><br>Section 2 of the bill contains the following two subdivisions that implicate Rules:<br><br>"(b) PROTECTION OF TRADE SECRETS.—<br>(1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts.<br>(2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege."<br><br>"(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if—<br>(1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and<br>(2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software." | • 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology |
| **Juneteenth National Independence Day Act** | **S. 475** | AP 26; BK 9006; CV 6; CR 45 | Established Juneteenth National Independence Day (June 19) as a legal public holiday | • 6/17/21: Became Public Law No: 117-17. |

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| **Bankruptcy Venue Reform Act of 2021** | H.R. 4193<br>*Sponsor*:<br>Lofgren (D-CA) | BK | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453<br><br>**Summary:**<br>Modifies venue requirements relating to Bankruptcy proceedings. | • 6/28/21 Introduced in House, Referred to Judiciary Committee |
| **Nondebtor Release Prohibition Act of 2021** | S. 2497<br>*Sponsor*:<br>Warren (D-MA) | BK | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195<br><br>**Summary:**<br>Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by:<br>• Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate.<br>• Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate. | • 7/28/21 Introduced in Senate, Referred to Judiciary Committee |

# TAB 2

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 8, 2021
Held Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Bankruptcy Judge Dennis R. Dow, Chair
Circuit Judge Thomas L. Ambro
Bankruptcy Judge Rebecca Buehler Connelly
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge Melvin S. Hoffman
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
Professor David A. Skeel
Tara Twomey, Esq.
District Judge George H. Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura B. Bartell, associate reporter
District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel R. Coquillette, consultant to the Standing Committee
Professor Catherine T. Struve, reporter to the Standing Committee
Professor Daniel J. Capra, liaison to the Emergency Rules Subcommittee
Bankruptcy Judge A. Benjamin Goldgar as liaison to the Restyling Subcommittee
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
David A. Hubbert, Department of Justice
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Julie Wilson, Esq., Administrative Office
Shelly Cox, Administrative Office

David A. Levine, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office
Kevin Crenny, Rules Law Clerk
Molly T. Johnson, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees
John Hawkinson, freelance journalist
Sai, pro se litigant
Teri E. Johnson, attorney
Connor D. McMullan, attorney
S. Kenneth Lee, Federal Judicial Center
District Judge Laurel M. Isicoff

**Discussion Agenda**

1. **Greetings and introductions**

Judge Dennis Dow welcomed the group and thanked them for joining this meeting remotely. He first discussed logistical matters for the remote meeting. He thanked outgoing member of the Advisory Committee, Judge Melvin Hoffman, and introduced the new members, Judge Rebecca Buehler Connelly, Judge Catherine Peek McEwen, Damian S. Schaible, Esq. and Tara Twomey, Esq.

2. **Approval of minutes of remote meeting held on Sept. 22, 2020.**

The minutes were approved by motion and vote after a correction in the name and title of Dana Elliott.

3. **Oral reports on meetings of other committees**

(A) ***Jan. 5, 2021 Standing Committee meeting***

Judge Dow gave the report.

(1) **Joint Committee Business**.

(a) ***Emergency Rules.*** Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, which required that "the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule

amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)." Each of the Advisory Committees for the Civil, Criminal, Appellate and Bankruptcy Rules participated in a discussion before the Standing Committee about the efforts to develop a relatively uniform version of an emergency rule. Professor Dan Capra provided a side-by-side comparison of the rules and discussed the outstanding differences between them. The Standing Committee provided its reactions to those outstanding issues.

(2) **Bankruptcy Committee Business**.

The Advisory Committee presented for retroactive approval amendments to Official Forms 309A-I to make a technical amendment with respect to the new web address of PACER. The Standing Committee gave retroactive approval to those amendments and undertook to inform the Judicial Conference.

The Advisory Committee also presented for publication proposed amendments to (1) Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases); (2) Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal); and (3) Official Form 417A (Notice of Appeal and Statement of Election). The Standing Committee voted to publish those rules and form.

Judge Dow also reported to the Standing Committee on the approval of a change in the instructions for Official Form 410A (Proof of Claim, Attachment A) and on the status of the restyling project.

(B) ***April 7, 2021 Meeting of the Advisory Committee on Appellate Rules***

Judge Donald made the report. The Appellate Committee met April 7, 2021. It approved amendments to Appellate Rule 42 (Voluntary Dismissal) and 25 (Filing and Service) which were published for public comment in August 2020. Bankruptcy Rule 8023 is being amended to conform to amended Appellate Rule 42(b). Appellate Rule 25(a)(5) is being amended to make applicable provisions on remote access in Civil Rule 5.2(c)(1) and (2), and the Appellate Committee examined the rule to ensure that it was consistent with other rules. There was discussion of amicus briefs and what should be disclosed, and the Appellate Committee will return to that issue in the future. The Appellate Committee approved for publication amendments to Appellate Rules 35 and 40 dealing with hearings and rehearing en banc and panel rehearing, which will fold them into a single Rule 40.

The next meeting of the Appellate Committee is Oct. 7, 2021.

Professor Struve mentioned that the Appellate Committee is amending Rule 4(a)(4)(A)(vi) to contemplate the applicability of the new emergency rule to extensions of Civil Rule 51/52/59/60 motions. She asked if Bankruptcy Rule 8002(b)(1) should be amended in a parallel way.

(C) ***October 16, 2020 Meeting of the Advisory Committee on Civil Rules***

Judge Goldgar provided a report on the Oct. 16, 2020 meeting. The meeting was conducted virtually because of the COVID-19 health emergency.

**1. CARES Act – Rules Emergency.** The subcommittee addressing Rule 87, the rules emergency proposal, reported on its work. Prof. Capra made a cameo appearance and described the proposals from the different advisory committees. Some uncertainty was expressed about (1) whether Rule 87 was needed, given its limited scope and the flexibility of the civil rules (which have worked well during the pandemic, members said); and (2) when Rule 87 should be published if indeed it is needed. Despite these uncertainties, it appears the Committee at least intends to send the proposed rule to the Standing Committee.

**2. Appeal Finality after Consolidation.** The joint subcommittee that has been addressing whether rules amendments are necessary to address the effects of *Hall v. Hall*, 138 S. Ct. 1118 (2018), reported on its work. The subcommittee had asked the FJC to study whether *Hall* was causing problems that might warrant amendments. The FJC completed its work and found no problems, but its investigation only covered actions filed between 2015 and 2017. The subcommittee is considering whether data might be gathered in other ways, either informally from the courts of appeals or from bar groups. Since there appears to be no immediate need for rule-making, no decision has been made on a possible amendment.

**3. Rule 17(d) – Official Capacity.** The Civil Committee has been studying a proposed amendment that would require a public officer who sues or is sued in the officer's official capacity to be designated by official title rather than by name. (The current rule is permissive rather than mandatory.) The Department of Justice expressed its opposition to the amendment, and the sense was that the current rule works satisfactorily. The item was removed from the agenda.

**4. Rule 5(d)(3) – E-filing by Unrepresented Litigants.** Rule 5(d)(3) currently allows pro se litigants to file electronically only if a court order or local rule permits. The proposal is to allow all pro se litigants to file electronically. The Committee is continuing to gather information and study the question.

Judge Dow commented that the Bankruptcy Advisory Committee is very interested in the issue of electronic filing.

**5. IFP Disclosures.** The Committee considered a suggestion to change the IFP forms to require only the party seeking IFP status to disclose financial information. The forms currently require

information not only about the party's own finances but also finances of the party's spouse, and the suggestion said that raised privacy concerns. The Committee concluded that since these are Administrative Office forms, the decision on changing them is up to the AO. There was no action for the Committee to take.

**6. E-Filing Deadline.** A joint subcommittee continues to consider whether the e-filing deadline should be moved from midnight to the time when the clerk's office closes. The Federal Judicial Center is still examining the issue.

**7. Rule 9(b).** The Committee considered as an information item a suggestion from Dean Spencer (William & Mary) to amend Rule 9(b). The amendment would change the sentence that allows state of mind to be pled "generally" by deleting that word and saying instead that state of mind may be pled "without setting forth the facts or circumstances from which the condition may be inferred." The goal is to undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged "with particularity," the allegation must still satisfy Rule 8(a)) – meaning some facts must be pled. Spencer's view is set out at length in a Cardozo Law Review article.

This is a question of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy because section 523(a)(2)(A) is one of the most commonly invoked exceptions to discharge. Judge Goldgar also said that he was a fan of *Iqbal*. Many creditors having contract claims bring adversary proceedings under section 523(a)(2)(A), contorting their claims into fraud claims and alleging intent only as a conclusion. *Iqbal* allows a judge to dispose of those quickly. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

**8. Privilege Logs – Rules 26(b)(5)(A) and 45(e)(2).** The Committee considered as an information item a proposal to amend Rules 26(b)(5)(A) and 45(e)(2). The amendments would require parties to add specific details about materials withheld from production on privilege grounds. Prof. Cooper expressed skepticism about the proposal, saying it was unclear an amendment would solve the problem. But the lawyer members of the Committee countered that the problem was a serious one. The Committee concluded that the proposal warranted further study. Since these rules apply in bankruptcy, and since privilege problems also arise in bankruptcy cases, we will want to keep an eye on this one as well.

**9. Sealing Court Records.** The Committee considered as an information item a proposal from Prof. Volokh on behalf of the Reporters Committee for Freedom of the Press for a national rule on sealing court records**.** The rule would override local practices and rules. The matter was continued for further discussion. Another one we will want to watch.

**10. Rule 15(a).** The Committee took up a proposal to change the word "within" in Rule 15(a)(1) to "no later than." The change, Prof. Cooper said, would avoid an apparent gap that results from a literal, "if not common-sense," reading of the rule. The Committee found the amendment both sensible and innocuous and will move ahead with it.

Judge Catherine Peeks McEwen provided the report on the agenda for the next Civil Rules Committee to be held virtually on April 23, 2021. The Civil Committee will be looking at suggestions regarding Rule 4(f)(2) on Hague Convention service, Rule 65(e)(2) on preliminary injunctions in interpleader actions, Rules 6 and 60 on times for filing, and will be revisiting in forma pauperis standards.

(D) ***Dec. 8-9, 2020 meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

The Bankruptcy Committee met by videoconference on Dec. 8-9, 2020. The next meeting is June 22-23, 2021. Before the last meeting, the Committee took action to address the impact of the COVID-19 pandemic on the bankruptcy system. Following the enactment in March 2020 of the CARES Act, and based on the possibility at the time that Congress might quickly move forward with further legislation in response to COVID-19, the Bankruptcy Committee recommended a legislative proposal that was included in the judiciary's package of legislative proposals transmitted to Congress in April 2020.

That proposal would authorize bankruptcy courts to extend statutory deadlines and toll statutory time periods under title 11 and chapter 6 of title 28 of the United States Code during the COVID-19 national emergency, upon a finding that the emergency conditions materially affect the functioning of a particular bankruptcy court of the United States. The authorization would expire 30 days after the date that the COVID-19 national emergency declaration terminates, or upon a finding that emergency conditions no longer materially affect the functioning of the particular bankruptcy court, whichever is earlier. Unfortunately, since the legislative proposal was transmitted to Congress in April, Congress has taken no action on it and it has not been included in any of the COVID-19 stimulus legislation introduced to date.

The Bankruptcy Committee recommended that the legislative proposal be withdrawn because of the existence of the local emergency rules that have been enacted in the meantime, and the fact that the legislation might call these into question. The Judicial Conference withdrew the legislation.

The Bankruptcy Committee is considering whether to recommend a permanent grant of authority during an ongoing emergency, which could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. The Committee deferred making any recommendation until the COVID-19 emergency has subsided or ended and courts have resumed normal operations, and to evaluate the potential impact of any Bankruptcy Rule changes under consideration by the Bankruptcy Rules Committee that would impact or overlap with the

proposal. As drafted, the permanent grant of authority under consideration would not extend to the Bankruptcy Rules.

The Bankruptcy Committee was grateful for the work of the Advisory Committee on Rule 3011 dealing with unclaimed funds.

The Bankruptcy Committee, jointly with CACM, decided not to pursue a proposal to allow parties to access the BNC electronic data base of addresses for service of process and notice.

**Subcommittee Reports and Other Action Items**

4. **Report of the Emergency Rule Subcommittee**

Judge Hoffman and Professor Gibson provided the report. The Subcommittee has been working in response to the directive of Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, which required that "the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)." At the direction of the Standing Committee, the Advisory Committees on Civil Rules, Criminal Rules, Appellate Rules and Bankruptcy Rules, working through Dan Capra who was appointed by the Standing Committee to be the liaison to the Advisory Committees on this issue, worked to prepare their own emergency rules with the goal of achieving uniformity to the extent possible.

Initial drafts of a proposed Rule 9038 and the other proposed emergency rules were presented to the Standing Committee at its January meeting, and they were the subject to extensive discussions there. Although no formal votes were taken, the Standing Committee provided views on some of the key elements of the rules and Rule 9038 was revised accordingly. The Subcommittee worked to achieve as much uniformity as possible with the other Advisory Committees, and approved the revised rule and presented it to the Advisory Committee for approval and publication. Professor Gibson discussed some of the key elements of the rule.

(a) The biggest difference from the prior version reviewed by the Advisory Committee is with respect to who may declare a rules emergency. The Standing Committee indicated that they thought only the Judicial Conference of the United States should have the authority to declare an emergency, and the draft rule was therefore revised to follow the Civil and Criminal Rules model.

(b) A second issue was the standard for an emergency. The Subcommittee did not include the additional requirement – included in the Criminal emergency rule -- that there be no other feasible means of complying with the existing rules, and the Standing Committee indicated that the Criminal Rules could differ in that respect.

(c) The third change was the use of the word "court." The word "bankruptcy" was added before the word "court" throughout, to avoid using the Rule 9001-defined word "court."

(d) The Criminal Rules committee is proposing to remove the words "to modify the rules" in (b)(1)(B), and we may conform to that proposal because the rules are not really modified.

(e) In part (b)(4), all Committees now make termination permissive, not mandatory.

(f) Bankruptcy Rule, Part (c) is different from other sets of emergency rules, because unlike the other emergency rules the bankruptcy emergency rule only provides for an extension of time limits, and therefore it seems appropriate that it can be ordered on a district-wide level or by an individual judge. Circumstances can differ between districts, and the Judicial Conference likely does not want to be in the business of deciding what extensions should be adopted.

The style consultants have suggested modifications to (c)(1)(A) that removed one illustration of the types of actions that might be affected.

Professor Struve raised an issue regarding further extensions in (c)(4). She believes that as written the "good cause" requirement might be read to apply only to motions made by a party in interest and not to decisions by the judge sua sponte, and it should apply to both. She suggested revised text to make that clear.

(g) Professor Struve also suggested that the committee Note should address Subdivision (c)(5), and Professor Gibson agreed to draft a new paragraph for that purpose.

Judge Dow then opened the floor for discussion. Professor Capra said that the Bankruptcy Rules Committee has been very cooperative in this process.

Judge Bates congratulated the Subcommittee. He raised a question as to why bankruptcy was different with respect to (c) as to who decides what extensions should be granted. He also asked if an individual bankruptcy judge should be able to extend time limits even if the chief bankruptcy judge for the district has not made that decision for the entire district. Judge Dow said that this is indeed allowed and appropriate. That authority exists in most circumstances

anyway. Prof. Capra said that this is not a declaration of the emergency, but just responding to it – not a "rear-guard action" trying to move the authority to declare an emergency away from the Judicial Conference – and this should be made clear. Judge Hoffman stated that there are some bankruptcy cases involving large numbers of participants nationally (mega-cases) that are different from other cases in the district that therefore require unique treatment. That justifies giving the authority to particular bankruptcy judges. Judge Bates said that this is an area that just may require differences between the various emergency rules.

Judge Bates also suggested that line 45 should be "presiding judge" rather than "bankruptcy judge" like in line 59. Tara Twomey supported use of the term "presiding judge" because of the possibility of withdrawal of the reference.

Judge Isicoff supported using extra verbiage rather than the style consultants' suggestion of "take any other action" in subdivision (c)(1)(A). Judge Bates noted that the only eliminated language is "commence an action." Professor Gibson thought perhaps that language should be returned.

Judge McEwen pointed out that "court" is used in some places without "bankruptcy" before it. For district-wide determinations, what about divisions of the district? Could (c)(1) be amended to say in any district or division?

Judge Isicoff pointed out that when the entire S.D. Florida was shut down by a hurricane she was reversed when she tried to extend deadlines. She would support using all the language of (c)(1)(A).

Judge Kayatta asked why (c)(2) is different from (c)(4) in terms of good cause and notice and hearing. Professor Gibson says that changing the status quo may require more formality in (c)(4).

Judge Goldgar said that the rule only provides for the extension of deadlines. He fears that local districts might be held not to have the power to do anything else, like suspend local rules, by negative implication given that the rule does not address those actions. Judge Dow said that this rule is addressed only to matters for which the courts do not already have authority; it does not preclude other emergency actions. Professor Gibson pointed out the first paragraph of the Committee Note that should eliminate that worry. Professor Capra said that it was intended not to include in the emergency rules anything that was already flexible under the existing rules.

Professor Gibson said the elimination of "bankruptcy" before "court" came from the style consultants. As for "presiding judge" she assumed it was whoever was on the bench at the time.

Judge Dow identified the issues to be discussed:

1. (b)(1)(B) – delete the words "to modify the rules." The Advisory Committee agreed to deletion.

2. (c)(1)(A) -- add back "commence a proceeding" to all the various actions. The Advisory Committee agreed.

3. good cause requirement in (c)(4) – revise the language to read "the judge may do so only for good cause after notice and a hearing and only on the judge's own motion or motion of a party in interest or the United States trustee." The Advisory Committee agreed.

Professor Struve said that the judge does not need to have notice and a hearing for a sua sponte decision. She was concerned only about ambiguity. Judge Hoffman pointed out that "notice and a hearing" does not actually require a hearing. Judge Dow thought no alteration was required.

4. revision to committee note to reference (c)(5) – Advisory Committee approved.

Professor Struve asked how that note deals with the time for taking an appeal? Professor Gibson says that Rule 8002 deals with the time for appeal, so it is not a time limit set by statute. Judge Dow agreed. Professor Struve suggested mentioning it in the Committee Note. Judge McEwen thought that mentioning one and not others would be troubling. Professor Struve feared that a statute that mentions a rule might be deemed to make the rule unalterable. Judge Donald said that the fact we are discussing this issue suggests it should be addressed in the Committee Note. Judge Dow wants to avoid mentioning any specific examples. Professor Struve suggested defining what "imposed by statute" means in (c)(5). Professor Gibson will revise the Committee Note with these comments in mind.

5. (c)(1) caption and text – reference "district or division" instead of just district. Advisory Committee approved.

6. use of the term "a presiding judge" in (c)(2) instead of "any bankruptcy judge in the district" – Advisory Committee approved.

7. standards in (c)(2) v. (c)(4) – Judge Connelly suggested that good cause is appropriate in (c)(4) but not needed in (c)(2) because the circumstances are different. Judge Dow proposed that we leave the draft as is. Advisory Committee approved.

Judge Bates asked whether (c)(3) and (c)(4) should be reversed in order. Judge Connelly suggested leaving it as is, because the extension could come after the termination. Judge Dow agreed. The Advisory Committee decided to make no change.

Judge Dow inquired whether the Advisory Committee was concerned to the extent the Bankruptcy Rule is not uniform. No one expressed concern.

Professor Capra suggested that the Advisory Committee approve the rule for publication. It was agreed to send the revised draft and Committee Note around after the meeting and provide for an electronic vote next week to send the rule to the Standing Committee for publication in August.

The Advisory Committee subsequently voted by email to approve the draft for publication.

5. **Report by Appeals, Privacy, and Public Access Subcommittee**

(A) ***Comments on amendments to Bankruptcy Rule 8023 to conform to proposed amendments to FRAP 42(b)***

Judge Ambro introduced the issue and Professor Bartell provided the report. Proposed amendments to Bankruptcy Rule 8023 (Voluntary Dismissal) were published in August 2020 that would conform the rule to proposed amendments to Fed. R. App. P. 42(b) dealing with voluntary dismissals. The amendments are intended to clarify that a court order is required for any action other than a simple dismissal.

No comments were submitted in response to publication of the proposed amendments. The Advisory Committee approved the amended rule and recommended the amended rule to the Standing Committee for final approval.

6. **Report by the Business Subcommittee**

(A) ***Consider comments on SBRA Rules – Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, and 3019***

Professor Gibson provided the report. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act ("SBRA") took effect as local rules or standing orders on Feb. 19, 2020, the effective date of the SBRA. The amended and new rules were published for comment last summer, along with the SBRA form amendments. No comments were submitted in response to publication of the amendments to

Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, or 3019, or new Rule 3017.2. There was only one stylistic change from the existing interim rules.

Rule 1020 has subsequently been amended on an interim basis in response to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") which took effect on March 27, 2020. The CARES Act modified provisions allowing more debtors to elect treatment under subchapter V of chapter 11, and necessitated amending Interim Rule 1020 to add references to the debtors allowed to elect such treatment under the CARES Act. Even after the extension of the CARES Act provisions to March 27, 2022 by the Bankruptcy Relief Extension Act of 2021, Pub. L. 117-5, 135 Stat. 249, the CARES Act amendments are anticipated to sunset before the amended Rule 1020 becomes effective Dec. 1, 2022. Therefore, the published version of Rule 1020 is the appropriate one for final approval.

Ramona Elliot suggested deleting the last line in the Committee Note to Rule 3019 which seems to be a mistake. Professor Gibson agreed.

With that change, the Advisory Committee approved the rules as published and directed they be submitted to the Standing Committee for final approval.

(B) ***Review comments on Rule 7004(i) addressing Suggestion 19-BK-D***

Professor Bartell provided the report. Amendments to Rule 7004 (Process; Service of Summons, Complaint) to add a new paragraph (i) were published in August 2020. The amendments would make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names.

No comments were submitted in response to publication of the proposed amendments.

Judge McEwen suggested deleting the comma after "7004(b)(3)." The Advisory Committee agreed to do so.

Judge Wu asked whether the term "Agent" was sufficient as an addressee, as the Committee Note suggested. The Advisory Committee approved modifying the Committee Note to change "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the amended rule and Committee Note and recommended it to the Standing Committee for final approval.

(C) ***Review comments on Rule 5005***

Professor Bartell provided the report. Amendments to Rule 5005 (Filing and Transmittal of Papers) were published in August 2020. The amendments allow transmission of papers required to be transmitted to the United States trustee to be done electronically, and eliminate the requirement for filing a verified statement for papers transmitted other than electronically.

The only comment submitted in response to publication was one that noted an error in the redlining of the published version, but recognized that the comment clarified the intended language.

The Advisory Committee approved the amended rule and recommended it to the Standing Committee for final approval.

7. **Report by the Consumer Subcommittee**

(A) ***Recommendation Concerning Suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1***

Judge Connelly provided an introduction to the three items from the Subcommittee.

Professor Gibson provided the report. As was discussed at the last four Advisory Committee meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees (NACTT) and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). These suggestions are intended to increase compliance with the rule and make sure the debtor and trustee get the appropriate information.

The Advisory Committee provided feedback on a preliminary draft at its meeting in September 2020, and after several further meetings, the Subcommittee prepared draft amendments for approval for publication. (The Forms Subcommittee prepared related forms for publication – discussed at 8(B)).

Professor Gibson described the proposed changes to Rule 3002.1, which are intended to accomplish two goals. First, they would provide a more straight-forward and familiar procedure for determining the status of a mortgage claim at the end of a chapter 13 case. Second, they would provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred.

Professor Gibson described the changes in the Rule. Subdivision (a) would be modified only to make it applicable to reverse mortgages that do not have regular payments made in installments.

Subdivision (b) is intended to provide the debtor and the trustee notice of any changes in the home mortgage payment amount during the course of a chapter 13 case so that the debtor can remain current on the mortgage. The two main changes to this subdivision are the addition of provisions about the effect of late payment change notices and detailed provisions about notice of payment changes for home equity lines of credit (HELOCs). Proposed subdivision (b)(2) would provide that late notices of a payment increase would not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease.

Professor Struve questioned why the payment increase begins on the first due date that is at least 21 days after the date when the notice is filed as opposed to when it is served. Professor Gibson suggested adding the words "and served" after "is filed" on line 38 and line 61.

Professor Gibson described the new subdivision (b)(3) which would replace language added to the rule in 2018 and would provide that a HELOC claimant would only file annual payment change notices—which would include a reconciliation figure (net over- or underpayment for the past year)—unless the payment change in a single month was for more than $10. This provision, too, would ensure at least 21 days' notice before a payment change took effect.

There were mostly stylistic changes to Subdivision (c) and (d), many to conform to the changes made in the ongoing restyling project. Subdivision (e) now allows a party in interest to shorten the time for seeking a determination of the fees, expense, or charges owed.

Subdivisions (f) and (g) are new and implement a new midcase assessment of the status of the mortgage. The procedure would begin with the trustee providing notice of the status of the mortgage. An Official Form has been proposed for this purpose. The mortgage lender would then have to respond (subdivision (g)), again by using an Official Form to provide the required information. If the claim holder failed to respond, a party in interest could seek an order compelling a response. A party in interest could also object to the response. If an objection was made, the court would determine the status of the mortgage claim.

Subdivisions (h)–(j) provide for an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure that would result in a binding order, and time periods for the trustee and claim holder to act would be lengthened. Under

subdivision (h), the trustee would begin the process by filing – within 45 days after the last plan payments was made – a motion to determine the status of the mortgage. Two Official Forms have been created for this purpose, one for cases in which the trustee made ongoing postpetition payments to the claim holder and one for cases in which the debtor made those payments directly to the claim holder. The claim holder would have to respond within 28 days after service of the motion, again using an Official Form to provide the required information (subdivision (i)). If the claim holder failed to respond, a party in interest could seek an order compelling a response. A party in interest could also object to the response. This process would end with a court order detailing the status of the mortgage (subdivision (j)). If the claim holder failed to respond to an order compelling a response, the court could enter an order stating that the debtor was current on the mortgage. If there was a response and no objection to it was made, the order could accept as accurate the amounts stated in the response. If there was both a response and an objection, the court would determine the status of the mortgage. Subdivision (j)(4) specifies the contents of the order.

Subdivision (k) was previously subdivision (i) and is the sanctions provision. The provision would be amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes were also made.

Judge Dow opened the floor to comments from the Advisory Committee.

Deb Miller said that the mortgage holders were part of the group making these recommendations through NACTT and will not be surprised by the changes.

Judge Hoffman asked about the impact of the proposed rule on districts that have tremendous chapter 13 dockets, and whether those judges have had input. Deb Miller said that the motion described in the rule will probably not trigger an actual hearing on most cases, so it will not take a lot of court time. Although there may be an opportunity for a motion to compel, most parties will be satisfied with an order that the debtor is current.

Judge McEwen asked about the midterm report. What happens if the servicer does not respond? Does failure to respond to the midcase notice merely preclude them from bringing up evidence on something they should have revealed later in the case? Professor Gibson said that is correct, and perhaps the court could sanction the servicer for not responding if it wished to do so.

Judge McEwen also expressed concern about fees, and how to make sure the fees are reasonable. Deb Miller says that her office objects to fees under Section 330 of the Code. The amended rule did not change much with respect to fees and charges for that reason. Tara Twomey also said that the rule was not trying to change the underlying contractual provisions

relating to fees and charges. Judge Dow said that the court has authorization to consider reasonableness if the underlying contract required the fees and charges to be reasonable. Judge McEwen said she thought the court had inherent power to judge the reasonableness of the fees. Professor Gibson said that the fee language has not been changed from the existing rule.

Professor Gibson said that the style consultants have extensive comments on the rule, and the subcommittee will have to deal with those before this rule goes to the Standing Committee.

The Advisory Committee approved inserting the words "and served" in lines 38 and 61.

Judge Dow asked whether the midcase review should indeed be mandatory. Judge Connelly said the advantage of not being mandatory would provide for the new provisions to be tested. If it is mandatory, how is it enforced? Deb Miller said that the US trustee will enforce it.

Judge Dow concluded that it is time to see what others think of the proposal by publishing it and then deal with the comments.

The Advisory Committee approved amended Rule 3002.1, subject to further stylistic changes approved by the Subcommittee, and recommended it to the Standing Committee for publication.

(B) ***Review Comments on Rule 3002 regarding Suggestion 19-BK-F***

Professor Bartell provided the report. Proposed amendments to Rule 3002 (Filing Proof of Claim or Interest) were published in August 2020. The amendments would make uniform the standard for seeking bar date extensions between domestic and foreign creditors. There were no comments on the proposed amendments.

The Advisory Committee approved the amended rule and recommended it to the Standing Committee for final approval.

(C) ***Consideration of City of Chicago v. Fulton, 141 S. Ct. 585, and Suggestions 21-BK-B and 21-BK-C for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceedings***

Professor Gibson provided the report. On Jan. 14, 2021, the Supreme Court decided in City of Chicago v. Fulton, 141 S. Ct. 585, that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). The Court concluded that a contrary reading would render largely superfluous the provisions of § 542(a) providing for turnover of property of the estate. In a concurring opinion Justice

Sotomayor noted that turnover proceedings "can be quite slow" because they must be pursued by adversary proceedings, *id*. at 594, and stated that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id*. at 595.

Since the decision in *Fulton*, we received suggestion 21-BK-B from 45 law professors for rules amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding for all chapters and all types of property. Another suggestion, 21-BK-C, submitted by three of those law professors proposed amended language from that offered in the original suggestion.

The Subcommittee began considering these suggestions during its Feb. 19, 2021 meeting and seeks input from the Advisory Committee on three issues. First, is any change needed to the existing turnover procedure under Rule 7001(1) requiring an adversary proceeding? The Subcommittee was inclined to believe an amendment would be appropriate. Second, if so, should an amendment to Rule 7001(1) apply to all types of property and all types of debtors, or should it be more limited? The Subcommittee tended to think the amendment should be more limited, but had no recommendation on whether it should be limited to certain types of property (e.g., cars, property necessary for an effective reorganization, tangible personal property, or some other characterization) or certain bankruptcy chapters (e.g., chapters 11, 12, and 13), or certain types of debtors (e.g., consumers), or property having a certain value (small v. large).

Because a number of bankruptcy courts already allow turnover by motion in certain situations, the Subcommittee asked Ken Gardner to solicit information about local practices from court clerks, and Deb Miller sought information from chapter 13 trustees. A number of respondents favor a national rule on this issue.

David Skeel said that coming up with a narrowing principle is very difficult. Therefore, there should probably be a broad change or no change. Judge Dow noted that the ABI Consumer Bankruptcy Commission proposed a different time period for chapter 13 as opposed to other bankruptcy cases and therefore endorsed a narrowing principle. Judge Dow said he was not persuaded of the need to extend the procedure to non-chapter 13 cases.

Ramona Elliott said that the government was concerned about extending turnover by motion to all types of property, like cash held by the government. There does not seem to be a need to go beyond tangible property, or consumer cases. There are also due process issues. The government really cannot deal with the turnover motion on seven days' notice.

David Hubbert agreed with Ramona Elliott. If a new rule is limited to § 542(a), that eliminates a lot of concerns the government may have. There are a myriad of statutes under which the government may be holding payments. He thinks this should apply only to tangible assets in chapter 13 cases.

Judge Dow said that it seems the Advisory Committee supports a rule, limited to chapter 13 and tangible property. Judge McEwen suggested limiting it to personal property that is used for personal, family or household purposes. Judge Dow said perhaps it should be personal property necessary for an effective reorganization. Judge Ambro suggested sending it back to let the Subcommittee craft a proposal. Judge McEwen wants to eliminate § 542(b) from the equation. Ramona Elliott asks how far we should go beyond the situation in *Fulton*.

The Subcommittee will be reviewing any local rules, but a lot of courts have not yet acted but are contemplating local rules in the wake of *Fulton*.

Judge McEwen would include chapter 7 cases because of the exemption issue. She would also not limit it to cars.

Judge Dow said that the Subcommittee is not bound by the suggested rule proposed by the law professors, but it can be used as a starting point.

8. **Report by the Forms Subcommittee**

(A) ***Review comments on SBRA Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A***

Professor Gibson provided the report. The new and amended forms promulgated in response to the enactment of the Small Business Reorganization Act ("SBRA") took effect on Feb. 19, 2020. Although publication was not required, the Advisory Committee chose to publish the forms for comment last August, along with the SBRA rule amendments. One additional amended form was published, Official Form 122B (Chapter 11 Statement of Your Current Monthly Income) in order to correct an instruction at the beginning of the form.

No comments were submitted on the SBRA forms in response to publication. The Advisory Committee gave final approval to Official Form 122B and made no changes to the other Official Forms that are already in effect.

Ramona Elliott noted that we do not have a form for an individual subchapter V debtor like Official Form 122B. This may be something the Subcommittee should consider. Judge McEwen pointed out that Form 122C-2 is not required for a chapter 13 debtor who is under

median and whose expenses are measured with reference to the same statutory limits (in 1325(b)) as those stated in 1191(d).

(B) ***Consider forms to implement proposed amendments to Rule 3002.1***

Professor Gibson provided the report. The Consumer Subcommittee recommended for publication amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). The amended rule provides for new Official Forms. The five new forms do the following:

(1) Form 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim) – used by the trustee to provide the notice required by amended Rule 3002.1(f)

(2) Form 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim) – used by the claim holder to indicate whether it agrees with the trustee's statements about the status of the mortgage claim under amended Rule 3002.1(g)(1)

(3) Form 410C13-10C (Motion to Determine the Status of the Mortgage Claim) – used by the trustee who made ongoing postpetition mortgage payments in a conduit district at the end of a chapter 13 case under amended Rule 3002.1(h)

(4) Form 410C13-10NC (Motion to Determine the Status of the Mortgage Claim) – used by the trustee if ongoing postpetition mortgage payments were made by the debtor in a nonconduit district at the end of a chapter 13 case under amended Rule 3002.1(h)

(5) Form 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim) – used by the claim holder to indicate whether it agreed with the trustee's statements about the status of the mortgage claim under amended Rule 3002.1(i)(1) and (2)

Judge Dow suggested that in Form 410C13-1R, Part III, it should say "as of the date of the Trustee's Notice" instead of "as of the Trustee's Notice." And in the signature block, the word "Trustee" should be eliminated. He also suggested that, on Form 410C13-10R, paragraphs 2, 3 and 4 need headings.

The Advisory Committee approved the proposed forms with the proposed amendments and directed they be submitted to the Standing Committee for publication.

(C) ***Consider Suggestions 20-BK-I from Judge Callaway and 21-BK-A from Judge Surratt-States concerning Official Form 101, line 4***

Professor Bartell provided the report. The Advisory Committee received suggestions from two different bankruptcy judges suggesting that consumer debtors are confused by Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy), Part 1, line 4, which asks the debtor to list "any business names and Employer Identification Numbers you have used in the last 8 years." Both judges have reported that consumer debtors are listing the names of limited liability companies or corporations through which the debtors have conducted business in the past 8 years, not realizing that the question seeks only names that the debtor individually has used during that period. Because the debtors list those LLC and corporate names, those names appear as names of additional debtors on the notice of bankruptcy on the applicable version of Form 309 even though those LLCs and corporations have not filed for bankruptcy protection.

The proposed amendment to Form 101 eliminates the portion of line 4 that asks for any business names the debtor has used in the last 8 years, and instead asks for additional similar information in Question 2, which is consistent with the treatment of that information in Form 105, 201, and 205. There is also new language in the margin of Form 101, Part 1, Question 2, directing the debtor NOT to insert the names of LLCs, corporations or partnerships that are not filing for bankruptcy.

The Advisory Committee approved the amended form and recommended it be submitted to the Standing Committee for publication.

(D) ***Consider Suggestion 21-BK-E from Judge Dore***

Professor Bartell provided the report. Bankruptcy Judge Timothy W. Dore of the W.D. Wash. suggested that the language in line 7 of Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case for Individuals or Joint Debtors) (line 8 in Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case for Individuals or Joint Debtors under Subchapter V)) is not clear about when the deadline is for objecting to discharge, as opposed to seeking to have a debt excepted from discharge. The Subcommittee agreed, and recommends amended forms for approval and publication.

The Advisory Committee decided to change the line that says "the court will send you notice of that date later" to add the words "or its designee" after "the court."

The Advisory Committee approved the amended forms with the additional amendments and recommended them to be submitted to the Standing Committee for publication.

9. **Report by Technology and Cross Border Insolvency Subcommittee**

Professor Gibson presented the report. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management ("CACM"), submitted a suggestion based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ's opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in pursuing the issues. The matter was assigned to this Subcommittee.

The use of electronic signatures by debtors and others without a CM/ECF account is a matter that the Advisory Committee spent several years considering (2012-2014), only to abandon the proposed rule after reviewing the comments received following publication, in large part because of opposition from the Department of Justice. The Subcommittee identified several questions that should be addressed in considering whether to pursue a new e-signature rule:

(1) is there a problem that needs fixing?
(2) what is the Department of Justice's current view regarding the use of e-signatures by debtors without retention of documents with wet signatures?
(3) what e-signature products are available, and what safeguards to assure authenticity do they possess?
(4) should a new e-signature rule specify needed safeguards for e-signatures or just refer to standards to be developed by the Administrative Office of the Courts?
(5) rather than creating a new rule for e-signatures, can debtors and pro se litigants be given CM/ECF accounts so that they come within Rule 5005(a)(2)(C)'s provision for e-signatures?

The Subcommittee is being assisted in gathering information by Drs. Molly Johnson and Ken Lee of the Federal Judicial Center, and Nicole Eallonardo, a staff member in the District

Court for the Northern District of New York who is a member of the subgroup of the COVID-19 Judiciary Task Force that is focusing on using virtual technology for court proceedings and other meetings with detainees.

The Subcommittee intends to seek input from such groups as court clerks, the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter Thirteen Trustees, and the National Association of Bankruptcy Trustees. The Department of Justice will be seeking input from U.S. trustees, U.S. attorneys, and the FBI. The Subcommittee also plans to gather information about e-signature products currently on the market, as well as procedures used by bankruptcy courts that allow electronic filing by pro se debtors.

Molly Johnson said that the FJC has begun a survey of courts about what procedures they have put in place, especially during the pandemic, an update of the FJC's prior investigation. They will be trying to get a group sense of whether the rules should be changed.

Dave Hubbert is surveying the prosecutors on how the issue has been addressed, to see if the Department's position has changed since the last inquiry. Law enforcement agencies are distinguishing between digital signatures that have authenticated identity v. electronic signatures.

Professor Gibson asked whether there are any issues that should be explored or resources the Subcommittee should pursue that have not been described. Tara Twomey suggested that pro se litigants are not going to be able to use digital signatures with authenticated identity. That means there has to be a balance. Ken Gardner said that it would be a burden to teach all pro se litigants to use CM/ECF. If electronic signatures are too complicated, they will not be useful.

Judge Connelly suggested that signatures are always verified at the 341 meeting, whether the debtors are pro se or not. Therefore, why should we require something more onerous for a pro se litigant than one prepared with a petition preparer? Ken Gardner said that petition preparers do not use electronic filing, so there is a wet signature. Judge Dow said that the problem is a bigger one than merely the signatures on the petition. Scott Myers said the consumer bar thinks it is easier to work with clients if they can apply the electronic signature after the petition is finalized with last minute changes, and when the client cannot meet in person with the lawyers. Judge Dow pointed out that electronic signatures are used in tax filings and other contexts, and there is no reason they should not be used in bankruptcy filings. Although the 341 meeting can take care of the signature on the petition, subsequent documents will never be examined for the signature.

Judge Bates says it is a very complicated issue in bankruptcy. But it can impact other advisory committees as well. Has there been any outreach to other committees? Professor

Gibson said that it has not happened yet because there is nothing concrete to show them. Judge Bates suggested that the FJC might want to look beyond bankruptcy.

Judge McEwen said that we should make use of current technology, even if some cannot use it. Eventually people will catch up. Bankruptcy should not be the "dinosaur." Judge Donald agreed.

Dave Hubbert noted that there is a statute that governs the filing of tax returns. They will look at other statutes governing filings with governmental agencies.

Tara Twomey suggested looking at eSign, and the commercial world for guidance going forward.

10. **Report by the Restyling Subcommittee**

(A) ***Consider comments on, and recommendation for final approval of, the 1000 and 2000 series of Restyled Rules***

Judge Melvin Hoffman, member of the Subcommittee, and Professor Bartell provided the report.

The first two parts of the Restyled Bankruptcy Rules, Parts I and II, were published for comments in August 2020. The Advisory Committee received extensive comments from the National Bankruptcy Conference, each of which was considered, shared with the style consultants, and either incorporated or rejected, as discussed in the memo included in the agenda book.

Judge McEwen asked about the capitalization issue, and Professor Bartell and Judge Goldgar explained how the style consultants have the final word on matters of style.

The Advisory Committee gave final approval to Parts I and II of the Restyled Bankruptcy Rules and recommended them to the Standing Committee for final approval, with the suggestion that they not be submitted to the Judicial Conference until all other parts of the Bankruptcy Rules have been restyled, published, and given final approval.

(B) ***Consider recommendation to publish the 3000 through 6000 series of Restyled Rules***

Professor Bartell provided the report. The Restyling Subcommittee has completed its work on the restyled versions of the next four parts of the Bankruptcy Rules, Parts III, IV, V and VI and presents them to the Advisory Committee for approval for publication.

The Advisory Committee approved the Restyled Rules in Parts III, IV, V and VI and recommended them to the Standing Committee for publication.

Judge Bates expressed his congratulations to the Restyling Subcommittee and the style consultants for their work on this project.

11. **Information Items**

(A) ***By an email vote closing February 3, 2021, with all members voting in favor, the Advisory Committee recommended Director's Form 4100S to address provisions of the Consolidated Appropriations Act of 2021***.

Professor Gibson provided the report. The Consolidated Appropriations Act of 2021 ("CAA") contains provisions that address the treatment of amounts that are deferred on Federally backed mortgage claims under the CARES Act. The CAA allows an eligible creditor to file a supplemental proof a claim for a CARES Act forbearance claim in a chapter 13 case. Director's Form 4100S is a new proof of claim form for these CARES Act forbearance claims. The applicable provisions of the CAA are scheduled to sunset one year from the date of enactment, on Dec. 27, 2021. Therefore the Forms Subcommittee concluded that a Director's Form was the best means of providing a form that could be easily adjusted and withdrawn while the CAA provisions are in effect. The Advisory Committee approved the new form by email vote closing Feb. 3, 2021.

(B) ***By an email vote closing January 28, 2021, with all members voting in favor, the Advisory committee recommended Interim Rule 4001(c) for distribution to the courts to be adopted as a local rule if and after the Administrator of the Small Business Association takes certain actions authorized under the Consolidated Appropriations Act of 2021***

Professor Bartell provided the report. The Consolidated Appropriations Act of 2021 included a provision amending Section 364 of the Code to provide for certain loans under the Small Business Act, and to specify that the court hold a hearing on such a loan within 7 days after the filing and service of a motion to obtain such a loan. The CAA also states that the court may grant final relief at such a hearing "notwithstanding the Federal Rules of Bankruptcy Procedure." This provision of the CAA is to take effect on the date on which the Administrator of the Small Business Administration submits to the Director of the Executive Office of the United States Trustees a written determination that certain debtors in possession or trustees

would be eligible for the specified loans. If that determination were submitted, amendments to Rule 4001(c)(2) (dealing with hearings on motions to obtain credit) would be necessary to reflect the new CAA directions. As it was not clear when the Administrator might submit that determination, the Advisory Committee approved by email vote an interim rule to be adopted as a local rule if and after that declaration is submitted.

Ramona Elliott said that the Administrator of the SBA has the matter under consideration. The SBA posted updated information FAQs about what it means to be involved in a bankruptcy case for purposes of PPP loans, and allows reorganized debtors to apply for PPP loans.

12. **Future meetings**

The fall 2021 meeting has been scheduled for September 14, 2021.

11. **New Business**

There was no new business.

12. **Adjournment**

The meeting was adjourned at 3:25 p.m.

## Proposed Consent Agenda

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

1. Business Subcommittee.

A. Recommendation of no action regarding Suggestion 21-BK-D from former member Thomas Mayer concerning Rule 3007(c)-(e) (Professor Bartell).

2. Consumer Subcommittee.

A. Recommendation of no action regarding Suggestion 20-BK-I from Judge Calloway for an amendment to Rule 3001(c) to require last transaction information for claims that may have a statute of limitations defense (Professor Bartell).

3. Forms Subcommittee.

A. Recommendation of no action regarding Suggestion 20-BK-H from Trustee Aguilar to include a question on official Form 410 requiring the filing creditor to assert whether it believes its claim is protected by the anti-modification provisions of 11 U.S.C. § 1325(a), and to include instructions on how to compute the secured amount of such a claim (Professor Bartell).

# TAB 3

# TAB 3A

# TAB 3A1

**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

Judge John D. Bates, 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 A. 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 Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura 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 Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

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

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

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

## OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

## JOINT COMMITTEE BUSINESS

*Emergency Rules Project Pursuant to the CARES Act*

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates's thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee's feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees' proposals now use the same definitional language. The proposals all state that a rules emergency may be declared when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to" a court, "substantially impair the court's ability to perform its functions in compliance with these rules." The proposed emergency Criminal Rule adds a requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this "no feasible alternative" language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a "soft landing" provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the "soft landing" issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." Professor Capra described this as a "half-full / half-empty" distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The "no feasible alternative measures" requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)'s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee's spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book's version, Rule 62(e)(3)'s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)'s requirement, because Rule 62(e)(3)(A)'s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read "the requirement in (2)(B)," eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62's "soft landing" provision. As noted previously, the "soft landing" provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but "does not terminate … the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment." This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note's discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when "conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access" which should be "contemporaneous if feasible." The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public "if access to the video transmission is not feasible." This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note's suggestion that video access should be provided to the public if "feasible" seemed to raise an undue barrier for courts—such as this member's court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not "feasible"—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note's language about "feasibility" should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with "reasonable alternative access." The first judge endorsed the Rule's feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in "heroics" to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)'s provision that a noncapital defendant who has pleaded guilty "waives the right to be present … when the defendant is voluntarily absent during sentencing." In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*'s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless "the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing." The phrase "requests in writing" had replaced "consents in writing" in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the "requirements in (2)(B) and (C)" on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words "and consents" after "in writing" in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant's lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule's requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King's, that lines 110-11 might require that a defendant "consent by requesting in writing." But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant "consents after consulting with counsel"—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that "the court may sign for" a pro se defendant "if the defendant consents on the record," but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that "an adequate opportunity to consult"—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than "consulting."

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said "the defendant consents." This might resolve the pro se defendant issue. In (e)(3)(B) the word "consent" could be added somewhere. And (e)(4)(C) simply requires that "the defendant consents." This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say "after the opportunity to consult." A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting "consent in writing" for "request in writing." Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee's policy choice, "consent in writing" would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase "after consulting with counsel" be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant's consent "after consultation with counsel." So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the "opportunity" to consult, Professor King suggested, would not be inconsistent with the Advisory Committee's intent.

Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member's drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King's point that "request" was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court's use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an "opportunity to consult," it should use the "adequate opportunity" language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the "opportunity" or "consultation" language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant's ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through "a method that is reasonably calculated to give notice." The Rule states that "[t]he court may order" such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a "soft landing" provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own "soft landing" provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that re-start civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a "soft landing" provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

"[a]n act authorized by an order under" Rule 87(c)(2) "may be completed under the order after the emergency declaration ends."

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration "state any restrictions on the authority" granted in subsequent portions of Criminal Rule 62. The Criminal Rule's formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court's discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra's suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: "[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days." Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a "court may order service" through an alternative method instead of saying that a "court may authorize service?" Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used "order" rather than "authorization" because an "order" guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the "order" would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say "[t]he court may by order authorize." Professor Cooper and Judge Dow approved of this change.

The member's second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word "plaintiff" because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read "unless the court, after notice and an opportunity to be heard, modifies or rescinds the order."

A third change agreed upon was to delete (for style reasons) "authorized by the order" from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.") Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) ("a timely motion … under Rule 54(d)(2)") was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of "bankruptcy court" instead of "court" throughout the proposed rule. Bankruptcy Rule 9001 defines "court" as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use "bankruptcy court" when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates's question concerned (c)(4)'s provision on "Further Extensions or Shortenings." He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge's extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur "only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee." Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, "notice and a hearing" is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act sua sponte. Professor Hartnett asked about the significance of saying that "only" these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words "and only" could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words "and only" on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules' proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee's suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed "within the time allowed by" the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed "within the time allowed by" the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only "if the motion is filed no later than 28 days after the judgment is entered." This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed "within the time allowed for filing a motion under Rule 59." That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)'s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

*Action Items*

*Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)*. Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that "as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended." Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 "brings all rule of completeness questions under one rule." He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that "[t]he court may

admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together"). Professor Capra responded that Judge Bates's question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

*Publication of Proposed Amendment to Rule 615 (Excluding Witnesses)*. Judge Schiltz introduced the proposed amendment to Rule 615, a "deceptively simple" rule providing, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge's order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member's comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom "includes exclusion of witnesses from a virtual trial."

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word "one" was missing from "only <u>one</u> witness-agent is exempt at any one time"). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not "bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness," but then goes on to say that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis." The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note's drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court's discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude "a person authorized by statute to be present," was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party's request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, "must" be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee's work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

*Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses)*. Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993), which directs that "the trial judge must determine at the outset, pursuant to Rule 104(a)," whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

*Action Items*

*Final Approval of Restyled Rules Parts I and II.* Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

*Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act).* Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre–CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest)*. Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers)*. Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court's electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint)*. The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word "Agent" to "Agent for Receiving Service of Process."

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal)*. The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income)*. Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that "an individual . . . filing for bankruptcy under Chapter 11" must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added "(other than under subchapter V)" to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

*Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series).* Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

*Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)*. Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than $10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

*Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)*. This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

*Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))*. Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

*Action Items*

*Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g).* Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,

there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow's district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead "any identifying designation provided by the Commissioner with the final decision"; a conforming change was made to the committee note. Supplemental Rule 6's language was clarified. The committee note now observes that the rules' scope encompasses instances where multiple people will share in an award from a claim based on one person's wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4's provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney's Office for the relevant district and "to the appropriate office within the Social Security Administrations' Office of General Counsel." The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the "appropriate office."

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from "after the court disposes of all motions" to "after entry of an order disposing of the last remaining motion"). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges' ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 ("Notice to the Commissioner is sent to the appropriate regional office") should mirror the language in Supplemental Rule 3 itself (referencing notice being sent "to the appropriate office within the Social Security Administration's Office of General Counsel"). Judge Bates asked if deleting the word "regional" would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what "any identifying designation provided by the Commissioner" referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like "including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier." This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was "provided by the Commissioner." Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund "identifying" in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

(1) The complaint must:
  (A) state that the action is brought under § 405(g);
  (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  (C) state the name and the county of residence of the person for whom benefits are claimed;
  (D) name the person on whose wage record benefits are claimed; and
  (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word "regional" on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,[†] decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

*Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings*. The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee's April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

[†] Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

*Information Items*

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

*Action Item*

*Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection)*. Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference**, with the sole change of the removal of the committee-note sentence identified by Professor Beale.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

*Action Items*

*Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act.* Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal).* Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment[‡] might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

*Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing)*. Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling requirement that the court of appeals "must" dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at https://www.law.cornell.edu/rules/frcp/rule_84). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.

Judge Bates asked whether the new, combined Rule 40 could not be titled simply "Petitions for Panel or En Banc Review" rather than (as in the current proposal) "Petition for Panel Rehearing; En Banc Determination." Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested "Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc."

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying "transferred" rather than "abrogated." This judge had two other comments. First, this judge thought it would be better to change "or" to "and" on page 218 (subdivision (c)(1)) to accord with the "and" on page 217 (subdivision (b)(2)(A)); the "and" in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)'s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words "hear[] or" before "rehear[]" at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the "and" versus "or" discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using "or" in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a "petition [for initial hearing en banc] must be filed no later than the date when the appellee's brief is due." The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the "legacy" rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that "the full court's consideration is therefore necessary to secure and maintain

uniformity of the court's decisions" must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules' substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

*Information Item*

*Amicus Disclosures.* Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

## OTHER COMMITTEE BUSINESS

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee's strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference's Strategic Plan for the Federal Judiciary, a list of the Standing Committee's initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

## CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.

# TAB 3A2

**Agenda E-19 (Summary)**
**Rules**
**September 2021**

**SUMMARY OF THE**

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 23-25

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

# REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

## EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

***Rules Approved for Publication and Comment***

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

### *Information Items*

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Rules and Form Recommended for Approval and Transmission*

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting);
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status);
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11);
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement);
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

Rules 3002(c)(6), 5005, 7004, and 8023

*Rule 3002(c)(6) (Filing Proof of Claim or Interest).* The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

*Rule 5005 (Filing and Transmittal of Papers).* The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

*Rule 7004 (Process; Service of Summons, Complaint).* The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

*Rule 8023 (Voluntary Dismissal).* The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

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

**Recommendation:** That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

***Official Rules and Forms Approved for Publication and Comment***

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition

defaults that may have occurred. The amended rule includes proposed stylistic changes throughout.

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

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

***Information Items***

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

### *Rule Approved for Publication and Comment*

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

### *Information Items*

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Rule Recommended for Approval and Transmission*

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

***Rule Approved for Publication and Comment***

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

### *Information Items*

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

## FEDERAL RULES OF EVIDENCE

### *Rules Approved for Publication and Comment*

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

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

The proposed amendment to Rule 106 would fix two problems with Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended to address two issues. The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702, such testimony must be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

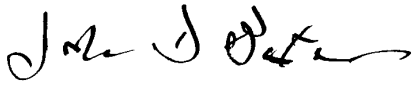
***Information Items***

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

## OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

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| Jesse M. Furman | Carolyn B. Kuhl |
| Daniel C. Girard | Patricia A. Millett |
| Robert J. Giuffra, Jr. | Lisa O. Monaco |
| Frank M. Hull | Gene E.K. Pratter |
| William J. Kayatta, Jr. | Kosta Stojilkovic |
| Peter D. Keisler | Jennifer G. Zipps |
| William K. Kelley | |

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed new supplemental rules and supporting report excerpt)

Appendix D – Federal Rules of Criminal Procedure (proposed amendment and supporting report excerpt)

# TAB 4

# TAB 4A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: CONSUMER SUBCOMMITEE

SUBJECT: 21-BK-G – Rule 1007(b)(7)

DATE: AUG. 19, 2021

Section 727(a)(11), added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8, 119 Stat. 23, § 106(b)(3), directs the court to deny a discharge in a chapter 7 case to an individual debtor if:

> "(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111 [subject to certain exceptions]…."

The debtor must also complete an instructional personal financial management course (again, subject to certain exceptions) to obtain a discharge in chapter 13 under § 1328(g)(1), and (for an individual debtor if § 1141(d)(3) applies) in chapter 11 under § 1141(d)(3)(C).

Rule 1007(b)(7) was adopted to reflect those 2005 amendments, and, as restyled, provides as follows:

> "(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a statement that such a course has been completed (Form 423)."

Bankruptcy Judge Arthur I. Harris of the N.D. Ohio has submitted Suggestion 21-BK-G, in which he proposes that use of Official Form 423 not be required in all cases if the approved provider of the instructional course concerning personal financial management has not notified the court directly of the debtor's completion of the course. Instead, he suggests that the rule be amended to allow submission to the court of the Certificate of Debtor Education that is provided to the debtor by the provider of that course. He notes that the Certificate of Debtor Education includes essentially the same information as Official Form 423, and that some courts are already accepting the Certificate of Debtor Education in lieu of Official Form 423. Indeed, submission of that Certificate by the provider of the course through ECF satisfies Rule 1007(b)(7), and Judge Harris contends that submission of the same Certificate by the debtor should be equally acceptable. (Alternatively, Judge Harris suggests that Official Form 423 be amended or the instructions be modified to indicate that the debtor may submit the Certificate of Debtor Education in lieu of the form.)

The Subcommittee agreed with Judge Harris that the certificate of completion issued by the provider should be acceptable evidence of completion of the required course on personal financial management, but recommends that the amendment go further and make that certificate the *only* acceptable evidence. The Subcommittee sees no benefit in allowing debtors to complete an Official Form in lieu of submitting the actual certificate to evidence course completion.

Second, the Subcommittee recommends that a debtor who is not required to complete such a course be explicitly excluded from the requirements of the rule. If the debtor has been excused from completing the course by court order, the court order will provide adequate evidence of that fact and submission of an Official Form seems unnecessary.

The Subcommittee recommends that the Advisory Committee approve for publication an amendment to Rule 1007(b)(7) that would read as follows:

"(7) ***Personal Financial-Management Course***[1]**.** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete such a course as a condition to discharge, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a ~~statement that such a course has been completed (Form 423)~~certificate of course completion issued by the approved provider."

Advisory Committee Note

Rule 1007(b)(7) is amended in two ways. First, language is added to make the rule inapplicable to debtors who are not required to complete an instructional course concerning personal financial management as a condition to discharge. See § 727(a)(11), § 1328(g)(2), § 1141(d)(3)(C). Second, the rule is amended to require an individual debtor who has completed an instructional course concerning personal financial management to file the certificate of course completion (often called a Certificate of Debtor Education) issued by the approved provider of that course in lieu of filing an Official Form, if the provider has not notified the court that the debtor has completed the course.

If this recommendation is adopted, the Subcommittee recommends that the Forms Subcommittee consider whether to eliminate Official Form 423. Form 423 currently provides information not only for debtors who have completed the required course, but also for debtors who are not required to complete the course.

[1] The changes indicated are to the restyled version of Rule 1007 included in the June 2021 Agenda Book of the Committee on Rules of Practice and Procedure (the Standing Committee) https://www.uscourts.gov/sites/default/files/2021-06_standing_agenda_book_final_6-23_0.pdf. The restyled bankruptcy rules are expected to go into effect December 1, 2024, if approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress takes no action to the contrary.

**The Subcommittee recommends that the Advisory Committee approve the proposed amendments to Rule 1007(b)(7) and submit them to the Standing Committee for publication.**

# TAB 4B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTIONS FOR SEEKING TURNOVER BY MOTION

DATE: AUGUST 19, 2021

At its meeting on August 17, the Subcommittee continued its consideration of the suggestions by 45 law professors (21-BK-B and 21-BK-C) to allow turnover of estate property to be brought by motion rather than as an adversary proceeding. The original suggestion and its addendum were prompted by Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton,* 141 S. Ct. 585, 595 (2021), in which she wrote that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." The professors suggest "an expansion beyond chapter 13 to allow turnover actions by motion in all circumstances," extending to turnover sought in all types of cases under §§ 521(a)(4), 542, or 543 and for all types of property.

Since the Advisory Committee last met, the National Bankruptcy Conference ("NBC") has submitted a suggestion (21-BK-J) in support of the law professors' suggestions. It says that

> the current procedural structure creates particular problems for chapter 13 debtors. Revising the rules to permit section 542 actions to be pursued by motion in the first instance – subject always to the bankruptcy court's ability under Bankruptcy Rule 9014(c) to impose additional Part VII rules when warranted by the facts and context of a particular dispute – would be a material improvement to the rules.

The NBC also offers a few "technical drafting refinements" to the professors' draft of proposed amendments to four rules and a proposed new rule.

After briefly reviewing the Advisory Committee's discussion of this topic at last spring's meeting, this memorandum examines information that has been gathered regarding bankruptcy courts' current practices for seeking turnover. It then concludes with a discussion of the Subcommittee's recommendation of a proposed amendment for publication.

Discussion at the Spring Advisory Committee Meeting

At the spring meeting, the Subcommittee presented for discussion the law professors' suggestions and the Subcommittee's tentative view that a narrower approach than was suggested would be preferable. No one seemed to disagree with that view, although Professor Skeel said that coming up with a narrowing principle will be difficult and thus either taking a broad approach or making no change at all may be necessary. Ms. Elliott and Mr. Hubbert said that the government would be concerned with a broad rule applicable to all types of property, including funds held by the government, especially if the government had only seven days to respond. Limiting turnover by motion to recoveries under § 542(a), however, would help alleviate the government's concerns, they said.

The draft of the meeting minutes summarizes the ensuing discussion as follows:

> Judge Dow said that it seems the Advisory Committee supports a rule, limited to chapter13 and tangible property. Judge McEwen suggested limiting it to personal property that is used for personal, family or household purposes. Judge Dow said perhaps it should be personal property necessary for an effective reorganization. Judge Ambro suggested sending it back to let the Subcommittee craft a proposal. Judge McEwen wants to eliminate § 542(b) from the equation. Ramona Elliott asks how far we should go beyond the situation in *Fulton*.

Current Procedures for Turnover

Rule 7001(1) provides that, subject to a few listed exceptions, "a proceeding to recover money or property" is an adversary proceeding, governed by the Part VII rules. Because none of

the exceptions applies to a request for the turnover of estate property from a third party, the rule requires such relief to be sought by an adversary proceeding.

In her concurring opinion, Justice Sotomayor noted that despite Rule 7001(1), some "courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice." 141 S. Ct. at 594. Nevertheless, she said, any problems caused by delays in obtaining turnover of essential property are best addressed by Congress or the Rules Committee.

Because the Subcommittee was interested in the extent to which bankruptcy courts are allowing turnover to be sought by motion, the content and scope of any such local rules, and the prospects for new local rules in response to *Fulton*, Ken Gardner offered to survey bankruptcy clerks on these issues, and Deb Miller offered to do the same for chapter 13 trustees. They gathered their information in March, shortly after the Subcommittee's last meeting.

Forty clerks responded to Mr. Gardner's survey. Of those, four respondents said that their districts—prior to *Fulton*—had local rules or orders that allowed turnover of estate property by motion. Those districts are the District of Minnesota, the Middle District of Georgia, the Northern District of California, and the Western District of Missouri. Several other respondents said that their courts allowed a request for turnover to proceed by motion if the respondent did not object.

Local Rule 6072-1 in Minnesota provides as follows:

> If upon demand an entity has refused to deliver to the trustee tangible property of a kind specified in § 542(a) of the Code, the value of the property is less than $10,000 and the property is located within the District of Minnesota, the trustee may seek an order for turnover by way of motion. At any time, on motion and for cause, the court may convert the proceeding to an adversary proceeding.

Local Rule 7001-1 in the Middle District of Georgia provides:

> In the interest of expediting certain matters covered in Part VII of the Federal Rules of Bankruptcy Procedure, the Court shall consider a motion by a debtor in Chapter 13 to recover an automobile or an item of consumer goods repossessed by a creditor as a contested matter in Part IX of the Federal Rules of Bankruptcy Procedure. Upon the request of any party in interest, any such motion shall be deemed an adversary proceeding under Part VII of the Federal Rules of Bankruptcy Procedure.

The respondent from the Northern District of California replied as follows:

> Yes, prior to Fulton the ND CA Bankruptcy Court allowed turnover of estate property by motion, in accordance with applicable case law. Shapiro v. Henson, 739 F.3d 1198, 1200 (9th Cir. 2014) ("§ 542(a) allows a turnover motion to be brought against the entity at any time during the pendency of the bankruptcy case"); Collins v. Wolf, 835 Fed. Appx. 905, 905; 2020 WL 6440919 (9th Cir. 2020) ("the bankruptcy court did not err in finding that the Trustee did not have to bring her turnover claim in the adversary complaint," citing Shapiro v. Henson).

The Western District of Missouri does not have a local rule expressly authorizing turnover to be sought by motion, but Local Rule 9060-1 (Notices and Hearings) lists a "motion to compel turnover" as one that will be held for 21 days to allow a response. If no response is filed, the rule allows the court to enter an order. Several other courts that have a local rule or other document that refers to a "turnover motion," without having a local rule that expressly authorizes that procedure. *See, e.g.,* Appendix N to D. Neb. Local Rules (Certification for A La Carte Fees/Expenses by Counsel for the Debtor(s)) ($350 for "Motion for turnover if no adversary proceeding is necessary"); E.D.N.C. Local Rule 2016-1 (Compensation of Professionals) (non-base fee service includes "motion for turnover"); D.Vt. Local Rule 9013-4 (Hearings—Routine Motions—Notice Under Optional Default Procedure) ("The default procedure may only be used for applications or motions seeking the following relief: . . . (43) turnover of property to the trustee (11 U.S.C.§ 542)").

Of the respondents to Mr. Gardner's survey, eight said that their court is considering orders or rule revisions in response to *Fulton*; none had already adopted them at the time of the response. Other respondents said that they did not think that such local rules were permissible, given Rule 7001(1), and that a national response is needed.

Ms. Miller's outreach to chapter 13 trustees produced responses representing 51 districts. These responses were similar to the ones from the clerks. Four said that their courts allowed turnover by motion prior to *Fulton*, and six said that their courts were considering doing so. (It should be noted that more than one of those respondents might have been from the same district.) Three commented that their courts have been allowing turnover by motion without a local rule that expressly provides for that procedure. Three trustees said that a national rule was needed on this issue, but that it should be limited to essential personal property in a chapter 13 case. Finally, one trustee commented that it would be disturbing if any court required an adversary proceeding for turnover since debtors do not generally have the means to retain experienced bankruptcy lawyers to file such actions.

There are a few courts that require turnover relief to be sought by an adversary proceeding but have local rules that allow these proceedings to be expedited under certain circumstances. For example, the Bankruptcy Court for the District of South Carolina has a local rule (9075-1) that provides that "[i]n an adversary proceeding seeking immediate turnover of property, the filing party must also file a Motion For Immediate Turnover and a request for an expedited hearing on the motion." The Middle District of Tennessee has a more detailed rule:

> **7001-1. Adversary Proceedings**
>
> **(a) Turnover of Money or Property.** A complaint for turnover of a Motor Vehicle (as defined in LBR 4070-1(b)(1)) shall include as an exhibit Proof of Insurance (as defined in LBR 4070(1)(b)(2)).

> **(b) Turnover Complaints in Chapter 13 Cases.** A complaint for turnover of a Motor Vehicle or funds of the debtor in a Chapter 13 case (the "Expedited Complaint") may be scheduled for an expedited preliminary hearing if the complaint includes information substantially in compliance with LBR 9075-1.
>
> (1) An Expedited Complaint filed before 4:00 P.M. on any Wednesday may be scheduled for expedited preliminary hearing no earlier than Wednesday of the following week.
>
> (2) The attorney for the plaintiff (or the plaintiff, if pro se) shall provide immediate email, telephonic or facsimile notice of the hearing and transmit a copy of the complaint to the defendant, the attorney for the defendant (if known), the debtor, the debtor's attorney, and the Chapter 13 Trustee by hand delivery, facsimile, overnight courier service, or email. The attorney for the plaintiff (or the plaintiff, if pro se) shall promptly file a certificate of service pursuant to LBR 9013-3.

These rules represent an alternative way of dealing with the need for prompt turnover.

The Subcommittee's Recommendation

Because it seems to be the sense of the Advisory Committee that the rules should not be amended as broadly as the law professors suggest, the Subcommittee considered the comments at last spring's meeting, the nature of the concerns expressed by Justice Sotomayor, the concerns motivating the local court practices that deviate from Rule 7001(1), and comments by clerks and trustees in considering how to amend the rules most appropriately to allow more expeditious turnover proceedings. All agreed that having to wait a hundred days to get a car needed to commute to work to earn money to fund a chapter 13 plan is not desirable.

The Subcommittee discussed several possible limiting principles of a rule allowing turnover to be sought by motion. They included allowing turnover by motion only in chapter 13 cases, the situation most frequently cited as giving rise to concerns. Subcommittee members, however, thought that the need for the urgent turnover for property could exist in other types of cases, so that it would be better to limit the proposed amendment to cases involving individual debtors rather than just chapter 13 cases. The Subcommittee also agreed that the procedure

should be used only when turnover is sought under § 542(a)—that is, efforts to obtain "property that the trustee may use, sell, or lease under section 363 . . . or the debtor may exempt under section 522." That limitation would still require adversary proceedings for the turnover of debts under § 542(b), turnover of records by an attorney or accountant under § 542(e), and turnover of property by a custodian under § 543.[1]

The Subcommittee then considered whether the rule should further limit the types of property for which turnover could be sought by motion. Several possibilities were discussed, and the Subcommittee concluded that any such limitation should be one that is easily discernible, because the type of procedure needed to initiate a turnover proceeding should not depend on an uncertain factual determination. Members concluded that a motion procedure is most appropriate for the turnover of tangible personal property.

Although the law professors suggested creating a new rule that would provide a national procedure for turnover motions, the Subcommittee concluded that an amendment to Rule 7001 is sufficient to implement the proposal. Rule 9014 would apply, and courts could use their own procedures for motion practice.

Based on its deliberations, **the Subcommittee recommends that the following amendment to Rule 7001(1) be proposed for publication for public comment**:

[1] The law professors also include turnover under § 521(a)(4) within their proposals, but no amendment to Rule 7001(1) is needed for that provision because it already includes an exception for "a proceeding to compel the debtor to deliver property to the trustee."

**Rule 7001. Types of Adversary Proceedings**[2]

An adversary proceeding is governed by the rules in this Part VII. The following are adversary proceedings:

(a) a proceeding to recover money or property—except a proceeding to compel the debtor to deliver property to the trustee, a proceeding by an individual debtor to recover tangible personal property under § 542(a), or a proceeding under § 554(b), § 725, Rule 2017, or Rule 6002;

* * * * *

Committee Note

Paragraph (a) is amended to create an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need to obtain the prompt return from a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of property that may be exempted. As noted by Justice Sotomayor in her concurrence in City of Chicago v. Fulton, 141 S. Ct. 585, 592-95 (2021), the more formal procedures applicable to adversary proceedings can be too time-consuming in such a situation. Instead, the debtor can now proceed by motion to require turnover of such property under § 542(a), and the procedures of Rule 9014 will apply. In an appropriate case, however, Rule 9014(c) allows the court to order that additional provisions of Part VII of the rules will apply to the matter.

[2] The changes indicated are to Rule 7001 as currently proposed for restyling. The restyled Bankruptcy Rules are expected to go into effect December 1, 2024, if approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress takes no action to the contrary.

# TAB 5

# TAB 5A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: SUGGESTION FOR AMENDMENT TO OFFICIAL FORM 113

DATE: AUGUST 18, 2021

The Advisory Committee has received Suggestion 21-BK-K from Charles A. King, an attorney for the City of Chicago. Mr. King practices bankruptcy law in the Northern District of Illinois, a district that uses the national chapter 13 plan form—Official Form 113. Based on what he considers to be inappropriate treatment of the City's claims that were secured by statutory liens, Mr. King suggests that a portion of part 3.1 of the form be revised. Specifically, he contends that the following plan statement regarding the effect of lifting the automatic stay is contrary to the Bankruptcy Code and produces consequences that were likely unintended by the Advisory Committee:

> If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

After discussing below the suggestion and the history of the provision in question, the memo explains the reasons for the Subcommittee's recommendation that no further action be taken on the suggestion.

## I. Suggestion 21-BK-K

As related by Mr. King, "A trustee in the Northern District of Illinois recently demanded refunds of payments made to the City of Chicago on claims secured by statutory utility liens after stay relief was granted to a different creditor with respect to the property receiving the utility."

The demands were based on the provision of Official Form 113 quoted above, and as a result, Mr. King says, "the City is no longer receiving payment of its claim, and the debtor will still owe those underlying debts when the case is completed."

Mr. King first contends that this result is contrary to § 1325(a)(5)(B) of the Code, which requires payment of secured claims in full and in equal monthly amounts. He says that merely lifting the stay as to one creditor does not necessarily result in a foreclosure or in transferring property out of the estate. Creditors secured by the property remain secured creditors, and "[c]easing payments on a claim and/or expunging a claim from the plan altogether based merely on a creditor obtaining relief from the stay does not comport with" § 1325(b)(5)(B).

Mr. King then posits that the result is not likely one intended by the debtor—or indeed by the Advisory Committee that drafted the form. The statement that any claim secured by the property in question "will no longer be treated by the plan," he says, means that none of those claims will be discharged, and the debtor will remain liable on them after bankruptcy. Moreover, the Committee Note is silent on this provision, "thus indicating that this particular effect of that section was not intended."

Mr. King suggests that "the Committee consider revising the form plan in a manner that leaves the claims of secured creditors intact after stay relief is granted with respect to any collateral related to the secured claims."

## II. History of the Provision

Because the suggestion raises questions about what was intended by the lift-stay provision in Part 3.1 of Official Form 113, the reporter reviewed the history of the provision for the Subcommittee.

The first draft of Form 113 was presented to the Advisory Committee at the September 2012 meeting. The provision on curing defaults and maintaining payments (Part 2.6 at that time) did not address what would happen if the stay were lifted. That topic first appeared as an issue for discussion at the mini-conference on the form and related rule amendments held in January 2013. The draft of the form circulated in advance to participants included the following provision for discussion: "Unless otherwise ordered by the court, upon entry of an order granting relief from the automatic stay, payments under this paragraph will cease and the moving creditor's secured claim will be treated by surrender." The transcript of the mini-conference does not reveal any discussion of this issue. Written materials submitted by the panel that discussed the draft form, however, stated "yes" to the question, "Should the plan specify a different treatment of home mortgages and other secured claims if relief from the automatic stay is granted?"

By the time of the April 2013 Advisory Committee meeting, the following provision was included in Part 3.1: "Unless otherwise ordered by the court, . . . if relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan." There is no record of any discussion of that provision at the meeting.

When the proposed Form 113 was published for comment in August 2013, Part 3.1 included the provision just quoted. Comments in response to that publication were discussed at the April 2014 Advisory Committee meeting. A number of comments addressed the lift-stay provision. The memo to the Advisory Committee summarized them and the working group's response to them as follows:

> Additional changes to the form include alterations to the language regarding the lifting of the automatic stay. As published, § 3.1 provided that "if relief from the

> automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan." A number of comments raised two objections to that language. First, as Henry Sommer (comment 42) explained, debtors may wish, for a variety of legitimate reasons, to continue making payments even after the stay is lifted. Judge Arthur S. Weissbrodt (Bankr. N.D. Cal.) (comment 92), Judge Teel (comment 142), and others made the same point. Second, as Judge Kay Woods (Bankr. N.D. Ohio) (comment 10) pointed out, the language of the published form ("all claims as to that collateral will no longer be treated by the plan") suggested that the plan would not treat an unsecured deficiency claim as to the collateral for which the stay was lifted. The Working Group found these comments to be well taken, and altered the language in § 3.1 accordingly, to provide that only "secured claims" based on the collateral as to which relief from stay was granted would no longer be treated and to make clear that this result would be subject to contrary court order.

Because of the number of negative comments in response to the first publication of Form 113, a revised form was published for comment in August 2014. At this point, the provision in question read as follows:

> If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan.

A few comments addressed the provision, some seeking the addition of explicit language that any deficiency claim would be discharged and a couple of trustees expressing concern that they might not know immediately that the stay had been lifted. One creditor expressed concern that "[t]he stay relief language in this section will prevent a creditor from receiving payment on a claim secured by collateral upon which another creditor obtained relief from stay."

With no changes made and no further discussion of it, this version of the provision was ultimately adopted.

## III. Discussion and Recommendation

The Subcommittee concluded that the history of the lift-stay provision in Part 3.1 refutes Mr. King's arguments in support of his suggestion. First, the impact on creditors other than the

creditor that sought relief from the stay was intended by the drafters. The provision originally applied just to the "moving creditor's secured claim." It was then changed to refer to "all claims as to that collateral" and later to "all secured claims based on that collateral." The underlying rationale for the provision was that once the stay is lifted, the moving creditor can exercise its state-law remedies to obtain payment, and other creditors secured by that collateral can seek relief to do the same if the order granting relief did not already modify the stay in favor of all secured creditors with respect to collateral. The limited funds available for distribution under the plan should therefore be devoted to other claims. Furthermore, inclusion of the provision in the plan prevents the debtor from having to file an amended plan if the stay is lifted as to certain collateral.

The Advisory Committee's addition of the word "secured" before "claims based on that collateral" was intended to clarify that only a creditor's secured claim would no longer be treated by the plan, and thus any unsecured deficiency claim would still be eligible for payment under the plan and discharge.

The Subcommittee does not believe that the provision is inconsistent with § 1325(a)(5)(B). Section 1325(a)(5) prescribes treatment only for an allowed secured claim "provided for by the plan." The provision says that after the stay is lifted, all claims secured by that collateral will no longer be "treated" by the plan. Despite the variance in language, the meaning seems sufficient to render § 1325(a)(5) inapplicable.

The wording of the provision may not be perfect; it would be better, for example, if it said "provided for" rather than "treated." And perhaps this provision should have been made applicable to all secured claims, not just those being cured and maintained. But the Subcommittee concluded that Mr. King's suggestion just represents a disagreement with the

intended purpose of the provision: to require secured creditors to look to their collateral, not the plan, for payment of their secured claims once they stay has been lifted with respect to that property.

The Subcommittee noted that only a handful of districts use Official Form 113 rather than their own local form, and the provision in question is not one that Rule 3015.1 requires local forms to include. Its impact is therefore limited. Because the provision is consistent with the Code and seems to be operating as intended, **the Subcommittee recommends that the Advisory Committee take no further action on the suggestion.**

# TAB 6

# TAB 6A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

SUBJECT: SUGGESTIONS FOR THE USE OF ELECTRONIC SIGNATURES

DATE: AUGUST 20, 2021

During its meeting on August 10, the Subcommittee continued its consideration of the suggestion (20-BK-E) by the Committee on Court Administration and Case Management ("CACM") regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account (e.g., debtors). Since the Advisory Committee's last meeting, two additional suggestions (21-BK-H and 21-BK-I) have been submitted to the Advisory Committee that are related to the CACM suggestion and have been referred to the Subcommittee. They have been folded into the Subcommittee's consideration of the CACM suggestion.

The Subcommittee is still in the fact-finding stage of its deliberations. Dave Hubbert and Ramona Elliott are engaged in discussions within the Department of Justice about its views on the issues raised by the suggestions and whether those views have changed since 2014, when DOJ opposed a proposed amendment to Rule 5005(a) that would have allowed the use of debtors' scanned signatures without the retention of the documents bearing the original, "wet" signatures. Meanwhile, Ken Lee of the Federal Judicial Center has been collecting information about local bankruptcy and district court practices regarding electronic signatures and requirements for retaining wet signatures, both during "normal times" and during the COVID-19 pandemic.

This memorandum discusses the new suggestions that have been submitted and summarizes information that was reported on at the Subcommittee meeting. It then presents a discussion of the issues and approaches that the Subcommittee considered at its meeting. The memorandum concludes with an explanation of the feedback it seeks from the Advisory Committee and possible next steps.

## I. Suggestions 21-BK-H and 21-BK-I

These suggestions were submitted by Sai, who has filed several suggestions with the various rule committees over the last few years advocating for the rights of *pro se* litigants.[1] Suggestion 21-BK-H is addressed solely to the Bankruptcy Rules Committee. Suggestion 21-BK-I is addressed to the Civil Rules Committee, but was filed with several of the rules committees and makes suggestions regarding the parallel appellate, bankruptcy, civil, and criminal rules governing electronic filing and signing.

In the suggestion directed specifically to this Committee, Sai addresses *pro se* electronic signatures and CM/ECF. He says that wet signatures are no more secure than electronic signatures, at least in the absence of a spectrograph. Instead, he says that what is needed for security are the following:

> 1. identification ("who is this person");
> 2. authentication ("how do I know the person doing this action is who they say they are"); and
> 3. authorization ("what is the identified person allowed to do").

Under the current operation of CM/ECF, someone can file for a registered user if that person gives the filer their log-in credentials. Sai argues that instead of that procedure, "courts should allow [the holder of] one account to authorize [the holder of] another account to perform certain

[1] Sai describes himself as a computer security professional and explains his name as follows: "I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no 'Mr.') and with gender-neutral language /pronouns (e.g. 'they/their' or 'Sai/Sai's')."

actions on its behalf." According to Sai, this method would "make exact attribution, auditing, etc much clearer in case there is later any issue with needing to determine who actually filed the document."

Sai's bottom line is that *pro se* litigants should not be subject to any more rigorous security requirements for electronic signatures than CM/ECF imposes on its registered users. That means, he says, that the following questions must be asked:

> 1. Does the system verify the applicant's identity as much as, and no more than, the CM/ECF signup form?
> 2. Does it verify that they are the same person as the one who signed up as much as, and no more than, a CM/ECF username and password?
> 3. Does it verify that the person with that account is authori[zed] to submit the filing in question as much as, and no more than, CM/ECF?

Only if the answer to all of those questions is yes, he suggests, should an electronic signature product be used.

In Suggestion 21-BK-I, Sai renews suggestions that he made at the time electronic filing rules, including Bankruptcy Rule 5005(a), were being considered by the rules committees. He suggests that reconsideration is appropriate in light of some courts' allowance of electronic filing by *pro se* litigants during the pandemic. For all of the various rules, Sai suggests that electronic filing should be generally required for all litigants, whether or not they are represented, unless a litigant is prohibited by the court from doing so for good cause (not including that the litigant is *pro se*). He further suggests exceptions that would allow litigants to file nonelectronically for good cause or pursuant to a local rule; or litigants who are not represented could file nonelectronically unless the court found good cause to require them to file electronically. A *pro se* prisoner, however, could not be required to file electronically.

## II. Department of Justice Deliberations

Dave Hubbert reported to the Subcommittee on discussions within the Department concerning the use of electronic signatures by persons other than registered users of CM/ECF. While no official position has been arrived at, there is an acknowledgment that electronic signature technology has advanced considerably since 2014. Because the Department's position will likely be closely tied to the types of electronic signature products allowed and the security features required, the Subcommittee's exploration and understanding of the technological aspects of electronic signatures will be important.

## III. FJC Report

The following information is a summary of the information that Ken Lee has gathered on the practices of bankruptcy and districts courts with respect to requirements for the use and retention of wet signatures of debtors and other non-attorney participants in bankruptcy, civil, and criminal cases. The summary compares the current practices to those reported by Molly Johnson in 2013, and it shows the alterations in court practices in response to the COVID-19 pandemic.

### "Wet" Signature Requirements of Bankruptcy and District Courts

### I. "Wet" Signature Requirements in Local Rules and Procedures

a. Bankruptcy Courts

- Vast majority of courts required retention of wet signature in paper format for a specified period: 80 courts in 2013, 71 courts in 2021
- Largest increase was in the number of courts requiring retention in either paper or electronic format: 1 court in 2013, 7 courts in 2021

*2013 Study*[*]

Retention in paper, period specified: 80
Retention in paper (original or copy), period specified: 1 (WAE)
Retention in paper, period unspecified: 1 (WIW)

Retention in paper, only if scanned copy not filed: 2 (CAE, ALM)
Retention in paper or electronic format: 1 (HI)
Retention in paper or electronic format, only if scanned copy not filed: 1 (DC)
None: 7 (NH, PAM, TNM, ILN, MN, AK, NM)

* Northern Mariana Islands not included

*2021 Update*

Retention in paper, period specified: 71
Retention in paper (original or copy), period specified: 1 (WAE)
Retention in paper, period unspecified: 2 (OHN, WIW)
Retention in paper, only if scanned copy not filed: 2 (CAE, MT)
Retention in paper or electronic format: 7 (PAM, KYE, MIE, CAS, HI, NMI, WAW)
Retention in paper/electronic format or written permission: 1 (NE)
Retention in paper or electronic format, only if scanned copy not filed: 2 (PAE, DC)
None: 8 (NH, MSS, TNM, ILN, MN, AK, NM, ALM)

b. District Courts

- Most district courts required retention of wet signature in paper format for a specified period.
- Number of courts requiring retention in paper format only decreased between the two studies
    - Civil (88 courts → 83 courts); criminal (92 courts → 86 courts)

*2013 Study (Civil)*

Retention in paper, period specified: 82
Retention in paper, period unspecified: 6 (TXE, MIE, INN, AK, FLM, DC)
Retention in paper, only if scanned copy not filed: 1 (CAN)
None: 5 (NYE, VAW, ARE, ARW, MT)

*2021 Update (Civil)*

Retention in paper, period specified: 78
Retention in paper, period unspecified: 5 (TXE, MIE, INN, AK, DC)
Retention in paper, only if scanned copy not filed: 1 (CAN)
Retention in paper or electronic format: 1 (TXW)
None: 9 (RI, NYE, ARE, ARW, SD, MT, KS, OKN, GAS)

*2013 Study (Criminal)*

Retention in paper, period specified: 80
Retention in paper, period unspecified: 12 (TXE, MIE, INN, ARE, ARW, MOW, ND, AK, UT, ALM, FLM, DC)
None: 2 (NYE, MT)

*2021 Update (Criminal)*

Retention in paper, period specified: 77
Retention in paper, period unspecified: 9 (TXE, MIE, INN, MOW, ND, AK, UT, ALM, DC)
None: 8 (RI, NYE, ARE, ARW, SD, MT, OKN, GAS)

## II. Covid-related Suspension of "Wet" Signature Requirements

a. Bankruptcy Courts

- Of the 94 bankruptcy courts, 69 (73%) had some Covid-related suspension of "wet" signature requirement, while 25 courts (27%) had no such provisions.
- Two common types of provisions
  - Temporarily allow attorneys to file either *without* or *before* obtaining wet signature
    - Before: must obtain wet signature within certain period of time (e.g. within 30 days of filing) (14 courts)
    - Without: no such requirement to obtain wet signature (45 courts)
    - Whether without or before obtaining wet signature, typically also require one of the following
      - ***Digital signature*** via any commercially available software;
      - ***Express written permission*** (including via text messages or email) to affix the debtor's signature to the document(s); or
      - ***Image of signature page*** via email, text messages of facsimile
  - Temporarily allow *pro se* party to file by email (9 courts)
- Three courts used permanent measures to suspend "wet" signature requirement
  - Mississippi Northern
    - Court determined that Federal Rule of Bankruptcy Procedure 5005 has obviated the need for "wet" signatures, and ordered that bankruptcy petitions, schedules, unsworn declarations, affidavits, verifications, and other documents may be signed electronically.
  - Montana
    - Court changed local rule to allow *pro se* party to file by email after signing agreement with clerk's office.
  - Georgia Northern

- Court expanded the definition of "Original Signature" to include digital signature and image format.

b. District Courts

- Of the 94 district courts, 29 courts (31%) had some Covid-related suspension of "wet" signature requirement while 65 courts (69%) had no such provisions.
- Two common types of provisions
  - Temporarily allow attorneys to file without wet signature by signing electronically (15 courts).
    - Where a defendant's signature is required, defense counsel or (in some courts) the presiding judge may sign on the defendant's behalf if defendant consents.
    - (In some courts), where consent or waiver is not explicitly required to be in writing, such consent or waiver may be obtained in whatever form is most practicable under the circumstances, so long as the defendant's consent or waiver is clearly reflected on the record.
  - Temporarily allow pro se party to file by email (17 courts).

Attached to this memo is an example of an order suspending the wet signature requirement during the pandemic.

## IV. The Subcommittee's Discussion

*A. Introduction.* The rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently sufficient for evidentiary purposes. The issue the Subcommittee has been considering, therefore, is how best to require an evidentially sufficient form of a debtor's signature that appears on an electronically filed document.

Currently, this goal is generally achieved by the requirement in local rules that the attorney retain the original document with the wet signature for a period of years. This method works, although it has the drawback of making the attorney the custodian of potential evidence

against his client—a situation that in the past has caused concerns for both prosecutors and debtors' attorneys.

If a rule were instead to permit the electronic filing of documents with signatures in a form that was sufficient for evidentiary purposes, a requirement for retention of wet signatures by debtors' attorneys would be unnecessary. The Advisory Committee's 2013 proposal—which would have required the filing of a scanned signature page along with an electronically filed document—was an attempt at this type of solution. In proposing the amendment, the Committee was unaware of the FBI's position that it would not provide conclusive expert testimony on handwriting analysis without a wet signature. Believing that a scanned signature was equivalent to a wet signature insofar as proof of authenticity was concerned, the Committee thought that after the court was provided with a scanned signature, there would be no need for the debtor's attorney to retain the wet signature.

A solution that provides for an acceptable electronic signature on the document that is filed—rather than a retention requirement—is what CACM seems to have in mind. Its suggestion refers to "the ability of those without CM/ECF filing privileges in bankruptcy cases to electronically sign documents that are submitted to the court." A drawback of this approach, however, is that it would require adequate e-signature technology in the software that many bankruptcy lawyers use for the creation and filing of forms that debtors must sign, such as the petition and schedules. Such software may not currently exist, and a rule that requires the development and purchase of new software is not desirable.

*B. Possible options for represented debtors*. Because of the software issue, the Subcommittee's discussions focused on requiring a signature of a represented debtor to be retained in a form that will be sufficient for evidentiary purposes, rather than on the use of

technology that would allow an electronically filed document bearing a debtor's signature to be sufficient by itself. It concluded that the question of electronic signatures of *pro se* debtors presents different issues and should be considered separately. Those issues are discussed in the next section.

The Subcommittee considered a number of possible options regarding the retention of evidentially sufficient forms of represented debtors' signatures on documents that are filed electronically. It began with the option that no change be made to the rules and that instead a statement be included in the Advisory Committee's report to the Standing Committee clarifying that nothing in Rule 5005(a) or elsewhere in the rules prevents a court from allowing the electronic filing of a document bearing a debtor's signature, so long as the court requires the retention of the document with a wet signature or a signature in an otherwise evidentially sufficient form. This option has the drawback, however, of being hidden in the records of the rules committees. Only a diligent researcher would find it. Even if Rule 5005(a) were amended to include such a statement, that approach would not achieve the perhaps desired goal of creating a uniform practice within the bankruptcy courts.

The Subcommittee therefore considered possible amendments to Rule 5005(a) that would create a national retention requirement of either wet signatures or electronic signatures in an evidentially acceptable form. Subdivision (a)(2)(C), governing signatures, could be amended to provide for persons who are not CM/ECF account holders. Although the Subcommittee has no recommendation to present at this meeting, it is considering the following possible amendment:

(C) *Signing.*

> (i) A filing made through a person's electronic-filing account and authorized by ~~that~~ the person whose signature appears on the document, together with that person's name on a signature block, constitutes the person's signature.

(ii) A filing under (i) is authorized by a person other than the account holder if—prior to filing—the account holder receives the document with the person's actual signature affixed or the person's signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer. The account holder must retain the signed document for *x* years from the case's closing.

This option not only imposes a national retention period, but it also allows the retention of electronic signatures. It further declares that, if the requirements are met, the electronic signature that is filed constitutes the debtor's signature. That statement allows electronically filed documents signed by represented debtors to comply with rules and statutes that require the debtor to sign.

*C. Possible options for unrepresented debtors*. The Subcommittee was not interested in pursuing Sai's suggestion to revisit the electronic filing rights of *pro se* litigants. But because courts are authorized to allow *pro se* debtors to file electronically, an all-encompassing amendment about electronic signatures needs to include such filers. Indeed, the CACM suggestion may have been prompted by that situation. Its suggestion was made in response to a question from Bankruptcy Judge Vincent Zurzolo of the Central District of California. That district has an Electronic Self-Representation Program (eSR) that allows *pro se* debtors to prepare their petitions and related documents online. While they are not permitted to file the petition electronically—the court does it for them after reviewing the documents—the court may want to allow *pro se* debtor*s* to do so. The judge's inquiry concerned the court's authority to allow electronic signatures of individuals without a CM/ECF account on documents filed in a bankruptcy case.

If a court allows *pro se* debtors to file electronically through CM/ECF, they are covered by Rule 5005(a)(2)(C), and their electronic signature would be treated the same as an attorney with a CM/ECF account.

If a court allows *pro se* debtors to file by other means—such as by email or through an eSR program—then there needs to be a method of authenticating the electronic signature. A retention requirement is likely ineffectual in this situation. Prosecutors are unlikely to favor a requirement that the *pro se* debtor retain the document with the wet signature, so unless courts are willing to retain such documents, there would need to be a rule requiring the electronic signature itself to be evidentially sufficient. A rule could require such a debtor to use "a signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer." However, based on information that Molly Johnson provided the Subcommittee about the need for a DocuSign license, such a requirement is probably feasible only if courts can include such technology in their software for *pro se* filers.

## V. Request for Feedback and Next Steps

The Subcommittee seeks the Advisory Committee's feedback about whether it is on the right track in considering amendments to Rule 5005(a)(2)(C) that would (1) allow represented debtors to sign documents that are filed electronically so long as their attorneys retain the documents with either a wet signature or an acceptable electronic signature; and (2) allow *pro se* litigants who are permitted to file electronically to do so either through CM/ECF or using a method that uses acceptable electronic signature technology. The Subcommittee also seeks the Advisory Committee's view on whether it agrees that the suggestion to revisit the electronic filing rights of *pro se* litigants should not be pursued now.

Once the Subcommittee has a concrete proposal that is consistent with the Advisory Committee's views, it would like to seek input from outside groups. These groups would include, among others, other rules advisory committees or their reporters; court officials; the Department of Justice and law enforcement officials; debtors' attorneys; IT experts; and bankruptcy software vendors. Ken Lee from the FJC has agreed to survey some outside groups, and the Subcommittee has discussed the possibility of seeking permission to convene a mini-conference on a proposed amendment.

Attachment

Attachment

Signed: March 18 2020

Rebecca B. Connelly
United States Bankruptcy Chief Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| **IN RE:** | ) | |
| | ) | |
| **Debtor Signatures on Electronic Filings** | ) | **Standing Order No. 20-3** |
| | ) | |
| | ) | |

ORDER TEMPORARILY SUSPENDING REQUIREMENT TO OBTAIN ORIGINAL SIGNATURES FROM DEBTORS FOR ELECTRONIC FILINGS

This Order is being issued in response to the recent outbreak of Coronavitus Disease 2019 (COVID-19) in the United States and the Commonwealth of Virginia. On March I l, 2020, the President of the United States declared a national emergency as a result of the COVID- 19 outbreak. The Centers for Disease Control and Prevention ("CDC") advises that individuals should engage in "social distancing" to prevent the spread of COVID-19. In addition, there are individuals who may be in isolation because they are sick or have been exposed to someone who has or is suspected to have COVID-19. Accordingly, to reduce the need for personal contact, there is good cause to temporarily and conditionally suspend the requirement that an attorney obtain a debtor's original, physical signature for an electronic filing.

Accordingly it is hereby ORDERED that, effective upon the date of this Order and until further notice, for all documents that require a debtor's signature, the Court suspends the requirement that an attorney secure the debtor' s original, physical signature prior to electronically filing such documents on the condition that, prior to filing, the attorney has either (a) obtained the debtor's digital signature via any commercially available digital signature software that provides signature authentication and maintains a copy of the digitally signed document(s) in the debtor's case file; or (b) obtains express written permission from the debtor to affix the debtor's signature to the document(s) and maintains a copy of the writing in the debtor's case file. The filing of the document(s) with a debtor's digital signature constitutes a certification that the attorney either has obtained the debtor's original, physical signature or has complied with the foregoing conditions. The electronic signature or the written permission shall have the same force and effect as if the attorney is in possession of the paper original of such document duly signed.

**End of Order**

2

# Consent Tab 1

# Consent Tab 1A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: LAURA BARTELL, ASSOCIATE REPORTER

SUBJECT: RULE 9006(a)(6) LEGAL HOLIDAYS

DATE: August 23, 2021

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays "Juneteenth National Independence Day, June 19."

The Bankruptcy Rules include a definition of "legal holiday" in Fed. R. Bankr. P. 9006(a)(6), which currently reads as follows:

> (6) "Legal Holiday" Defined. "Legal holiday" means:
>
> (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, or Christmas Day;
>
> (B) any day declared a holiday by the President or Congress; and
>
> (C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located. (In this rule, "state" includes the District of Columbia and any United States commonwealth or territory.)

To reflect the new public legal holiday, I recommend that the Advisory Committee approve an amendment to Rule 9006(a)(6)(A) to insert the words "Juneteeth National Independence Day," immediately following the words "Memorial Day," and that such change be recommended to the Standing Committee for approval without publication.

# Consent Tab 2

# Consent Tab 2A

MEMORANDUM

TO: ADVISORY COMMITTEE FOR BANKRUPTCY RULES

FROM: BUSINESS SUBCOMMITTEE

SUBJECT: 21-BK-F – PROPOSAL REGARDING RULE 1007(c)

DATE: AUG. 10, 2021

Fed. R. Bankr. P. 1007(c) requires that, in a voluntary case, "the schedules, statements, and other documents [required to be filed] shall be filed with the petition or within 14 days thereafter [except as otherwise provided in the Rule]." In many cases a debtor filing a voluntary case will in fact file the required schedules with the petition, but the rule provides that they may be filed within 14 days thereafter, or later if the court provides an extension for cause.

The Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (SBRA), gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Fed. R. Bankr. P. 1007(c) is applicable to all voluntary cases, including those filed under subchapter V of chapter 11.

Bankruptcy Judge Catherine McEwen filed a suggestion, 21 BK-F, that Rule 1007(c) be amended to provide for a shorter period for filing schedules, statements and other required documents in a subchapter V case. Her suggestion was intended to be consistent with the overall goal of subchapter V to be a faster process than existing mechanisms for small business bankruptcy. She provides two supporting reasons for her suggestion. First, the U.S. trustee is required to appoint a subchapter V trustee "right away," and "it's hard" to determine whether a prospective trustee has conflicts without the schedules. Second, the initial debtor interview in a subchapter V case must be held no later than ten days from the petition date.

Neither of these reasons is persuasive. The SBRA does not itself impose any time limit on appointment of a subchapter V trustee; section 1183(a) merely provides that the "United States trustee shall appoint 1 disinterested person to serve as trustee in the case." In practice, the appointment occurs very quickly. Looking at the dockets of subchapter V cases filed in 2021, in the vast majority of those cases the subchapter V trustee was appointed within five days of filing, and often on the same day the case was filed. The time of appointment has no correlation to the submission of the debtor's schedules. Indeed, the Handbook for Small Business Chapter 11 Subchapter V Trustees (U.S. Dept. of Justice, Exec. Office for U.S. Trustees Feb. 2020) (the "Handbook") assumes that the trustee will generally be appointed "very shortly after the petition is filed" and that "the case docket may not yet contain all of the required documents," including the schedules. Handbook, ch. 3 para. (A)(1)(a). Therefore, the Handbook does not contemplate that the appointment of a subchapter V trustee requires a review of the schedules, at least initially.

Judge McEwen is accurate in saying that a subchapter V trustee must be free of conflicts of interest. The Handbook requires that:

> The trustee must decline to accept any appointment where the trustee has a conflict of interest. Moreover, the trustee's duty to review conflicts in assigned cases is ongoing. The trustee must advise the United States Trustee in writing of any actual or potential conflicts upon becoming aware of them and disclose any actual or potential conflicts at the meeting of creditors or on the court record, if applicable.
>
> If the trustee discovers a conflict after accepting an appointment, the trustee must immediately file a notice of resignation in the case and notify the United States Trustee, who will reassign the case to another trustee. …

*Id*. at ch. 2, para. D.

The subchapter V trustee must also be a "disinterested person." 11 U.S.C. § 1183(a). A "disinterested person" is defined in § 101(14) as a person that "(A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason."

The prospective subchapter V trustee should be able to make a preliminary assessment of conflicts and disinterestedness even in those cases in which the debtor has not filed the schedules with the petition. The subchapter V debtor is required by § 1187(a), "[u]pon electing to be a debtor under this subchapter," to "file the documents required by subparagraphs (A) and (B) of section 1116(1)." These include the debtor's "most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return" (or a statement that no such document exists). The Handbook requires that a prospective subchapter V trustee "review the initial case filings to make a determination whether the trustee has any connection to any parties in the case or conflicts and communicate the results of this initial review to the United States Trustee . . . within two days of the case being filed." Handbook, ch. 3, para. (A)(1).

The remedy if the subchapter V trustee discovers a conflict or other impediment to serving after the appointment is for the trustee to resign. Of the hundreds of subchapter V cases filed since the enactment of the SBRA, in only seventeen subchapter V cases did the subchapter V trustee resigned after appointment, and in all but two the reason for the resignation had nothing to do with a conflict of interest or disinterestedness. In one, Adam Capes, No. 20-68493 (Bankr. N.D. Ga. July 28, 2020), the subchapter V trustee resigned on the same day he was appointed (one day after the petition was filed), stating explicitly that he discovered a conflict of interest. But no new information about the debtor had been filed between the appointment and resignation, so the trustee should never have accepted the appointment in the first place. In another case, Homes4Families, LLC, No. 20-20771 (Bankr. D. Md. Dec. 14, 2020), the subchapter V trustee resigned sixteen days after the petition was filed and did not provide any

reason, but the resignation was filed two days after the schedules were filed so it is possible that the trustee discovered a conflict of interest.

In sum, the problem of later-discovered conflicts does not seem to be a serious problem warranting a modification of Rule 1007(c) to shorten the period within which schedules must be filed in subchapter V cases.

Judge McEwen is also correct in stating that the Handbook requires the United States trustee to conduct an initial interview with the debtor and debtor's counsel within 10 days after the case is filed. Handbook, ch. 3, para. (A)(1)(d). However, that interview has nothing to do with the debtor's schedules. The Handbook states, "At the [initial debtor interview], the United States Trustee will discuss the facts of the case and explain the administrative requirements of the case to the debtor and debtor's attorney, including required financial information, taxes, insurance, debtor in possession bank accounts, and monthly reports." *Id*. The information conveyed by the United States trustee is not specific to the debtor's case but is a more general description of the subchapter V requirements. There is no reason the initial debtor interview cannot be held before the schedules are filed. It is not a § 341 meeting.

Not only is there no compelling reason to shorten the time provided by Rule 1007(c) for submitting schedules in a subchapter V case, the consequences of doing so would increase the burden on subchapter V debtors as compared to debtors who file under other chapters (which was certainly not the intention behind the enactment of the SBRA), and might lead to a large number of motions for extensions, which would also increase the burden on the United States trustees and the court.

The Subcommittee recommends that the Advisory Committee take no action on this suggestion.

MEMORANDUM

TO: ADVISORY COMMITTEE ON RULES OF BANKRUPTCY PROCEDURE

FROM: KEN LEE AND MOLLY JOHNSON, FEDERAL JUDICIAL CENTER

SUBJECT: WET SIGNATURE REQUIREMENTS OF BANKRUPTY AND DISTRICT COURTS

DATE: SEPTEMBER 1, 2021

## Executive Summary

In its Fall 2020 meeting on September 22, the Judicial Conference Advisory Committee on Rules of Bankruptcy Procedure ("Committee") requested that the FJC update its 2013 report on courts' practices regarding electronic signatures and look at the experiences of courts that have temporarily modified their wet signature requirements during the pandemic. The Committee, in its Spring 2021 meeting on April 8, 2021, also asked that the study include district courts as well as bankruptcy courts.

The FJC examined local rules and procedures to update the 2013 report and collected Covid-related court orders that suspended wet signature requirements. The main findings are:

- Most of bankruptcy and districts courts require the retention of wet signature but more courts are allowing retention in electronic format as an alternative.
    - The number of courts requiring retention in paper format only for a specified period decreased over time.
        - Bankruptcy courts: from 80 courts in 2013 to 71 courts in 2021
        - District courts: civil cases (82 → 78 courts); criminal cases (80 → 77 courts)
- Most bankruptcy courts had some Covid-related suspension of wet signature requirement.
    - Many courts temporarily allowed attorneys to file either *without* (45 courts) or *before* (14 courts) obtaining wet signature.
        - Whether without or before obtaining wet signature, typically attorneys are also required to secure *digital signature, express written permission, or image of the signature page.*
    - Some courts temporarily allowed *pro se* parties to file by email (9 courts).
- Less than half of district courts had some Covid-related suspension of wet signature requirement.
    - Some courts temporarily allowed attorneys to file without wet signature by signing electronically (15 courts).
        - Where a defendant's signature is required, defense counsel or (in some courts) the presiding judge may sign on the defendant's behalf if defendant consents.
    - Courts also temporarily allowed *pro se* parties to file by email (17 courts).

## Wet Signature Requirements in Local Rules and Procedures

Under the Federal Rule of Bankruptcy Procedure 5005(a), "[a] filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature." Rule 5005(a) is, however, silent on the signatures of those without electronic-filing account. Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, with exactly the same provision in their corresponding part, are also silent on non-CM/ECF user's signature (Fed. R. Civ. P. 5(d); Fed. R. Crim. P. 49(b)). Given this, most bankruptcy and district courts still require attorneys to retain their client's wet signature when filing electronically.

*Bankruptcy Courts*

In 2021, most bankruptcy courts (71 of 94) require the retention of wet signature in paper format for a specified period of time. In comparison, the number of such courts was 80 in 2013. The change has been driven by the increase in the number of courts allowing retention in electronic format (e.g. scanned image). In 2013, only 2 courts (HI and DC) allowed retention in electronic format. In 2021, however, the number has increased to 10 (PAM, KYE, MIE, CAS, HI, NMI, WAW, NE, PAE, and DC).

2013 Study*

Retention in paper, period specified: 80
Retention in paper (original or copy), period specified: 1 (WAE)
Retention in paper, period unspecified: 1 (WIW)
Retention in paper, only if scanned copy not filed: 2 (CAE, ALM)
Retention in paper or electronic format: 1 (HI)
Retention in paper or electronic format, only if scanned copy not filed: 1 (DC)
None: 7 (NH, PAM, TNM, ILN, MN, AK, NM)

* Northern Mariana Islands not included

2021 Update

Retention in paper, period specified: 71
Retention in paper (original or copy), period specified: 1 (WAE)
Retention in paper, period unspecified: 2 (OHN, WIW)
Retention in paper, only if scanned copy not filed: 2 (CAE, MT)
Retention in paper or electronic format: 7 (PAM, KYE, MIE, CAS, HI, NMI, WAW)
Retention in paper/electronic format or written permission: 1 (NE)
Retention in paper or electronic format, only if scanned copy not filed: 2 (PAE, DC)
None: 8 (NH, MSS, TNM, ILN, MN, AK, NM, ALM)

Among the courts that expanded the usage of retention in electronic format, the district of Nebraska is of particular interest. Its Local Rule 9011-1 (reproduced below) extends the definition of a signature by including, in addition to wet signature, scanned image, digital signature, and "/s/" with printed name (when supplemented by the evidence of signatory's permission). As will be discussed later, these are the wet signature alternatives temporarily allowed by many courts during the COVID-19 pandemic. In Nebraska, therefore, these measures have now become permanent.

**RULE 9011-1. SIGNATURES AND DOCUMENT RETENTION**

A. Petitions, lists, schedules and statements, amendments, pleadings, affidavits, and other documents which must contain original wet ink signatures or which require verification under Fed. R. Bankr. P. 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically and may include, in lieu of the original wet ink signature, the signature forms described in this Local Rule.

B. As used in the Nebraska Rules of Bankruptcy Procedure and the Federal Rules of Bankruptcy Procedure including, but not limited to, Rule 9011, all of the following shall constitute a signature on an electronically filed document:

1. A copy or digitally scanned image of the originally signed document containing a wet ink signature.
2. An image with a signature captured electronically at the time of document creation, and signatures created and verified by use of special software programs for electronic signatures, such as DocuSign and SignEasy.
3. An original wet ink signature on an original document.
4. Subject to paragraph C below, a filing party may indicate a signature of any party to a document by showing "/s/" followed by the printed name of the signatory where the filing party has received the signature of the signatory.
5. An attorney's use of the login and password issued for CM/ECF shall constitute the signature of the attorney and client(s) for all purposes, including Fed. R. Bankr. P. 9011.

C. Any electronically filed document containing "/s/" for a debtor or non-filing party in lieu of one of the other signature types referenced in paragraph B above constitutes a representation under penalty of perjury by the registered CM/ECF filer that he or she has the document with the signature of such party or, if the signing party is also a registered CM/ECF filer, that the filing party has evidence of permission to indicate the party's signature by use of "/s/." The registered CM/ECF filer shall retain the signed document (original wet ink signature or other signature type set forth in subparagraphs 1, 2, and 3 of paragraph B above) or retain evidence of permission to indicate the party's signature by use of "/s/" for all bankruptcy cases and adversary proceedings for a least one year after the case is closed. Upon request, the signed document or evidence of permission must be provided to other parties or the Court for review.

* * * * *

*District Courts*

Most district courts required retention in paper format in 2013 and they still do in 2021. Now, however, fewer courts require retention in paper format for a specified period of time. For civil cases, there were 82 such courts in 2013 but only 78 in 2021. For criminal cases, the number decreased from 80 to 77.

The changes are relatively small compared with the corresponding change in bankruptcy courts (from 80 to 71). Moreover, unlike bankruptcy courts, they have not been driven by the increase in the number of courts allowing retention in electronic format (the only district court that allowed retention in electronic format was Texas Western in 2021). Instead, the change has been mainly due to the increase in the number of courts that either had no formal retention requirement or had a retention requirement in paper but without a specified retention period.

2013 Study (Civil)

Retention in paper, period specified: 82
Retention in paper, period unspecified: 6 (TXE, MIE, INN, AK, FLM, DC)
Retention in paper, only if scanned copy not filed: 1 (CAN)
None: 5 (NYE, VAW, ARE, ARW, MT)

2021 Update (Civil)

Retention in paper, period specified: 78
Retention in paper, period unspecified: 5 (TXE, MIE, INN, AK, DC)
Retention in paper, only if scanned copy not filed: 1 (CAN)
Retention in paper or electronic format: 1 (TXW)
None: 9 (RI, NYE, ARE, ARW, SD, MT, KS, OKN, GAS)

2013 Study (Criminal)

Retention in paper, period specified: 80
Retention in paper, period unspecified: 12
(TXE, MIE, INN, ARE, ARW, MOW, ND, AK, UT, ALM, FLM, DC)
None: 2 (NYE, MT)

2021 Update (Criminal)

Retention in paper, period specified: 77
Retention in paper, period unspecified: 9
(TXE, MIE, INN, MOW, ND, AK, UT, ALM, DC)
None: 8 (RI, NYE, ARE, ARW, SD, MT, OKN, GAS)

## Covid-related Suspension of Wet Signature Requirements

*Bankruptcy Courts*

Of the 94 bankruptcy courts, 69 (73%) had some Covid-related suspension of wet signature requirement, while 25 courts (27%) had no such provisions. There were two common types of provisions. First, some courts temporarily allowed *pro se* parties to file by email (9 courts). Second, many courts allowed attorneys to file either without or before obtaining wet signature (59 courts).

When courts allowed filing *before* obtaining wet signature (14 courts), attorneys were required to obtain wet signature within certain period of time (e.g. within 30 days of filing). No such requirement was attached, however, when courts allowed filing *without* wet signature (45 courts).

Whether without or before obtaining wet signature, typically attorneys also need one of the following before filing electronically:

- ***Digital signature*** via any commercially available software that provides signature authentication;
- ***Express written permission*** (including via text messages or email) to affix the debtor's signature to the document(s); or
- ***Image of signature page*** (or entire signed document) via email, text messages of facsimile.

The order shown below by the Northern District of Texas (General Order 2020-09, April 20, 2020) illustrates a typical order suspending the wet signature requirement during the pandemic (emphasis added).

**IN RE: TEMPORARILY SUSPENDING "WET SIGNATURE" REQUIREMENT**

* * * * *

**Signature Requirements**

The Court's requirement that attorneys receive and maintain "wet signatures" on documents, such as Petitions, Schedules, Statements of Financial Affairs, Plans, and other similar documents filed, is suspended until June 1, 2020, unless further extended by the Court. Until June 1, 2020, documents requiring a client's or other third party's signature may either be: (a) received and maintained in "wet signature form" in accordance with prior practice; (b) received by facsimile, email, text, or photo transmission from the signer (with attorneys using reasonable safeguards to ensure that the debtor has actually signed the applicable document); or (c) signed utilizing a commercially available electronic signing technology, such as DocuSign, that maintains an audit trail and other security features to ascertain the authentic identity of the signer.

**Attorney Certifications**

The electronic filing by an attorney of a document requiring the signature of a debtor, that is filed without the original "wet signature" in the attorney's possession, constitutes a certification by the debtor's attorney that: (i) the debtor's attorney transmitted the entire document to the debtor for review and signature, communicated with the debtor regarding the substance and purpose of the document, and received express authorization from the debtor to file the document; and (ii) the debtor has signed the document and that, at the time of filing, the debtor's attorney is in possession of an electronic image or other facsimile of the document, including the signature page received electronically from the debtor. Additionally, the debtor's attorney must file a certification within thirty (30) days of filing an electronically signed document that he or she has now received the debtor's original "wet signature" and will maintain it in accordance with Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts.

* * * * *

Most court orders modifying the wet signature requirement are temporary and intended to suspend the requirement only during the COVID pandemic. Several courts, however, took a more permanent measure to change the requirement. In Georgia Northern, for example, the court expanded the definition of "Original Signature" in the local rule to include digital signature and image format. The district of Montana, on the other hand, changed its local rule to allow *pro se* parties to file by email after signing agreement with clerk's office.

Of particular interest among these courts is Mississippi Northern. Court there ruled that the Federal Rule of Bankruptcy Procedure 5005 has "obviated the need for 'wet' signatures" and allowed attorneys to use electronic signature software or written authorization as an alternative for wet signature (Standing Order Obviating Need for "Wet" Signatures, dated March 1, 2020). The order in its entirely is provided below.

**STANDING ORDER OBVIATING NEED FOR "WET" SIGNATURES**

Considering the COVID-19 pandemic and the need for social distancing, coupled with the determination by the bankruptcy judges of this district that Federal Rule of Bankruptcy Procedure 5005 has obviated the need for "wet" signatures, it is hereby ORDERED that bankruptcy petitions, schedules, unsworn declarations, affidavits, verifications, and other documents may be signed electronically. The electronic filer must either (1) utilize electronic signature software, or (2) retain written authorization of the signatory in the form of a letter, email, or facsimile for five years. Counsel should exercise sound judgment in deciding whether to utilize electronic signatures in lieu of a wet signature.

* * * * *

*District Courts*

Of the 94 district courts, 29 courts (31%) had some Covid-related suspension of wet signature requirement while 65 courts (69%) had no such provisions. There were two common types. First, like bankruptcy courts, some district courts allowed *pro se* parties to file by email (17 courts). Second, courts also temporarily allowed attorneys to file without wet signature by signing electronically (15 courts). Unlike many bankruptcy courts, however, district courts in this case tended not to specify the types of evidence (e.g. digital signature or image of signature page) that proves the client's consent. The provisions shown below, from a Standing Order by Eastern District of Pennsylvania, April 15, 2020, are typical of such orders.

**IN RE: EXPANDED USE OF ELECTONIC SIGNATURES DUE TO THE EXIGENT CIRCUMSTANCES CREATED BY COVID-19**

* * * * *

For these reasons, it is ORDERED that, where a judge finds that obtaining an actual signature is impracticable or imprudent in light of the public health situation relating to COVID-19, any document submitted by the government or the defendant may be signed electronically.

It is further ORDERED that, with the exception of plea agreements, which must be signed by the defendant personally, where a defendant's signature is required, defense counsel may sign on the defendant's behalf if the defendant, after an opportunity to consult with counsel, consents.

It is further ORDERED that, where consent or waiver is not explicitly required to be in writing by the Federal Rules of Criminal Procedure or other applicable law, such consent or waiver may be obtained in whatever form is most practicable under the circumstances, so long as the defendant's consent or waiver is clearly reflected in the record.

* * * * *